

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOLUME 70

January 1, 1981 through December 31, 1981

BRONSON C. LA FOLLETTE
ATTORNEY GENERAL



MADISON, WISCONSIN
1981

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IN MEMORIAM: NANCY ARNOLD

November 2, 1946 - June 1, 1981

When Nancy Arnold died June 1, 1981, her family, friends and colleagues lost a remarkable individual. Her short life enriched the lives of all who knew her; her contributions to the legal profession will shine for years to come.

Nancy came to the Department of Justice as a law clerk in 1975, and ably clerked for deputies David Hase and David Hanson until her graduation from the University of Wisconsin Law School in 1977. She was immediately hired as an assistant attorney general, where she served first in the Environmental Protection Unit and then the Criminal Appeals Unit.

Guided by her admirable legal talents—particularly her gifted pen—Nancy sought out the department's unusual and difficult cases. She willingly poured enormous time, effort and talent into the open primary case, the "legislative prayer" case, and the complex Milwaukee water pollution litigation, in addition to handling her regular caseload. Nancy was a thorough, dedicated worker whose sense of responsibility to her profession earned the respect of her colleagues.

Nancy's dealings with people revealed her unique style: she brought dignity and "class" to her every endeavor. As a young woman attorney, she had the unusual ability to combine femininity with independence of spirit, assertiveness with grace. Nancy's style was subtlety and exactness tempered with good-humored common sense. Nancy charted her course through what has traditionally been a man's profession using good hard work, perseverance, and her keen mind.

To all who knew her, Nancy Arnold exemplified the highest ideals of her profession. She brought a special warmth and humanity to the practice of law, and she will be sadly missed.

THE STATE OF NEW YORK

OFFICE OF THE ATTORNEY GENERAL

In the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the United States the hundredth and second, I, the undersigned, Attorney General of the State of New York, do hereby certify that the following is a true and correct copy of the

Act of the Legislature of the State of New York, passed at the session of the Legislature at Albany, New York, on the twenty-first day of August, A.D. 1922, and published in the Laws of the State of New York for the year ending at the said session, at page 1000, and that the same is now in force.

Witness my hand and the seal of the Office of the Attorney General at Albany, New York, this twenty-first day of August, A.D. 1922.

JOHN W. WALKER, Attorney General.

Attest: My hand and the seal of the Office of the Attorney General at Albany, New York, this twenty-first day of August, A.D. 1922.

ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

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S. PARK COON, Milwaukee	from Jan. 7, 1850, to Jan. 5, 1852
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GEORGE B. SMITH, Madison.....	from Jan. 2, 1854, to Jan. 7, 1856
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GABRIEL BOUCK, Oshkosh.....	from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay.....	from Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukee.....	from Oct. 7, 1862, to Jan. 1, 1866
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STEPHEN S. BARLOW, Dellona	from Jan. 3, 1870, to Jan. 5, 1874
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ALEXANDER WILSON, Mineral Point.....	from Jan. 7, 1878, to Jan. 2, 1882
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LEVI H. BANCROFT, Richland Center.....	from Jan. 2, 1911, to Jan. 6, 1913
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SPENCER HAVEN, Hudson.....	from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel.....	from Jan. 6, 1919, to Jan. 3, 1921
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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
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ROBERT W. WARREN, Green Bay from Jan. 6, 1969, to Oct. 8, 1974
VICTOR A. MILLER, Saint Nazianz..... from Oct. 8, 1974, to Nov. 25, 1974
BRONSON C. La FOLLETTE, Madison from Nov. 25, 1974, to

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¹Resigned, 1981

²Appointed, 1981

³Retired, 1981

⁴Died, 1981

OPINIONS

OF THE

ATTORNEY GENERAL

Volume 70

Counties; County Board; Taxation; Where a county proceeds under sec. 75.69(1), Stats., to advertise and sell tax delinquent property, it must reject all bids less than the appraised value, but, if it determines to accept any bid, it can accept the bid it deems in good faith to be most advantageous to the county in view of the criteria set forth in the bid notice. Such bid need not be the highest bid in dollars.
OAG 1-81

January 8, 1981.

MATTHEW F. ANICH, *District Attorney*
Ashland County

You request my opinion on the following questions:

1. Where the county proceeds under sec. 75.69, Stats., to sell tax delinquent real estate acquired by the county pursuant to secs. 75.35, 75.36, Stats., where lands are located within the boundaries of the Chequamegon National Forest or Bad River Indian Reservation, and where a private individual, who is not the former owner or heir thereof, bids \$2,000, an amount in

excess of the appraised value, and the federal government bids \$3,000 for a given parcel, can the county accept the bid from the private individual, even though such bid is lesser on a pure monetary basis, on the theory that such bid is "more advantageous" to the county since the real estate would then be on the tax roll?

2. Where the county proceeds under sec. 75.69, Stats., to sell tax delinquent real estate acquired by the county pursuant to secs. 75.35, 75.36, Stats., and the land consists of an isolated parcel of unusual dimensions, presently without road access and is substandard in size and would not permit construction under present zoning codes, and where all bids are in excess of the appraised value, the highest being from a "non local [sic] resident," could the county reject all bids and sell the parcel to the adjacent land owner, who was not the former owner or heir thereof, for \$1.00 over the otherwise high bid of the "non local resident."

You do not define "non local [sic] resident," however, I take it to mean someone not a resident of the immediate area where the land is located or at least not a resident of the county or counties adjacent to Ashland County.

Under the facts stated in your first question, it does not appear that there would be a binding commitment that the land would continue to be taxable, or that taxes levied would be timely paid. Such purchaser might immediately sell the property to another, to a tax exempt entity, or might qualify the parcel for some tax exempt status.

Section 75.69(1), (2), Stats., provides:

(1) Except in counties having a population of 500,000 or more, no tax delinquent real estate acquired by a municipality as defined in s. 75.35 (1) (a), shall be sold unless the sale and appraised value of such real estate has first been advertised by publication of a class 3 notice, under ch. 985. Any such municipality *may accept the bid most advantageous to it* but every bid less than the appraised value of the property shall be rejected. Any such municipality is authorized to sell for an amount equal to or above the appraised value, without readvertising, any land previously advertised for sale.

(2) This section shall not apply to exchange of property under s. 59.97 (8), to withdrawal and sale of county forest lands, nor to the sale or exchange of lands to or between municipalities or to the state.

None of the opinions of this office which have considered sec. 75.69(1), Stats., have dealt with the meaning of the phrase “*may* accept the bid most advantageous to it.” See 36 Op. Att’y Gen. 454 (1947), 60 Op. Att’y Gen. 425 (1971), 67 Op. Att’y Gen. 150, 236 (1978). The statute is clear in providing that there must be an appraisal of the property before sale, advertisement of “the sale and appraised value,” and that “every bid less than the appraised value of the property *shall* be rejected.” In my opinion, the Legislature used the word “*may*” in the phrase in sec. 75.69(1), Stats., to permit rejection of any and all bids including those above the appraised value. There may be circumstances in a rapidly changing economy where bids at or above the appraised value may not be adequate and the committee or official in charge of the sale might deem it to be in the best interests of the county to seek a new appraisal. It is my further opinion, however, that sec. 75.69(1), Stats., does not require the county to accept the highest bid but grants the county discretion to “accept the bid *most advantageous to it*” above the appraised value. If the Legislature had intended that the county must accept only the highest bid above the appraised value it would have used that language. Its determination of which bid is most advantageous to the county must be made in good faith without fraud.

Although *Hermann v. Lake Mills*, 275 Wis. 537, 82 N.W.2d 167 (1957), was not concerned with the sale of tax delinquent property, it was there stated that whereas a city could not make a gift of municipal property to an industrial corporation for the purpose of aiding industrial growth in the community, the consideration to support a sale need not totally consist of money. The property there involved was not tax delinquent land but was land no longer needed for park purposes. In *Hermann*, 275 Wis. at 540, 541, the court stated:

In making sale of such parcel, the council was not required to solicit bids and sell to the highest bidder, and therefore, necessarily is vested with considerable discretion in the matter.

....

This brings us to the crucial question on this appeal, viz., what are the grounds upon which taxpayers of a city may successfully attack a sale of municipal property authorized by vote of the common council? We deem the proper answer to be that the plaintiff taxpayers must establish illegality, fraud, or clear abuse of discretion on the part of the governing board of the municipality, which has authorized the sale, before a court will void the sale.

In 72 Am. Jur. 2d *State and Local Taxation* sec. 933, it is stated:

A statutory requirement that the sale of lands for delinquent taxes be a "public sale" necessitates that an opportunity be given for competitive bidding. Apart from such a statutory dictate, the principle that property being sold at a judicial sale should be sold to the highest bidder applies to sales of land for taxes.

Whereas sec. 75.69(1), Stats., does not require sale to the highest bidder, it does contemplate, except as provided in subsec. (2), for public sale on notice. In my opinion there must be opportunity for competitive bidding on a common standard. The situation is somewhat akin to bidding on public contracts. In *State ex rel. Grosvold v. Board of Supervisors*, 263 Wis. 518, 523, 58 N.W.2d 70 (1953), it was stated that a requirement for public work to be let to the "lowest" bidder implies a common standard by which to measure the respective bids, and that common standard must necessarily be previously prepared specifications which are freely accessible to all who may desire to compete for the contract and upon which their bids must be based and that such specifications not be changed without equal opportunity to all. See also 56 Op. Att'y Gen. 181, 186 (1967).

Section 75.35(3), Stats., authorizes a county to provide by ordinance for a preference in the sale of tax-deeded lands in favor of the former owner or his or her heirs. Such ordinance may provide that such sale be exempt from the provisions of sec. 75.69, Stats. We are not concerned with such an ordinance. In 35 Op. Att'y Gen. 40 (1946), the preference in sec. 75.35(3), Stats., was referred to, and it was stated that a county could not provide for the sale of tax-deeded lands to veterans at a price less than the lands could be sold to others. Section 75.69, Stats., was not in existence in 1946. Nevertheless, it is

my opinion that there is nothing in such section which would permit discrimination in favor of local residents, adjacent landowners, or persons whose real estate is not exempt from taxation. It is my opinion, however, that the criteria set forth below, which may include (1) dollar amount of respective bids, (2) proposed use of property, and (3) whether the land will be subject to real estate taxes, can be applied, under specific fact situations, without discrimination in favor of local residents, adjacent landowners, or persons whose real estate is not exempt from taxation.

My answer to question one is yes, if the county in advertising such land for public sale by bids has set forth criteria to be considered in acceptance of bids under the "most advantageous" to the county standard referred to in sec. 75.69(1), Stats., and if county officials otherwise act in good faith with respect to such sale. Criteria might include notice that the county board will consider the dollar amount of the respective bids, the use to which the property is to be put, and whether the land will be subject to real estate taxes.

My answer to question two is no. Under the stated facts, the adjacent landowner does not appear to have been a bidder. Whereas I am of the opinion that the county could not discriminate against a "non-local resident" even where the adjacent landowner was a bidder by selling to such landowner at \$1.00 over the next highest bid, I am of the opinion that sale to an adjacent landowner, who was a bidder, could be made at a higher or lower amount than the highest bid above the appraised price if the notice of sale sets forth reasonable special criteria to be considered by the county board in the acceptance of bids under the "most advantageous" to the county standard. In addition to the amount of money, prospective use and liability for real estate tax criteria referred to above, reference should probably be made to the lack of buildability under present zoning codes and present lack of access if the board will consider such items in its determination. Whether residential, agricultural, or private recreational development of such "isolated parcels of unusual dimensions, presently without road access and substandard in size" located within the boundaries of a national forest or Indian reservation is advantageous to the county is debatable. A county board may, however, consider costs of providing services and road access and potential revenue from assessments and real estate taxes under the proposed uses as well as the

dollar amount of bids in determining which bid is most advantageous to the county.

BCL:RJV

Layoffs; Schools And School Districts; Teachers; Layoff and reinstatement provisions in sec. 118.23, Stats., are to be applied separately to classroom teachers and principals. OAG-2-81

January 29, 1981.

FRED A. RISSE, *President*
State Senate

On behalf of the Senate Committee on Organization you have asked several questions relating to seniority of teachers in school districts in Milwaukee County, but outside the City of Milwaukee. Central to your inquiry is the application of sec. 118.23, Stats., entitled Populous counties; teacher tenure. The underlying problem is the order in which principals and other administrators should be laid off in situations where enrollment is declining and the need for existing administrative staff is thus reduced. Your questions will be answered seriatim.

1. Does the term "teacher" as defined in Section 118.23(1), Wis. Stats., include the following classifications of employees: A. Principals? B. Assistant Principals? C. Directors of elementary or secondary instruction? D. Directors of Curriculum?

Section 118.23, Stats., establishes a system of tenure for teachers and principals in schools in any county having a population of 500,000 or more. Before a person can claim rights under sec. 118.23, Stats., he or she must satisfy the four basic requirements in the definition of "teacher" therein, namely:

- (1) Possession of a teacher certificate or license *and* whose legal employment requires such certificate or license;
- (2) Is employed full time;

- (3) Meets the minimum requirements prescribed by the governing body employing such person;
- (4) Is employed by a school board, board of trustees or governing body of any school lying entirely and exclusively in a county having a population of 500,000 or more, which now means only Milwaukee County.

The analysis herein is based on the assumption that each of the classifications of employes in question satisfies requirements two, three, and four above. The controlling consideration, therefore, is whether the legal employment of such persons depends on their possessing a teacher's certificate or license. It is my opinion that since persons employed as principals, assistant principals, directors of elementary or secondary instruction and directors of curriculum are not required to possess a teacher's certificate or license they do not come within the definition of teacher under sec. 118.23, Stats.

Before July 1, 1980, all school administrators (*e.g.*, principals or assistant principals) were required by administrative rule (PI 3.07(10)) to possess a valid teacher's license in order to be licensed as a school administrator. Now, they are required only to be eligible to hold a Wisconsin license to teach in either elementary or secondary schools, depending on the type of administrator license sought (PI 3.07(11)). Although actual teaching experience is required, it need not be secured in Wisconsin. (*See* PI 3.07(11)(c)1.b. and (d)1.b.)

Licensing for the classifications "directors of elementary or secondary instruction" and "directors of curriculum" is governed by PI 3.07(14). To be licensed, an applicant must either be eligible to hold a license to teach at the level of supervision involved or have completed an approved teacher education program. Also, such applicant must, among other requirements, have a minimum of three years teaching experience at the level of supervision involved.

In view of these administrative rules, it is clear that persons employed as principals, assistant principals, directors of elementary or secondary instruction or directors of curriculum are not legally required to possess a teacher's certificate or license. This is not to say, however, that a person's employment in one of these job classifications cannot be conditioned on the possession of a teacher's certifi-

cate or license. Unquestionably, the governing body employing such person may impose such condition as a minimum requirement for employment. Such a condition does not affect a person's "legal employment," however. A person is legally employed in any of the classifications in question provided that person meets the statutory and administrative rule requirements for such employment.

2. Are the following classifications of Administrators covered by the provisions of Section 118.23(4), Wis. Stats.: A. Principals? B. Assistant Principals? C. Directors of Elementary or Secondary Instruction? D. Directors of Curriculum?

Subsection (4) sets forth procedures to be followed in the event it becomes necessary to decrease the number of permanently employed teachers by reason of declining student enrollment within the school district. Permanent employment is secured by satisfying the tenure provisions set forth at subsec. (2). Subsection (2) makes clear that tenure as a teacher is not affected by reason of employment as a principal.

Thus, although principals may also qualify as tenured teachers under sec. 118.23(2), Stats., the clear legislative intent is to differentiate between teachers as a class and principals as a class with respect to tenure. There is no similar distinction drawn between directors of elementary or secondary instruction or directors of curriculum and regular classroom teachers. Although such persons may under parochial circumstances qualify as tenured teachers (*e.g.*, if their employment is conditioned upon their continuing status as teacher), they do not have any additional tenure rights in any particular administrative position. See generally *State ex rel. Farley v. Bd. of School Directors*, 49 Wis. 2d 765, 183 N.W.2d 148 (1971).

Under subsec. (4) permanently employed teachers may be laid off in the inverse order of appointment and if vacancies occur thereafter such teachers shall be reinstated in inverse order of their being laid off, if qualified to fill the vacancies.

There is nothing in subsec. (4) or in the legislative history of sec. 118.23, Stats., to indicate legislative intent to differentiate among

permanent (tenured) teachers who are qualified to fill a teaching position on any basis other than order of appointment. It is therefore my opinion that principals and assistant principals who also are tenured teachers are covered by the subsec. (4) procedures both as to layoffs and recalls. Because directors of elementary or secondary instruction and directors of curriculum as such are not teachers as defined in sec. 118.23(1), Stats., it follows that in that status they are not covered by subsec. (4) procedures. How these procedures are applied to specific situations is considered in several of your remaining questions.

In your next question you ask that I assume a school district wishes to properly prepare a lay off list applicable to persons who are certified or licensed and who are permanently employed in the above-listed classifications covered by sec. 118.23(4), Stats. You ask:

3. Does the phrase "order of appointment" as it is used in Wisconsin Statute Section 118.23(4) mean: (a) the date that an individual was first appointed to the teaching staff of the school district; or (b) the date that a person was first appointed to any [of the above listed] position [s] [You limit this question to persons who were previously members of the teaching staff in the district.]

The phrase "order of appointment" is broad enough to include both situations you describe. As already indicated, a classroom teacher is permanently employed if he or she has acquired tenure. Section 118.23(2), Stats., creates two tenure classifications. Although principals as such do not come within the definition of teacher for purposes of sec. 118.23, Stats., the Legislature established certain additional tenure rights and benefits for principals. In other words, principals can acquire tenure in the school system or school in the general job classification of principal in addition to tenure as a classroom teacher. Although a teacher may acquire tenure as a teacher and thereafter also acquire tenure as a principal, it was not the intent of this section to establish tenure in any specific staff position. *See Farley*. Nor is tenure extended to any administrative staff position other than that of principal. Rather, the intent was to provide job security and permanent employment for two broad general job classifications, firstly all classroom teachers and secondly all prin-

cipals. Recall that subsec. (2) provides that "a person who acquired tenure as a teacher under this section shall not be deprived of tenure as a teacher by reason of his [or her] employment as a principal."

When subsec. (2) and subsec. (4) are read together it is necessary, for internal consistency and to give effect to tenure for principals, to treat teachers and principals separately in effecting layoffs. Thus, if it becomes necessary to lay off permanently employed principals they would be subject to layoff in the inverse order of appointment as principals. Thus, the least senior principal in the school system would be laid off first. If such person also had acquired tenure as a classroom teacher, he or she would then be included in the teacher population subject to layoff in the inverse order of appointment as a teacher. If a person had not acquired tenure as a classroom teacher prior to appointment as a principal, then that person would not be entitled to the protections afforded tenured teachers. This would occur, for example, if an individual were appointed principal directly from a different school system or had been in the school system for less than the requisite number of years to gain tenure as a classroom teacher in that system.

A more difficult problem arises in determining whether a tenured teacher who has been appointed principal should be credited with both the years served as a classroom teacher and as a principal for purposes of "seniority."

As indicated, tenured principals who are subject to layoff have additional rights for purposes of layoff even if they also had acquired tenure as teachers prior to their appointment as principal. When placed back into the teacher pool for purposes of determining order of layoff it would be the date of their appointment as a classroom teacher that is controlling. Even though an individual was no longer an active classroom teacher after assuming responsibilities as a principal, that person nevertheless retained tenure as a teacher for purposes of layoff under the statute. Appointment to the position of principal is generally considered to be a promotion for a teacher. Accordingly, the evident legislative intent is to ensure that a person so appointed is not penalized in terms of order of dismissal for accepting such a position. Sec. 118.23(2), Stats.

It follows that supervisory positions other than principals, such as directors of elementary or secondary instruction and directors of curriculum, are not subject to the layoff and recall provisions applicable to teachers. If, however, such persons had acquired tenure as a teacher prior to assuming the additional responsibilities as a director, and the governing body employing such person requires that such person maintain teacher status, such persons arguably enjoy the same rights as all others who have acquired tenure as a teacher. They do not, however, have additional tenure in the staff position of a director.

4. If a school district wishes to lay off one or more permanently employed principals, pursuant to Section 118.23(4), ... how much seniority credit may the district give to an individual who, when they were first appointed as principal, held a full-time position that consisted of a part-time principal position and a part-time teaching position?

The analysis regarding question three above makes clear that the controlling consideration is the date of appointment whether it be as a classroom teacher or as a principal. The date that a person was first appointed a principal within the district would determine the amount of seniority for purposes of effecting layoffs within the general classification of principal. The fact an appointed principal is given teaching responsibilities does not alter the character of the appointment as one to a supervisory position. As long as the individual is a full-time employe and otherwise satisfies the tenure requirements for principals, that individual is entitled to full seniority from the date of appointment as principal.

5. Does the answer to question number 4 change if the employee is in a part-time position in either the item C [Directors of Elementary or Secondary Instruction] or D [Directors of Curriculum] classification listed in question number 2?

As already suggested, teacher tenure laws are to be strictly construed. *Farley*, 49 Wis. 2d at 771. Persons who accept duties as directors of elementary or secondary instruction or directors of curriculum do not acquire any special tenure rights in those positions pursuant to sec. 118.23, Stats. Such persons are simply included

within the general teacher population for purposes of layoffs if they are tenured teachers, notwithstanding the additional qualifications needed in order to hold such a position. It does not necessarily follow, however, that layoffs governed by sec. 118.23, Stats., must be effected on the basis of date of appointment considerations only. The discussion hereinafter concerning your remaining questions takes into consideration the effect that special qualifications for a particular job have on implementation of the layoff decision.

6. If the answer to any of the subsections in question number 2 are yes, does the employee have the right to bump into a "promotion" or higher administrative position covered by Section 118.23 if that employee is certified for the position and has more experience as an administrator in the district and the district is contemplating decreasing its administrative staff?

The ability of an employe to "bump" into another position is not specifically covered in sec. 118.23, Stats. Bumping, or the right of an employe to a less senior employe's job, is a common practice where seniority is the primary criterion for effecting layoffs and recalls. Section 118.23(4), Stats., implicitly allows bumping. Regarding reinstatement following a layoff, subsec. (4) provides: "Such teachers shall be reinstated in inverse order of their being laid off, *if qualified to fill the vacancies.*" Thus, once a layoff is effected, the most senior teacher qualified to fill an open classroom teaching position has a right to that job regardless of who held the position at the time of the layoff.

Since teacher tenure laws must be strictly construed, sec. 118.23, Stats., cannot be expanded through construction to guarantee that an individual will have permanent employment in any particular position. *See Farley*, 49 Wis. 2d at 771. Although all teachers must be considered in the same general pool for purposes of layoff, it nevertheless would make no sense to require the employer to lay off the least senior teacher regardless of position if there were no more qualified senior employes to fill the position, assuming that the position is not one being eliminated. The same reasoning, of course, applies to principals.

For example, the least senior principal, even though holding a highly responsible position, would be subject to layoff first even though that position could then be filled with a more senior principal qualified for the position whether or not such action would under normal circumstances be considered a promotion. This is possible because principals as a class, unlike other administrators, are guaranteed tenure rights.

7. May a principal who is laid off pursuant to Wisconsin Statute Section 118.23 (4), demand that he [or she] be allowed to "bump" a permanently employed teacher who has had less full time service (including both administrative time and teaching time) within the district than the principal, provided the principal is certified for the position held by that teacher?

Under the analysis regarding question number six a laid off principal, who also has tenure as a teacher, and has the requisite qualifications, could in effect bump into a teacher position provided there are less senior teachers available for layoff. Obviously, the reverse is not possible since a tenured teacher would have no seniority rights in principal positions.

8. May persons (teachers or administrators) who have been laid off pursuant to Wisconsin Statute Section 118.23(4), who could have "bumped" into other jobs within the school district (prior to layoff) had they been certified for those positions, secure such certification while on layoff and upon being so certified "bump" into other jobs held by persons within the school district who have less seniority than they?

The controlling consideration is the status of the employe at the time of the layoff and subsequently at the time of reinstatement. Each event is independent of the other. If a senior teacher is not qualified to fill a position retained by the employer, a less senior qualified teacher has a right to that position at the time layoffs are effected. The subsequent acquisition of requisite qualifications cannot affect the earlier layoff decision. To conclude otherwise would give some persons rights to employment clearly not specified in sec. 118.23, Stats.

On reinstatement, the most senior qualified individual must be offered the position first. There is nothing in sec. 118.23, Stats., to suggest that qualifications cannot be secured during a layoff period. It is my opinion that the controlling consideration is whether the individual has the qualifications to fill the position at the time of reinstatement regardless of when or how those qualifications were secured.

9. Would it be correct to conclude that the provisions of Section 118.23 override any contrary provisions, in regard to "bumping" into a bargaining unit, found in a collective bargaining agreement between teachers and a school district?

Unquestionably a layoff-reinstatement proposal is a mandatory subject of bargaining under the Municipal Employment Relations Act, sec. 111.70, *et seq.* Stats. *Mack v. Joint School District, No. 3*, 92 Wis. 2d 476, 488, 285 N.W.2d 604 (1979); *Beloit Education Ass. v. WERC*, 73 Wis. 2d 43, 242 N.W.2d 231 (1976). These collective bargaining rights are available to all teachers. It follows that teachers may secure *additional rights* in this general subject area through collective bargaining.

The tenure provisions in sec. 118.23, Stats., however, are directed only to teachers in a county having a population of 500,000 or more. Section 118.23, Stats., in comparison to the Municipal Employment Relations Act, is a much more specific statute. I have found nothing in the legislative history of the Municipal Employment Relations Act to indicate that the Legislature intended to qualify the specific layoff and reinstatement rights guaranteed certain teachers under sec. 118.23, Stats., when it authorized collective bargaining. *Cf. Board of Education v. WERC*, 52 Wis. 2d 625, 640, 191 N.W.2d 242 (1971); *Faust v. Ladysmith-Hawkins School Systems*, 88 Wis. 2d 525, 277 N.W.2d 303 (1979). Compare sec. 111.93(3), Stats., and *WERC v. Teamsters Local No. 563*, 75 Wis. 2d 602, 613-14, 250 N.W.2d 696 (1977).

County Board; Forfeitures; Before payment of a settlement is made in resolution of an action against the county, the county board as a whole must approve it; if an action against the county results in assessment for a forfeiture, the board may not refuse to pay it but the authorization for payment may be direct or, depending upon the amount, through the delegation permitted under sec. 59.07(3), Stats. OAG 3-81

February 2, 1981.

THOMAS A. MARONEY, *District Attorney*
Waupaca County

Your predecessor has by letter asked for my opinion on the following questions:

- 1) Whether the county board as a whole must approve a forfeiture in the amount of \$2,500 or greater in settlement of an action for forfeiture under sec. 50.04, Stats., brought against a county-owned extended care facility; and
- 2) Whether or not the answer to the first question is different if the forfeiture is assessed as a consequence of an administrative order following a formal hearing instead of through a stipulated settlement.

The answer to the first question is yes. The answer to the second is that the county board must either directly authorize payment of a final administrative order or delegate that ministerial duty for sums of \$2,500 or less. My reasons for the answers are set forth below.

In answering the questions I have assumed that your phrase "our County extended care facility" means that the county is the owner of the facility and that the "Board of Trustees" described in your letter as "managers" of the facility are trustees appointed in behalf of the county pursuant to sec. 46.18, Stats. In that context the county is the actual, if not also the nominal, licensee for the facility.

If, as the letter suggests, there have been violations of ch. 50, Stats., at the county owned facility, then a cause of action lies against the county, and it is the county which is liable for the forfeitures

under either secs. 50.03(8) or 50.04(5), Stats., or both. As a consequence sec. 59.07(3), Stats., is operative; in pertinent part it reads:

The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language:

....

(3) Examine and settle all accounts of the county and all claims, demands or causes of action against the county and issue county orders therefor. In counties having a population of less than 50,000, the board may delegate its power in regard to current accounts against the county to a standing committee where the amount does not exceed \$2,500.

Since Waupaca County has a population under 50,000, the limit of the county board's authority to delegate payment of money in any event is \$2,500. The delegation is, however, limited to "accounts" and under ordinary principles of statutory construction would not include "claims, demands or causes of action." Examples of where that principle has been applied include: *Mutual Fed. S & L Asso. v. Sav. & L. Adv. Comm.*, 38 Wis. 2d 381, 387, 157 N.W.2d 609 (1968) and *Vandervelde v. Green Lake*, 72 Wis. 2d 210, 240 N.W.2d 399 (1976). Thus, delegation for settlement of this or any cause of action at exactly \$2,500 or even less is no different than settlement at an amount greater than \$2,500: The authorization must come from the county board as a whole.

While the trustees under sec. 46.18(6), Stats., are permitted to "defend in the name of the county any cause for action involving the interest of said institution," there is no provision for payment of a settlement without authorization from the county board. To the contrary, the thrust of the first sentences of sec. 46.18(6) and (11), Stats., is that the trustees do not have independent authority to incur obligations on the county treasury. Thus, absent express authorization to agree to a forfeiture independent of the county board and in view of the other provisions whose tone suggests that no such authorization should be implied, I am of the opinion that the trustees cannot authorize payment of a forfeiture without approval from the county board of supervisors.

The imposition of a forfeiture by administrative order would lead to a different role for the county board as compared to that exercised in a settlement context. Assessment of a forfeiture through an administrative order is delegated by the Legislature through ch. 50, Stats., to the Department of Health and Social Services. To the extent that the county board objects to the assessment by the Department it must do so through the formal hearing and appeal routes specified. Sec. 50.03(11), Stats. After the administrative order has become final it becomes the duty of the county board to pay any forfeiture. The board may well regard final orders as "accounts." The manner in which the board fulfills its duty to pay the account is, depending on the amount, within the board's control; it may be fulfilled by either of the mechanisms outlined in sec. 59.07(3), Stats. *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 597, 263 N.W.2d 152 (1978).

BCL:RMR

Health And Social Services, Department Of; Reimbursement; State Aid; The Department of Health and Social Services may not reimburse counties for administrative costs incurred in providing temporary assistance to state dependents. OAG 4-81

February 5, 1981.

DONALD E. PERCY, *Secretary*
Department of Health and Social Services

You ask whether the Department of Health and Social Services is implicitly authorized under sec. 49.04(1), Stats., to reimburse counties for administrative costs incurred in providing temporary assistance to state dependents.

It is my opinion that the Department may not provide reimbursement for such costs.

Section 49.04(1), Stats., provides:

From the appropriation under s. 20.435 (4) (e), the state shall reimburse the counties for such temporary assistance as

may be needed pursuant to s. 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, but expenses for medical care shall be paid only in those cases in which application for benefits under ss. 49.46 and 49.47 has been made during the first 30-day period and ineligibility for such benefits has been established.

There is no express statutory authority for the state to reimburse counties for administrative costs resulting from the provision of temporary assistance under sec. 49.04(1), Stats.

Funding for the reimbursement of temporary assistance is controlled by the reimbursement provisions contained in sec. 20.435(4), Stats. Section 20.435(4)(e), Stats., as amended by ch. 34, Laws of 1979, provides for reimbursement to counties for “[a] sum sufficient for state aids under ss. 49.04 and 49.046.” A careful reading of sec. 20.435(4)(de), (e), Stats., indicates that any reimbursement for direct relief provided under secs. 49.04 and 49.046, Stats., must come from the sum sufficient account provided under sec. 20.435(4)(e), Stats., while any reimbursement for administrative costs associated with providing such relief must come from the sum certain account provided under sec. 20.435(4)(de), Stats.

Reimbursement to counties from the account provided for under sec. 20.435(4)(de), Stats., is contractual: “The department shall reimburse each county for reasonable costs of income maintenance administration from s. 20.435(4)(de) ... under a separate contract according to s. 46.032.” Sec. 49.52(1)(a), Stats. Section 46.032, Stats., provides express authorization for reimbursement to counties only for “the reasonable costs of administering the income maintenance programs under ss. 46.23 [human services], 49.046 [relief for needy Indian persons], 49.19 [aid to families with dependent children] and 49.45 to 49.47 [medical assistance].” No other income maintenance programs, including the provision of temporary assistance under sec. 49.01(7), Stats., are mentioned. It is a rule of statutory construction that the express mention of one item impliedly excludes another. *Appleton v. ILHR Department*, 67 Wis. 2d 162, 172-73, 226 N.W.2d 497 (1975). Therefore, it is my conclusion that, while the Department may reimburse counties for costs incurred in

the administration of those income maintenance programs enumerated in sec. 46.032, Stats., there is no authority for the Department to reimburse counties for administrative costs incurred in providing temporary assistance under sec. 49.01(7), Stats.

BCL:FTC

Inebriates And Drug Addicts; Minors; An outpatient treatment program for alcohol and other drug abuse which meets the standards contained in section PW-MH 61.03 Wis. Adm. Code, and has been formally approved by the Department of Health and Social Services may provide treatment and services to a minor at least twelve years of age without obtaining the consent of the minor's parent or guardian.
OAG 5-81

February 5, 1981.

FRED A. RISSER, *President*
State Senate

The Senate Organization Committee has asked my opinion on the following question:

Under sec. 51.47(1), Stats., may an outpatient program for alcohol and other drug abuse which meets the standards contained in section PW-MH 61.03 Wis. Adm. Code, provide treatment and services to a minor at least twelve years of age, without obtaining the consent of the minor's parent or guardian?

In my opinion, the answer is yes, provided that formal approval of the program has been obtained from the Department of Health and Social Services.

As created by ch. 331, Laws of 1979, sec. 51.47(1), Stats., provides, in material part:

[A]ny ... health care facility licensed, approved or certified by the state for the provision of health services may render preventive, diagnostic, assessment, evaluation or treatment services for the abuse of alcohol or other drugs to a minor 12 years of age or

over without obtaining the consent of or notifying the minor's parent or guardian.

In order to provide treatment or services to a minor at least twelve years of age without obtaining consent from a parent or guardian, two basic criteria must be met by any outpatient program operated under section PW-MH 61.03 Wis. Adm. Code. First, the program must provide "health care" or "health services." Second, the program must constitute a "facility" which is "licensed, operated, approved or certified by the state."

I. Provision of "Health Care" or "Health Services."

In a slightly different context, the term "health services" has been defined by the Legislature as "clinically related services, including but not limited to diagnostic, treatment, rehabilitative, *alcohol, drug abuse* and mental health services." Sec. 150.01(2), Stats. "[T]o determine legislative intent, related statutes should be construed together." *McGraw-Edison Co. v. ILHR Dept.*, 72 Wis. 2d 99, 105, 240 N.W.2d 148 (1976). Because sec. 150.01(2), Stats., is the only legislative definition of the phrase "health services," it is persuasive as to the meaning of the phrase "health services" in sec. 51.47(1), Stats. An outpatient program operated under section PW-MH 61.03 Wis. Adm. Code provides individualized treatment and rehabilitation for alcoholics and other drug abusers. *See* section PW-MH 61.03(1)(b), (2)(b) Wis. Adm. Code. Therefore, such a program provides "health services" as that phrase is used in sec. 51.47(1), Stats.

Neither the phrase "health care" nor the phrase "health care facility" is specifically defined by statute. However, each part of a statute should be construed in connection with every other part so as to produce a harmonious whole. *Pelican Amusement Co. v. Pelican*, 13 Wis. 2d 585, 593, 109 N.W.2d 82 (1961); *Tews Lime & Cement Co. v. ILHR Department*, 38 Wis. 2d 665, 672, 158 N.W.2d 377 (1968). It would be a novel situation if a "health care facility" did not provide "health services." Because there is no evidence that the Legislature intended the phrase "health care" to have a meaning significantly different than the phrase "health services," it is my opinion that

health care is provided by an outpatient program operated under section PW-MH 61.03 Wis. Adm. Code.

II. State Approval

A. Treatment of Alcoholism.

Turning to the second criterion which must be met under sec. 51.47(1), Stats., the terms "approved private treatment facility" and "approved public treatment facility" are statutorily defined in connection with the provision of health services to alcoholics. Section 51.45(2), Stats., provides, in material part:

(b) "Approved private treatment facility" means a private agency meeting the standards prescribed in sub. (8) (a) and approved under sub. (8) (c).

(c) "Approved public treatment facility" means a treatment agency operating under the direction and control of the department or providing treatment under this section through a contract with the department under sub. (7) (g) or with the county mental health, mental retardation, alcoholism and drug abuse board under s. 51.42 (5) (h) 8, and meeting the standards prescribed in sub. (8) (a) and approved under sub. (8) (c).

....

(g) "*Treatment*" means the broad range of emergency, outpatient, intermediate, and inpatient services and care, including diagnostic evaluation, medical, surgical, psychiatric, psychological, and social service care, vocational rehabilitation and career counseling, which may be extended to alcoholics and intoxicated persons, and psychiatric, psychological and social service care which may be extended to their families.

Whether public or private, a treatment facility for alcoholics must meet the standards prescribed pursuant to sec. 51.45(8)(a), Stats., and be approved under sec. 51.45(8)(c), Stats. See sec. 51.45(2)(b), (c), Stats. Section 51.45(8), Stats., provides, in material part that:

(a) The department shall establish minimum standards for approved treatment facilities that must be met for a treatment

facility to be approved as a public or private treatment facility

....

(c) Approval of a facility must be secured under this section before application for a grant-in-aid for such facility under s. 51.42 or before treatment in any facility is rendered to patients.

The standards prescribed by the Department pursuant to sec. 51.45(8)(a), Stats., for the outpatient treatment of alcoholics are contained in section PW-MH 61.03 Wis. Adm. Code. Therefore, any private or public treatment agency which meets those standards and has secured the formal approval mentioned in sec. 51.45(8)(c), Stats., constitutes a "facility ... approved ... by the state" within the meaning of sec. 51.47(1), Stats. This conclusion is further reinforced because sec. 51.45(2)(g), Stats., includes outpatient care extended to alcoholics within the statutory definition of treatment.

B. Treatment of Drug Abuse

There are very few outpatient programs for drug abusers which do not also provide services to alcoholics. Consequently, the Department of Health and Social Services has promulgated one set of standards which applies to both types of programs. That set of standards is contained in section PW-MH 61.03 Wis. Adm. Code. The authority to promulgate such standards for outpatient drug abuse programs is derived from sec. 51.42(12), Stats. What has been said in connection with outpatient programs for alcoholics is applicable to outpatient programs for drug abusers because those programs are also approved by the Department of Health and Social Services. See secs. 51.01(2), 51.04, 632.89(1)(a), Stats. Thus, an outpatient program for drug abusers which meets the standards contained in section PW-MH 61.03 Wis. Adm. Code and has been formally approved by the Department constitutes a "facility ... approved ... by the state" within the meaning of sec. 51.47(1), Stats.

An outpatient program for alcohol and other drug abuse which satisfies the standards contained in section PW-MH 61.03 Wis. Adm. Code, and has been formally approved by the Department provides "health services" or "health care" and is a "facility ... approved

... by the state." Such a program may provide treatment or services to a minor at least twelve years of age without obtaining the consent of a parent or guardian.

BCL:FTC

Corporations; Licenses And Permits; Real Estate Brokers; A corporation not licensed as a real estate broker does not violate ch. 452, Stats., if it allows its nonlicensed employes to negotiate for and sign apartment leases of property owned by the corporation. Permitted limits of nonlicensed independent contractor agents discussed. OAG 6-81

February 18, 1981.

Real Estate Examining Board

You request clarification of several matters relating to 60 Op. Att'y Gen. 1 (1971), which stated that by reason of the exception in sec. 452.01(6)(e), Stats., no real estate broker's license is required by an individual who is an officer of a corporation or a partner of a partnership which owns apartment complexes, to act for the corporation or partnership in the rental of such property.

Your questions as renumbered and restated are:

1. Does a corporation not licensed as a real estate broker violate ch. 452, Stats., if it allows its nonlicensed employes, who are not corporate officers, to negotiate for and sign apartment leases of property owned by the corporation?
2. Does a corporation not licensed as a real estate broker violate ch. 452, Stats., if it allows its nonlicensed agents, who are not corporate officers or employes, and who operate as independent contractors, to negotiate for and sign apartment leases of property owned by the corporation?

This opinion assumes that such employes or agents have been granted power by the appropriate corporate officers to sign leases and to negotiate on behalf of the corporation. See sec. 706.03(1), (2),

(3), Stats., which is partially material. Section 452.01(6)(e), Stats., does not authorize employes or agents to execute leases on behalf of owners or managers of a residential building, but merely authorizes them to accept applications for leases without being licensed. The exception does not permit them to engage in full scale negotiations for leases, although the corporate officers could give them corporate authority to do that, but attempts to set the limits to which negotiation may extend without the necessity of a license.

There is no need to set forth the full terms of secs. 452.01(2)(a), (b), (6)(e), and 452.03, Stats., which have not been materially altered since the 1971 opinion.

I am of the opinion that the answer to question one is no. The reasoning in 60 Op. Att'y Gen. 1, 3 (1971), as to corporate officers is applicable to employes. The answer to your second question is that the owner corporation would probably not be in violation of ch. 452, Stats., but that the independent contractors would be if they in fact negotiated or offered to negotiate a lease, for the owner corporation and for a commission in a style and manner in excess of the strict limits of sec. 452.01(6)(e), Stats. Independent contractor agents, as individuals or corporations, would be exempt from licensing only if they limited their activities to the strict limits of the tasks specified in sec. 452.01(6)(e), Stats., that is, "exhibits a residential unit therein to prospective tenants, accepts applications for leases and furnishes such prospective tenants with information relative to the rental of such unit, terms and conditions of leases required by the owner or manager, and similar information," or if such agents were exempt by reason of subsec. (6)(c), (d).

BCL:RJV

Counties; Hill-Burton Act (Federal); Medical Aid; Counties are liable to reimburse emergency medical relief claims upon satisfaction of the prerequisites in sec. 49.02(5), Stats., and medical facilities are not foreclosed from submitting such claims nor are counties empowered to deny such claims because of assurances made by the facility in exchange for benefits received under the Hill-Burton Act. OAG 7-81

February 18, 1981.

DAVID H. RAIHLE, *Corporation Counsel*
Chippewa County

You have submitted questions relating to the relative rights and obligations of hospitals, counties, and individual patients under the Federal Hill-Burton Act and the state emergency medical relief program under sec. 49.02(5), Stats.

QUESTIONS

Your questions are:

1. May a hospital that has received funds under the Hill-Burton Act charge the cost of emergency medical care for a dependent person to a county pursuant to sec. 49.02(5), Stats., or must the hospital absorb the cost in satisfaction of assurances made under the Hill-Burton Act?
2. In answering the foregoing question, does it make any difference whether the person receiving the emergency medical care is currently receiving general relief or is not currently receiving general relief but is rendered unable to pay for the medical care by the accident or affliction which prompts it?
3. Does a person receiving emergency medical care have a personal right to be accorded medical treatment as a beneficiary of a hospital's Hill-Burton assurance to provide a reasonable volume of services to persons unable to pay therefor?

SUMMARY ANSWERS

1. A hospital that has received a grant under the Hill-Burton Act is obligated to honor the assurances it made as a condition to receiving the grant, but the nature and extent of a hospital's Hill-Burton obligation does not foreclose the hospital from submitting claims to the county under sec. 49.04(5), Stats., nor does it absolve the county of its statutory liability to pay such claims.

2. The answer is the same whether the person receiving emergency medical care is already authorized to receive general relief or becomes eligible to receive general relief due to the accident or affliction which prompts the care. Where a "dependent person" is given emergency medical care, the county is liable therefor even though the person was not previously authorized to receive general relief.

3. Although persons have a conditional right to compel a hospital to honor its Hill-Burton assurances, an individual does not have a personal right to be a beneficiary of such assurances.

DISCUSSION

The purpose of the Hill-Burton Act is to assist each state in developing an adequate statewide health care system and to stimulate the development of health care facilities and services. 42 U.S.C. sec. 291. Stimulation takes the form of grants, loans, and loan guarantees for the construction or modernization of hospitals or public health centers. 42 U.S.C. secs. 291a, 291j, 291j-1.

As a condition to receiving a grant, a hospital has to give certain assurances including an assurance that "there will be made available in the facility or portion thereof to be constructed or modernized a reasonable volume of services to persons unable to pay therefor." 42 U.S.C. sec. 291c(e). The exchange of Hill-Burton benefits for assurances creates a contractual relationship. *Corum v. Beth Israel Medical Center*, 359 F. Supp. 909, 912 (S.D.N.Y. 1973). The relationship between the federal government and a hospital under the Hill-Burton Act exists independent of state law.

Wisconsin's emergency medical relief program was created by ch. 585, Laws of 1945. The purpose of the program was to ensure that hospitals and doctors would provide prompt emergency care to those in need without regard for immediate payment or security therefor. See *Mercy Medical Center v. Winnebago County*, 58 Wis. 2d 260, 266, 206 N.W.2d 198 (1973).

As a general matter, if a hospital provides emergency medical care to a dependent person, as defined in sec. 49.01(4), Stats., the hospital is entitled to reimbursement for the care pursuant to sec. 49.02(5),

Stats., which creates a relationship between a county and a hospital independent of federal law. It reads as follows:

The municipality or county shall be liable for the hospitalization of and care rendered by a physician and surgeon to a person entitled to relief under this chapter, without previously authorizing the same, when, in the reasonable opinion of a physician, immediate and indispensable care or hospitalization is required, and prior authorization therefor cannot be obtained without delay likely to injure the patient. There shall be no liability for such care or hospitalization beyond what is reasonably required by the circumstances of the case, and liability shall not attach unless, within 7 days after furnishing the first care or hospitalization of the patient, written notices by the attending physician and by the hospital be mailed or delivered to the official or agency designated in accordance with this section, reciting the name and address of the patient, so far as known, and the nature of the illness or injury, and the probable duration of necessary treatment and hospitalization. Any municipality giving care or hospitalization as provided in this section to a person who has settlement in some other municipality may recover from such other municipality as provided in s. 49.11.

The duty of the county to pay proper claims for relief under sec. 49.02(5), Stats., is clear from the language of the statute and two supreme court decisions. In *Mercy Medical Center*, the court held that the county is liable for emergency hospital relief if the hospital satisfies the requirements of sec. 49.02(5), Stats., and the patient appears to be entitled to relief, even if the patient refuses to apply for relief subsequent to treatment. In *Clintonville Community Hosp. v. Clintonville*, 87 Wis. 2d 635, 275 N.W.2d 655 (1979), the court held that a city is liable for emergency medical treatment if the hospital meets its burden of proving that the prerequisites for liability under sec. 49.02(5), Stats., are satisfied. In rejecting the city's principal contention, the court declined to augment the statute by requiring hospitals to conduct investigations into a patient's entitlement to relief. The court held that since such a requirement is not expressed in the statute, it cannot be imposed. 87 Wis. 2d at 643.

These two supreme court decisions stand for two propositions pertinent here. First, a county is liable for emergency medical care if the

hospital proves that the expressed conditions of sec. 49.02(5), Stats., are met. Second, a county may not impose conditions in addition to those expressed in the statute. Since sec. 49.02(5), Stats., does not expressly condition a hospital's claims or a county's liability on satisfaction of assurances made by the hospital under the Hill-Burton Act, it follows that such a condition may not be imposed or relied upon by a county in its administration of the emergency medical relief program.

For a recent federal district court decision that is supportive of this conclusion, *see Gilmore v. Custer*, Civil No. L72-2 (N.D. Ind., Feb. 29, 1980), wherein the court held that it was improper for Indiana public welfare agencies to deny medical relief payments on the basis that free care was available by virtue of the Hill-Burton Act.

The question remains whether a hospital is foreclosed from submitting claims for emergency medical relief because of its Hill-Burton assurance to provide "a reasonable volume of services to persons unable to pay therefor." The answer is that federal law authorizes hospitals to submit such claims.

42 U.S.C. sec. 291c(intro.), (e) reads as follows:

General regulations

The Surgeon General, with the approval of the Federal Hospital Council and the Secretary of Health, Education, and Welfare, shall by general regulations prescribe—

.....

e) that the State plan shall provide for adequate hospitals, and other facilities for which aid under this part is available, for all persons residing in the State, and adequate hospitals (and such other facilities) to furnish needed services for persons unable to pay therefor. Such regulations may also require that before approval of an application for a project is recommended by a State agency to the Surgeon General for approval under this part, assurance shall be received by the State from the applicant that (1) the facility or portion thereof to be constructed or modernized will be made available to all persons residing in the territorial area of the applicant; and (2) *there*

will be available in the facility or portion thereof to be constructed or modernized a reasonable volume of services to persons unable to pay therefor, but an exception shall be made if such a requirement is not feasible from a financial viewpoint.

(Emphasis added.)

Under this authority, federal regulations were created in 42 C.F.R. sec. 53.111, *et seq.* New superseding regulations were published on May 18, 1979, and are contained in 42 C.F.R. Part 124. 44 Fed. Reg. 29372 (1979). This opinion will focus on the new regulations, although the conclusions would be the same under the old regulations.

To comply with their assurance to provide a reasonable volume of services to persons unable to pay for the services, a facility is required to provide uncompensated services in an amount that is not less than the lesser of (1) three percent of its operating costs or (2) ten percent of all federal assistance provided to the facility. 42 C.F.R. sec. 124.503(a). The standard is an objective one. A facility is not necessarily required to provide free care to all persons who seek it.

In computing uncompensated services, a facility may not include:

(a) Any amount that the facility has received, or is entitled to receive, from a third party insurer or under a governmental program, except where the person to whom the facility provides services refused to take reasonable actions necessary to obtain the entitlement.

(b) Any amount in excess of the payment that the facility has received, or is entitled to receive, from a third party insurer or under a governmental program where the facility has agreed or is otherwise required to accept this payment as payment in full for the services;

....

(d) Any amount for which reimbursement would be available under a governmental program (such as medicare or medi-

caid) in which the facility, although eligible to do so, and required by sec. 124.603(c)(1) to do so, does not participate.

42 C.F.R. sec. 124.509.¹

The regulation clearly contemplates that Hill-Burton facilities may seek reimbursement for services rendered to the poor. In fact, a facility is disadvantaged if it does not seek reimbursement which is available to it, because reimbursable care cannot be counted as "uncompensated services" even if reimbursement is not sought. The emergency relief provisions in sec. 49.02(5), Stats., constitute the sort of "governmental program" referred to in these federal regulations.

Along with the assurance to provide free care, Hill-Burton facilities were also required to make an assurance regarding community service. 42 U.S.C. sec. 291c(e). In satisfaction of that companion assurance,

[t]he facility shall make arrangements, if eligible to do so, for reimbursement for services with:

(i) Those principal State and local governmental third-party payors that provide reimbursement for services that is not less than the actual costs, as determined in accordance with accepted cost accounting principles; and

(ii) Federal governmental third-party programs, such as medicare and medicaid.

(2) The facility shall take any necessary steps to insure that admission to and services of the facility are available to beneficiaries of the governmental programs specified in paragraph (c)(1) of this section without discrimination or preference because they are beneficiaries of those programs.

42 C.F.R. sec. 124.603(c)(1).²

¹ The old regulations contain similar provisions at 42 C.F.R. sec. 53.111(f)(2).

² The old regulations contain similar provisions at 42 C.F.R. sec. 53.113(d)(2).

More than authorizing, the foregoing federal regulations require Hill-Burton facilities to seek reimbursement for services under programs such as the emergency medical relief program under sec. 49.02(5), Stats.

To summarize at this point, the assurance of a hospital to provide "a reasonable volume of services to persons unable to pay therefor" does not preclude the hospital from submitting claims for emergency medical relief under sec. 49.02(5), Stats., and a county is bound to honor such claims if the express conditions of that statute are satisfied.

This conclusion stands whether the person receiving the care is or is not receiving general relief at the time the emergency treatment is provided. The test under sec. 49.02(5), Stats., is whether the person is "entitled to relief" at the time even if there is not prior authorization. *Mercy Medical Center*, 58 Wis. 2d at 266-67, held that if it may be ascertained that the person was a "dependent person" at the time emergency services were rendered, the county is liable for the resultant claim even if the patient fails to subsequently apply for relief. Thus, even in this latter situation, the hospital would have a reimbursable claim which by 42 C.F.R. sec. 124.603(c)(1), it is bound to pursue and which by 42 C.F.R. sec. 124.509, it is precluded from reporting as an uncompensated service rendered in satisfaction of its Hill-Burton assurance.

Turning now to your final question: "Does a person receiving emergency medical care have a personal right to be accorded medical treatment as a beneficiary of a hospital's Hill-Burton assurance to provide a reasonable volume of services to persons unable to pay therefor?"

Hill-Burton facilities are obligated to provide a certain dollar amount of free care. 42 C.F.R. sec. 124.503(a). Hospitals are not necessarily required to provide free care to all indigents who come to the hospital. *Cook v. Ochsner Foundation Hospital*, 559 F.2d 968, 972 (5th Cir. 1977). Hospitals have some discretion to determine which patients or categories of patients are to be treated as beneficiaries of their Hill-Burton assurance. *Gordon v. Forsyth County Hospital Authority, Inc.*, 544 F.2d 748 (4th Cir. 1976).

Primary jurisdiction to enforce Hill-Burton assurances resides with the Federal Department of Health and Human Services under 42 U.S.C. sec. 300s-6 which establishes the exclusive mechanism for enforcing Hill-Burton assurances. *Newsom v. Vanderbilt University*, 453 F. Supp. 401, 405, 408 (M.D. Tenn. 1978); *Lugo v. Simon*, 453 F. Supp. 677, 684-85 (N.D. Ohio 1978). Under that provision, individuals have a right to bring actions to compel compliance with Hill-Burton assurances only if they first file a complaint with the federal government and the complaint is dismissed or not acted upon.

I am aware of no basis for concluding that an individual recipient has a personal right, enforceable against a hospital, to demand that he or she be considered an uncompensated account under the Hill-Burton Act rather than a reimbursable account under state law. Several cases suggest that there is no such personal right. *See Gordon v. Forsyth County Hospital Authority, Inc.*, 409 F. Supp. at 721, 722 (M.D.N.C. 1976), *affirmed in part, vacated in part and remanded*, 544 F.2d 748 (4th Cir. 1976); *Lugo*, 453 F. Supp. at 684; *Yale-New Haven Hospital v. Matthews*, 32 Conn. Supp. 539, 343 A.2d 661 (1974), *cert. denied*, 341 A.2d 432 (1975), *cert. denied*, 423 U.S. 1024 (1975) (hospital's failure to satisfy Hill-Burton assurance may not be raised by an individual as a defense against hospital's collection action).

The conclusions in this opinion are consistent with and supported by the holdings in *St. Michael Hospital v. County of Milwaukee*, 98 Wis. 2d 1, 295 N.W.2d 189 (Ct. App. 1980), petition for review denied September 25, 1980.

BCL:RWL

Interest; Mortgages; Lenders need not comply with the provisions of sec. 138.053, Stats., unless the right to increase the interest rate subsequent to the execution of the contract is conferred by the contract itself. OAG 9-81

March 11, 1981.

R. J. MCMAHON, *Commissioner*
Savings and Loan

You have requested my opinion as to the extent to which sec. 138.053, Stats., applies to the use of a series of short-term renewable balloon notes to provide a borrower with long-term mortgage financing. Section 138.053(1) and (2), Stats., provides as follows:

(1) No contract between a borrower and a lender secured by a first lien real estate mortgage on, or an equivalent security interest in, an owner-occupied residential property containing not more than 4 dwelling units may authorize the lender to increase the borrower's contractual rate of interest unless the contract provides that:

(a) No increase may occur until 3 years after the date of the contract;

(b) No increase may occur unless the borrower is given at least 4 months' written notice of the lender's intent to increase the rate of interest, during which notice period the borrower may repay his or her obligation without penalty;

(c) The amount of the initial interest rate increase may not exceed \$1 per \$100 for one year computed upon the declining principal balance;

(d) The amount of any subsequent interest rate increase may not exceed \$1 per \$200 for one year computed upon the declining principal balance;

(e) The interest rate may not be increased more than one time in any 12-month period; and

(f) The loan may be prepaid without penalty at any time at which the interest rate in effect exceeds the originally stated interest rate by more than \$2 per \$100 for one year computed upon the declining principal balance.

(2) No lender may make a loan secured by a first lien real estate mortgage on, or an equivalent security interest in, an owner-occupied residential property containing not more than 4

dwelling units providing for prospective changes in the rate of interest unless it has clearly and conspicuously disclosed to the borrower in writing:

- (a) That the interest rate is prospectively subject to change;
- (b) That notice of any interest adjustment must be given 4 months prior to any increase; and
- (c) Any prepayment rights of the borrower upon receiving notice of such change.

The statute provides significant safeguards to borrowers in the way of limitations on increases, notice periods and required disclosures.

You indicate that recent increases in the cost of funds to financial institutions and continuing uncertainty about the economy have resulted in the modification of lending practices by Wisconsin savings and loan associations. In the past it has been common practice for savings and loan associations to make loans on a long-term basis with the term of the note and the term of the mortgage equal in duration.

At the present time, however, many associations have begun to offer loans in which the note is for a short term while the mortgage is written for a substantially longer period. For example, you have advised that a lender might offer a two-year note secured by a thirty-year mortgage providing for monthly payments based on a thirty-year amortization period. At the end of those two years the note becomes due and the remaining principal balance would be payable in full as a balloon payment. At that time the loan would be subject to renegotiation. If the parties are unable to agree to terms for refinancing the balloon, the borrower's option is to obtain financing elsewhere.

You have asked whether the requirements of sec. 138.053, Stats., apply to a transaction such as the one just described. It is my opinion that they do not.

You have correctly observed that there does not appear to be any provision of Wisconsin law which would prevent the use of renewable notes in this way except in those transactions subject to the provisions

of the Wisconsin Consumer Act which have an annual percentage rate of 16.5 percent or more. Sec. 422.402, Stats. Since the Wisconsin Consumer Act does not apply to transactions in which the amount financed exceeds \$25,000 (sec. 421.202(6), Stats.), there are not likely to be a large number of such transactions.

In your letter you express the view that borrowers are best served by a contractual assurance of "full term financing" such as by means of a provision by which the lender agrees to refinance the remaining principal balance of the loan each time a short-term note comes due, even though the terms of the new note may be subject to renegotiation at the time of each renewal. You state that most savings and loans offering this type of financing would be willing to provide for such contract provisions but that they are concerned that to do so may bring them within the limitations of sec. 138.053, Stats. It is my opinion that the inclusion of such a provision would not change the nature of the transaction so as to require compliance with sec. 138.053, Stats.

While the cases have not directly addressed the question of whether a lender can accomplish indirectly the right to increase interest rates subsequent to the execution of the loan contract without complying with the requirements of sec. 138.053, Stats., it is my opinion that the statute is unambiguous and that it requires compliance only where the right to increase interest rates is conferred by the contract itself.

Section 138.053, Stats., was created by ch. 387, Laws of 1975, and took effect on June 12, 1976. Since I believe that the statute is unambiguous, it is not necessary to look to its legislative history for guidance in interpretation. I do note, however, that throughout the history of this section and its predecessor, sec. 215.21(3), Stats. (1973), the statutory sections have clearly referred to the provisions of the loan documents themselves to determine whether the transaction was covered by the statutory limitations.

I note that there are numerous ways in which a lender can subject a loan transaction to subsequent changes in material terms and sug-

gest that this may be an appropriate area for the promulgation of administrative rules for the guidance of lenders and borrowers.

BCL:RAV

Indians; Jurisdiction; Law Enforcement; Menominee Indians; Residence, Domicile And Legal Settlement; Jurisdictional relationship between State and Menominee Tribe discussed. OAG 10-81

March 11, 1981.

PAUL CORNETT, *District Attorney*
Shawano and Menominee Counties

You have asked several questions concerning the relationship between Menominee County and the Menominee Indian Tribe. Your questions will be answered seriatim.

1. Do state, county, and local law enforcement agencies have authority to execute warrants and bench warrants issued by the Menominee Tribal Court?

For the reasons that follow, it is my opinion that state law enforcement agencies now have no statutory authority to execute warrants issued by the Menominee Tribal Court.

The Menominee Tribe is a federally recognized Indian tribe. As such, it possesses the power to regulate its internal relations to the extent this power has not been qualified by federal law or affected by the unique relationship between Indian tribes and the United States. *See generally* 64 Op. Att'y Gen. 184 (1975); 66 Op. Att'y Gen. 115 (1977).

In *United States v. Wheeler*, 435 U.S. 313, 322 (1978), the Supreme Court held: "It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain a 'separate people, with the power of regulating their internal and social relations.' "

It is therefore clear that Indian tribes like the Menominee Tribe have retained "a semi-independent position ... not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973), quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886), and that the primary governmental authority to exercise general jurisdiction over tribe members within reservation boundaries rests with the Menominee tribal government and the federal government. Accordingly, original warrants and bench warrants issued by the Menominee Tribal Court have similar status as warrants issued by jurisdictions other than the State of Wisconsin and its political subdivisions.

The authority of state law enforcement agencies to execute warrants or otherwise make a lawful arrest is governed by statute, *Wagner v. Lathers*, 26 Wis. 436 (1870); *City of Madison v. Two Crow*, 88 Wis. 2d 156, 276 N.W.2d 359 (Ct. App. 1979). Absent statutory authorization, an arrest may not be made under a warrant outside the territorial jurisdiction of the court or magistrate issuing the warrant. *See Annot.*, 61 A.L.R. 377 (1929) "Territorial extent of power to arrest under a warrant." *See also* 62 Op. Att'y Gen. 209 (1973).

The duties and authority of state law enforcement officers to execute warrants are covered generally in ch. 968, Stats. The only distinction made in ch. 968 as to the locus or origin of a warrant as between the State of Wisconsin and other jurisdictions is in sec. 968.07, Stats., which provides:

- (1) A law enforcement officer may arrest a person when:
 - (a) He has a warrant commanding that such person be arrested; or
 - (b) He believes, on reasonable grounds, that a warrant for the person's arrest has been issued in this state; or
 - (c) He believes, on reasonable grounds, that a felony warrant for the person's arrest has been issued in another state; or
 - (d) There are reasonable grounds to believe that the person is committing or has committed a crime.

This statute does not distinguish between particular law enforcement officers who may arrest pursuant to warrants, nor does it distinguish between the type of warrant involved. Section 968.07(1)(b), Stats., specifically authorizes such officers to arrest under warrants "issued in this state," but such arrests under warrants issued in another state are restricted to felony warrants under sec. 968.07(1)(c), Stats. Thus, the Legislature has made specific provision for the execution of felony warrants issued in another state but has made no provision for the execution of warrants issued by tribal government. When sec. 968.07, Stats., is read *in pari materia* with other ch. 968 sections, it is clear that the Legislature has not authorized state law enforcement officers to arrest persons pursuant to warrants issued by the Menominee Tribal Court.

I have also considered the Uniform Criminal Extradition Act, sec. 976.03, Stats., and find no authority therein to allow state law enforcement officers to arrest Menominee Tribe members who are fugitives from tribal court jurisdiction.

2. An enrolled Menominee charged with committing a crime in Shawano County is apprehended by tribal authorities on the Menominee Indian Reservation. Must such a person be extradited pursuant to Sec. 976.03 Wis. Stats.?

Unquestionably, state courts do have jurisdiction to prosecute tribe members for crimes committed outside the reservation. Section 976.03, Stats., however, only applies to interstate extradition and, therefore, cannot be used to require the Menominee Tribe to turn over one of its members to state officials. To acquire personal jurisdiction over tribe members in such cases would require either waiting until such person voluntarily comes within the court's jurisdiction or is extradited pursuant to tribal ordinance. The Menominee Tribe has enacted an extradition ordinance which establishes procedures for securing the return of fugitives from state justice where a felony warrant for that person's arrest has been issued by the State of Wisconsin.

Most authority holds that a state cannot utilize self-help procedures by entering the Reservation and removing the individual without complying with tribal extradition procedures. The leading case is

State of Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969). There the court held Arizona had no authority to exercise extradition jurisdiction over Indians on the Navajo Reservation. An Indian resident of the reservation was wanted by the State of Oklahoma for an alleged crime committed in that state. Oklahoma requested extradition from the Governor of Arizona. A county sheriff arrested the individual on the reservation pursuant to a warrant of extradition issued by the Arizona Governor, and he brought a proceeding for a writ of habeas corpus.

The court began its analysis with the principle from *Worcester v. Georgia*, 31 U.S. 515 (1832), that tribes historically were regarded as "distinct political communities." 413 F.2d at 684. The court then took notice of the intent of the Navajo Treaty of 1868 to vest exclusive jurisdiction in the Indians over their internal affairs. The court concluded that Arizona's exercise of extradition jurisdiction in such circumstances would "infringe on the right of reservation Indians to make their own laws and be ruled by them," 413 F.2d at 684, citing *Williams v. Lee*, 358 U.S. 217, 220 (1959), and therefore was an unlawful exercise of its powers.

There likewise are cases which hold service of process on an Indian within reservation borders does not give state courts jurisdiction over an action allegedly occurring off the reservation, nor does the state (as opposed to the tribe) have jurisdiction to enforce a state court judgment against an Indian on the reservation. See, e.g., *Annis v. Dewey County Bank*, 335 F. Supp. 133 (C.D. S.D. 1971); *Francisco v. State*, 113 Az. 427, 556 P.2d 1 (1976); *Martin v. Denver Juvenile Court*, 177 Col. 261, 493 P.2d 1093 (1972); *Commissioner of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120 (1970); *Benally v. Marcum*, 89 N.M. 463, 553 P.2d 1270 (1976). See also *American Indian Nat. Bank v. Red Owl*, 478 F. Supp. 302 (C.D. S.D. 1979).

The Montana Supreme Court in a criminal case has ruled that state courts can acquire personal jurisdiction through service of process on a reservation. In *State ex rel. Old Elk v. District Court of Big Horn*, 170 Mont. 208, 552 P.2d 1394 (1976), the court held that the arrest of a tribe member on the reservation by a state officer pursuant to a state warrant for a crime allegedly committed off the reservation was valid. The court refused to follow the holding of *Turtle* claiming

it only applied in situations where the tribe had passed an extradition ordinance. Unlike the Menominee Tribe and the Navajo Tribe, the Crow Tribe involved in *Old Elk* did not have an extradition ordinance. In a recent case, *In Matter of Little Light*, 598 P.2d 572 (Mont. 1979), the Supreme Court of Montana used its holding in *Old Elk* to again uphold the validity of an arrest of an Indian made by state officers on a reservation. See also *Bad Horse v. Bad Horse*, 163 Mont. 445, 517 P.2d 893 (1974); *Little Horn State Bank v. Stops*, 170 Mont. 510, 555 P.2d 211 (1976); compare *State Securities, Inc. v. Anderson*, 84 N.M. 629, 506 P.2d 786 (1973), with *Benally*.

In view of *Turtle* and *Williams*, the inescapable conclusion is that the exercise of state jurisdiction in the circumstances you describe would clearly interfere with rights essential to the Menominee's self-government as reflected through the tribe's enactment of a comprehensive extradition ordinance. It is therefore my opinion that neither the state nor Shawano/Menominee County officials have authority to enter the reservation to arrest tribe members or otherwise acquire personal jurisdiction over tribe members residing and located on the reservation in criminal matters occurring off the reservation. Tribe members leaving the reservation may find themselves subject to the jurisdiction of state courts through arrest and service of process.

3. Are enrolled Indians residing on the Menominee Indian Reservation who otherwise qualify for public assistance residents of Menominee County for the purpose of obtaining public assistance (AFDC, relief, medical assistance, etc.)?

Such persons are residents of Menominee County for the purpose of obtaining public assistance from that county.

You will recall that Menominee County and the Town of Menominee were created as a result of termination. See *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 409-10 (1968), and the Menominee Termination Plan, 26 F.R. 3726 (April 29, 1961). The Menominee Reservation, which had been created by the Treaty of Wolf River in 1854 (10 Stat. 1064), but later modified by the Treaty of February 11, 1856 (11 Stat. 679), thus became coterminous with

Menominee County and the Town of Menominee, ch. 259, sec. 2 (1959) Wis. Sess. Laws 300-01, sec. 2.01(39m), Stats.

On August 15, 1953, Pub. L. No. 280 (67 Stat. 558, 28 U.S.C. sec. 1360, 18 U.S.C. sec. 1162) was enacted. It granted limited civil and general criminal jurisdiction to the State of Wisconsin in "all Indian country within the state except the Menominee Reservation." The Menominee subsequently were brought within the coverage of Pub. L. No. 280 but were removed again effective March 1, 1976. See 66 Op. Att'y Gen. 290 (1977). The Menominee Reservation was reestablished by the Menominee Restoration Act (87 Stat. 770, 25 U.S.C. secs. 903-903f), which repealed the Menominee Termination Act of June 17, 1954 (68 Stat. 250, 25 U.S.C. sec. 891, *et seq.*). In 66 Op. Att'y Gen. 115 (1977), it is concluded that as a result of restoration the county and the reservation boundaries once again are coterminous for jurisdictional purposes.

As already indicated, the state has very limited jurisdiction within the Menominee Reservation even though the reservation is within the territorial jurisdiction of the state, Menominee County and the Town of Menominee. The legal status of Menominee County and the Town of Menominee was not affected by restoration. Although the county and town continue to exist, the restoration of the Menominee Tribe, the reestablishment of the Menominee Reservation, and the loss of most state jurisdiction within the Reservation following restoration, together, severely limit the regulatory impact that state statutes have in the Town and County of Menominee.

Tribe members, nevertheless, continue to be eligible for and entitled to certain services provided by the state and local government. In cases involving tribe members, where eligibility for public services has been at issue, the courts have uniformly held that tribe members residing on non-taxable reservation lands are entitled to participate in public assistance programs such as those you mention. See, *e.g.*, *Morton v. Ruiz*, 415 U.S. 199 (1974); *Acosta v. San Diego County*, 126 Cal. App. 2d 455, 272 P.2d 92 (Dist. Ct. App. 1954); *State Board of Public Welfare v. Board of Com'rs*, 262 N.C. 475, 137 S.E.2d 801 (1964). See also 37 Op. Att'y Gen. 213 (1948); 38 Op. Att'y Gen. 531 (1949).

4. Are said persons likewise residents of Menominee County for the purpose of conferring jurisdiction on State courts for the establishment and enforcement of child support and prosecution of welfare fraud?

Although tribe members who reside upon the Menominee Reservation also are residents of Menominee County, residency alone does not confer jurisdiction upon state courts over such persons for the establishment and enforcement of child support and prosecution of welfare fraud cases. The State of Wisconsin has very limited jurisdiction over tribe members on the reservation in such matters.

The violation of child support orders and welfare fraud are crimes under Wisconsin law. See secs. 49.12, 52.05, 52.055, and 939.12, Stats. It is settled that the State of Wisconsin has no criminal jurisdiction over tribe members who commit crimes on the reservation. *State ex rel. Pyatskowitz v. Montour*, 72 Wis. 2d 277, 278, 240 N.W.2d 186 (1976). Compare *Sturdevant v. State*, 76 Wis. 2d 247, 254, 251 N.W.2d 50 (1977). See also *State v. LaTender*, 86 Wis. 2d 410, 431, 273 N.W.2d 260 (1979).

Also, the state has little, if any, jurisdiction over domestic relations involving Menominee Tribe members on the reservation. See generally, 37 Op. Att'y Gen. 213 (1948); cf. *Fisher v. District Court of the 16th Judicial District*, 424 U.S. 382 (1976); and *Wisconsin Potowatomies, etc. v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973). The establishment of child support involves both quasi-criminal and civil regulatory jurisdiction. Although some related enforcement activities also suggest that civil sanctions may be appropriate to effect compliance, the state nevertheless lacks jurisdictional authority to proceed in such matters in state court. State action in this regard clearly constitutes infringement on the right of the Menominees to make their own laws and to be ruled by them. *Williams v. Lee*, 358 U.S. 217 (1959). Cf. *White Mountain Apache Tribe v. Bracker*, 100 S. Ct. 2580 (1980).

It follows that if the child support order violation or the welfare fraud matter arose on the reservation the state would have no jurisdiction to prosecute such crimes. Rather, the prosecution is within the province of the Menominee Tribe or the federal government

under the Assimilative Crimes Act, 18 U.S.C. sec. 13, and the General Crimes Act, 18 U.S.C. sec. 1152. *Cf. United States v. Sosseur*, 181 F.2d 873 (7th Cir. 1950); 69 Op. Att'y Gen. 22 (1980).

Unquestionably, state courts have subject matter jurisdiction to establish child support and to prosecute the violation of child support orders and welfare fraud actions where they arise outside the reservation. Where the tribe member involved has moved to the reservation subsequent to the entering of a valid court order or after the alleged fraud occurred, the state must utilize the same extradition procedures it utilizes in any other situation where a crime has been committed outside the reservation and the tribe member accused of that crime has removed to the reservation. (See discussion above concerning extradition from the Menominee Reservation under question number two.) In this context it must be kept in mind that if the child support order was entered or the welfare fraud occurred during the termination period when the state had jurisdiction over tribe members, those cases should now be considered the same as current cases which involve off reservation criminal conduct.

The seemingly anomalous conclusion reached herein that Menominee Tribe members are eligible for public assistance but may not be prosecuted by the state for welfare fraud which occurs on the reservation is not intended to suggest that the state has no control over such matters. There are at least two principal ways available to the state to deal with this problem. One is through the establishment of eligibility criteria and another is through contract with the Menominee Tribe.

Some programs, such as the Relief To Needy Indian Persons Program (sec. 49.046, Stats.), is funded exclusively with state dollars. Other programs, such as the Aid to Dependent Children Program (sec. 49.19, Stats.) and the Medical Assistance Program (sec. 49.43, *et seq.*, Stats.) are funded through a combination of federal and state tax dollars. Through legislation and rules federally funded programs such as those under the Social Security Act, 42 U.S.C. sec. 301, *et seq.*, entitle any individual to certain benefits provided that certain qualifications are met. The same is true under the Relief To Needy Indian Persons Program. It is therefore my opinion that regardless of the program, it is clear that tribe members must meet the state and

federal eligibility requirements, most of which can be legally applied to such persons notwithstanding their status as tribe members residing upon an Indian reservation. Obviously, if a person cannot meet some eligibility criteria because of his or her status as a tribe member residing upon a reservation, such criteria would not apply to that person. *See, e.g.*, 37 Op. Att'y Gen. 213 (1948). Persons who are capable of but do not meet the eligibility requirements are obviously not entitled to either receive the benefit in the first instance or to continue to receive the benefit where there is a change in eligibility.

Also, it is my understanding that the state now contracts with the Menominee Tribe for the administration of several public assistance programs. It would appear that an effective way to address these jurisdictional problems may lie in the contractual relationship between the state and the tribe. For example, the Menominee Tribe could be asked to assume responsibility to ensure that eligibility requirements are met and that any violations are either punished by the tribe under tribal law or are corrected by the recovery of monies from recipients if they were received through fraud, mistake or similar circumstance.

5. Is the District Attorney for Shawano and Menominee Counties authorized to establish and enforce child support obligations in the Menominee Trial Court?

The District Attorney for Shawano and Menominee Counties has no statutory authority to establish child support in Menominee courts but does have authority to enforce state court judgments in such courts where permitted by the tribe.

The district attorney in Wisconsin is a constitutional officer elected under Wis. Const. art. VI, sec. 4. The constitution, however, does not establish the duties of a district attorney. In *Jessner v. State*, 202 Wis. 184, 194, 195, 231 N.W. 634 (1930), the court suggested that the district attorney has those generally recognized duties and functions belonging to the office in this country at the time of the adoption of the constitution. In *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 378-80, 166 N.W.2d 255 (1969), the court concluded that the office of district attorney was not one of inherent powers, but rather is subject to legislative enactments.

The Legislature has provided generally in sec. 59.47, Stats., and specifically in numerous other statutes, express duties for the office of district attorney. I have found no statute, however, that requires the district attorney to establish obligations and enforce judgments involving child support obligations in the Menominee Tribal Court. Section 59.47(1), Stats., does provide, however: "The district attorney shall: (1) Prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his [or her] county in which the state or county is interested or a party."

Undoubtedly, the Legislature did not have tribal courts in mind when referring to "courts of his [or her] county" but rather was concerned about state courts. The matters to which you refer, however, are without question actions in which the state is both interested and, in most instances of necessity, a party. Under sec. 59.47, Stats., and ch. 52, Stats., it is the duty of the district attorney to represent the state in matters involving support of dependents. It is my opinion that a district attorney does have the limited authority as the principal quasi-judicial legal representative for the state and county to represent the state in actions seeking execution of state court judgments in the Menominee tribal court. This conclusion is strengthened by the absence of anything in the statutes to preclude the district attorney from exercising discretion with regard to making appearance on behalf of the county or state in tribal courts. This analysis, of course, assumes that the Menominee Tribe has enacted a tribal law giving credit to state court judgments ordering support of dependents. For the reasons stated in response to the preceding question, otherwise valid state court judgments based on state laws in this subject area cannot be *enforced* against tribe members who are located upon the reservation unless so provided by the Menominee Tribe.

You next ask several questions relating to juvenile matters.

6. In the absence of a contract, is the Menominee County Department of Social Services responsible for providing services to the Menominee Tribal Court in juvenile matters?

Menominee County has no statutory obligation to provide services to the Menominee Tribal Court in juvenile matters. It is my under-

standing that the primary focus of your concern now is the responsibility of Menominee County to perform intake services for the Menominee Tribal Court. The Children's Code, ch. 48, Stats., requires several types of specifically described intake services. There is nothing in the Children's Code, however, to indicate legislative intent to require Menominee County to perform intake services for the Menominee Tribal Court.

As already indicated, the Menominee Tribe and the federal government have exclusive jurisdiction over virtually all matters involving enrolled tribe members where the cause of action arises within the boundaries of the Menominee Reservation. Since the reservation boundaries and the county boundaries are coterminous for jurisdictional purposes, Menominee County has no jurisdiction to enforce the Children's Code against tribe members residing upon the reservation, *i.e.*, within the county. *Cf.* 37 Op. Att'y Gen. 213 (1948); *Fisher v. District Court of the 16th Judicial District*, 424 U.S. 382 (1976); *Wisconsin Potowatomies, etc. v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973). It follows that the Menominee Tribe has the exclusive authority to deal with matters involving children who are enrolled tribe members residing on the reservation and also has the primary responsibility for making necessary government services available in such cases. It is true, as I indicated in answer to your third question, that certain public assistance benefits administered by the county which constitute individual entitlements are still available to tribe members notwithstanding the jurisdictional relationship that exists. That analysis, however, does not require the same conclusion when considering the delivery of services to the Menominee court, a tribal institution. Services that may be needed to allow the Menominee court to perform its responsibilities under the authority of tribal jurisdiction are the responsibility of the tribe.

In your next question you state:

7. The Circuit Court for Menominee-Shawano Counties is a multicounty court. The boundar [ies] of the Menominee Indian Reservation and Menominee County overlap. Does the Menominee County Division [of circuit court] have jurisdiction over a juvenile who is an enrolled Indian residing on the Menominee Indian Reservation?

For the reasons stated heretofore, the Menominee-Shawano court does not have jurisdiction over a juvenile who is an enrolled Indian residing on the Menominee Indian Reservation in actions arising on the reservation.

8. When a juvenile is an enrolled Indian residing on the Menominee Indian Reservation [and] is charged with committing a delinquent act in Shawano County, Sec. 48.185 provides that the matter may be venued in Shawano County as the county where the violation occurred. May the matter also be venued in Menominee County as the county where the child resides?

Section 48.185, Stats., provides in part:

Venue for any proceeding under ss. 48.12, 48.125, 48.13, 48.135, 48.14 and 48.18 may be in any of the following: the county where the child resides, the county where the child is present or, in the case of a violation of a state law or a county, town or municipal ordinance, the county where the violation occurred.

Section 48.12, Stats., provides for jurisdiction over children alleged to be delinquent. The court has exclusive jurisdiction, except as provided in secs. 48.17 and 48.18, Stats., over any child twelve years of age or older who is alleged to be delinquent because he or she has violated any federal or state criminal law. Unquestionably, proper venue may be had in either Shawano or Menominee County under the circumstances you describe. Since the counties of Menominee and Shawano are combined for judicial purposes, having a single court, it would appear to make little difference in which county venue is established. Sec. 48.035, Stats.

In your final question, you ask:

9. Is such a juvenile referred to in [the preceding question] a resident of Menominee County for the purpose of assessment of costs referred to in Sec. 46.26(4)(b) Wis. Stats.?

This question concerns financial liability for juveniles who have been found delinquent by the Menominee-Shawano Circuit Court

and who are in state correctional facilities like Ethan Allan School or Lincoln Hills School. Previously, the State of Wisconsin rather than Menominee or Shawano County paid for the costs of such juveniles who are in state secured correctional facilities. As of January 1, 1981, counties are financially liable for the cost of all care, services and supplies provided by the Department of State Correctional Facilities. Ch. 34, sec. 827, Laws of 1979 (sec. 46.26(4)(a), (d)). Section 46.26, Stats., fixes financial liability for costs in situations where one court has multi-county jurisdiction over juveniles. Section 46.26(4)(b), Stats., provides in part: "In multi-county court jurisdictions, the county of residency within the jurisdiction shall be liable for costs" for each person receiving Department services under secs. 48.34 and 51.35(3), Stats. Tribe members residing upon the Menominee Reservation are also residents of Menominee County. It follows that juvenile tribe members are residents of Menominee County under the circumstances you describe for purposes of assessment of costs under sec. 46.26(4)(b), Stats.

BCL:JDN

Appropriations And Expenditures; Mining Investment And Local Impact Fund Board; The Mining Investment and Local Impact Fund Board is authorized to make grants to municipalities under sec. 70.395(2), Stats., to drill wells and fence cave-ins on private lands to remedy public health and safety problems occasioned by mine closings. Such grants would not violate the public purpose doctrine and the internal improvements clause of the Wisconsin Constitution. OAG 12-81

March 19, 1981.

LAURENCE LEWIS, *Chairman*

Mining Investment and Local Impact Fund Board

You ask whether the Mining Investment and Local Impact Fund Board (hereinafter "Board") may make grants under sec. 70.395, Stats., to municipalities for mining-related costs incurred by private landowners. Two specific factual situations are cited in your request. The first situation involves the costs incurred by farmers to drill new

wells where the existing wells have been contaminated as the result of nearby mine closings. The second fact situation involves costs incurred to "fence in" abandoned mine shaft cave-ins on private property to protect individuals who may wander onto the land.

Your concern is whether the Board is statutorily authorized to make such grants. My answer is "yes." You also ask whether such grants would be constitutional in terms of the "internal improvements" clause, Wis. Const. art. VIII, sec. 10 and the public purpose doctrine. My answer is "yes."

Chapter 353, Laws of 1979, effective May 22, 1980, makes state funds available expressly to cover the types of mining-related costs with which you are concerned. However, the new law applies only to mining activities occurring subsequent to the act's effective date. Since the mining activities you describe ceased prior to the effective date of ch. 353, Laws of 1979, those funds are not available for the costs cited in your question.

There is no such time limitation relative to grants made out of the investment and local impact fund (hereinafter "fund"), however. Rather, the Legislature, in creating the fund, expressed its intent as follows:

It is the intent of the legislature that the investment and local impact fund be used exclusively to provide funds to municipalities for costs associated with social, educational, environmental and economic impacts of metalliferous mineral mining incurred prior to, during and after the extraction of metalliferous minerals, including the impacts of metalliferous mineral mining occurring prior to July 7, 1977. The fund may not be used to compensate counties, towns, cities and villages for the costs of mine reclamation for which the person mining the metalliferous minerals is liable under s. 144.91(2).

Sec. 70.395(2)(a), Stats. Grants may, therefore, be made out of the fund for mining-related impacts, regardless of the date of cessation of mining activities.

The purposes for which the fund may be used are specified in sec. 70.395(2)(g), Stats., which reads in part:

The board may distribute the revenues received under sub. (1)(b) or proceeds thereof in accordance with par. (h) for the following purposes, as the board determines necessary:

....

10. Expenses attributable to a permanent or temporary closing of a mine including the cost of providing retraining and other educational programs designed to assist displaced workers in finding new employment opportunities and the cost of operating any job placement referral programs connected with the curtailment of mining operations in any area of this state.

Thus, the Board is vested with broad statutory discretion to make grants to municipalities to remedy the adverse impacts of mine closings. Nevertheless, sec. 70.395(2)(g), Stats., places two conditions on exercise of the Board's discretion. First, the Board must find that the expenses are attributable to the mine closings. Second, the Board must determine that a grant for a particular purpose is necessary. To illustrate the operation of the "necessity" determination, one could hypothesize a mine shaft cave-in that would be located so remotely or be so obvious to passers-by that the Board would be incapable of making a determination of necessity relative to the fencing of the cave-in.

Subject to the requirements that the Board determine the necessity of the grant and make a finding that the expenses are attributable to the mine closings, it is my opinion that the Board has statutory authority to make grants to municipalities for the purposes you have described.

There is precedent for such authority. As discussed above, ch. 353, Laws of 1979, expressly created a mechanism to provide state funds for mining-related property damage. Also, the Board's grants to municipalities for well-drilling would be quite similar in purpose and function to the grants for private sewage systems provided by sec. 144.24(10), Stats.

You also ask whether grants under sec. 70.395(2), Stats., for those purposes would be consistent with the constitutional public purpose doctrine. That state funds may only be spent for a public purpose of statewide concern is a well-established principle of constitutional law. *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 183, 277 N.W. 278, 280 N.W. 698 (1938). However, an act of the Legislature is entitled to a strong presumption of constitutionality and will not be overturned unless unconstitutionality is established beyond a reasonable doubt. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973). If there is any conceivable public purpose, the statute will be upheld. *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 414, 208 N.W.2d 780 (1973).

The Wisconsin Supreme Court has long held that the promotion and protection of public health is a matter of statewide concern. *State ex rel. Martin v. Juneau*, 238 Wis. 564, 570-71, 300 N.W. 187 (1941). The court has determined that protection of the state's water supplies for the use of its citizens promotes public health and is therefore a public purpose. In *State ex rel. La Follette v. Reuter*, 33 Wis. 2d 384, 147 N.W.2d 304 (1967), the court upheld the constitutionality of a statute which provided for state financial assistance to municipalities for the construction of water pollution abatement facilities, stating that the "primary reason in constructing pollution abatement facilities is to protect the health of all citizens of the state whose need for pure water is essential to life itself." *La Follette*, 33 Wis. 2d at 397.

Similarly, the primary reason for well-drilling grants would be to assure a pure water supply to the municipality's citizens. The fact that a particular grant could be made to a sparsely-populated locality, where a relatively few citizens would directly benefit, does not affect the public purpose of the statute. As stated by the supreme court in *State ex rel. Thomson v. Giessel*, 265 Wis. 207, 216, 60 N.W.2d 763 (1953):

"The existence of *local conditions* which, because of their nature and extent, are of concern to the public as a whole, *the modes of advancing the public interest* by correcting them or avoiding their consequences, *are peculiarly within the knowl-*

edge of the legislature, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods.”

(Emphasis the court’s.)

It is my opinion that grants to municipalities under sec. 70.395(2), Stats., to drill new wells for citizens whose existing wells have been contaminated by mine closings serve a public purpose.

Grants for the fencing of mine cave-ins would appear to have public safety as their primary objective. And as I have stated in an earlier opinion, “I know of no more universally recognized function of government at any level than the protection of public safety.” 57 Op. Att’y Gen. 228, 230 (1968).

The Legislature, in recently enacting ch. 353, Laws of 1979, recognized dangers to persons and property occasioned by mine cave-ins, and further recognized the need for a state-funded mechanism to compensate individuals suffering personal or property injuries (*see* the prefatory note to the act, which details the obstacles to recovery for mining-related damages). It logically follows that if the Legislature has recognized a public need to compensate individuals for injuries caused by mine cave-ins, there may also reasonably exist a public need for fencing of the cave-ins to prevent those injuries from occurring.

Whether a particular grant promotes public safety is a factual question for the Board to decide. As discussed above, it is the Board’s responsibility to determine whether or not a specific grant is “necessary.” In terms of the promotion of public safety, a relevant consideration of the Board is the number of persons benefited by a particular grant. *See Hopper v. Madison*, 79 Wis. 2d 120, 130, 256 N.W.2d 139 (1977). As noted above, there may be particular cases where, due to location or obviousness, a cave-in simply does not involve public safety.

It is important to note that, in considering questions of public purpose, the fact that the grants benefit private individuals is not controlling. The supreme court has concluded that “[i]f an appropriation is designed in its principle parts to promote a public purpose so that its

accomplishment is a reasonable probability, private benefits which are necessary and reasonable to the main purpose are permissible.” *Hopper*, 79 Wis. 2d at 129.

The Legislature’s main purpose in creating the fund is to utilize mining tax revenues to provide compensation for the adverse effects of mining activities. Sec. 70.395(2)(a), Stats. In this case, those adverse effects include the contamination of water supplies and mine shaft cave-ins caused by mine closings. The fact that these problems have now manifested themselves on private land does not abrogate the underlying public scope of the problem and public purpose in providing a remedy for them. The drilling of wells and the fencing of cave-ins on private land would certainly appear to be necessary and reasonable to the main purpose of the fund, *i.e.*, to remedy the public health and safety problems created by past mining activities.

Grants for well-drilling and fencing of cave-ins have, as their primary objective, the promotion and protection of public health and public safety, respectively. Such grants are therefore consistent with the constitutional requirement that state funds be spent only for public purposes.

Finally, you ask whether grants under sec. 70.395(2), Stats., for well-drilling and fencing of mine cave-ins comply with Wis. Const. art. VIII, sec. 10, which prohibits the state from engaging in “works of internal improvement,” which the supreme court has defined 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.”

State ex rel. Owen v. Donald, 160 Wis. 21, 79, 151 N.W. 331 (1915) (quoting from *Rippe v. Becker*, 56 Minn. 100, 117, 57 N.W. 331 (1894)). Thus, state activities concerning the “preservation of public health” and “other like recognized functions of state government,” are excluded from the prohibitions of the internal improvements clause.

The supreme court has held that “[i]f a law is predominantly public in its aim, it will not be held to violate the internal improvements provision, in spite of the fact that the state carries on internal improvements incident to the main public purpose of the law.” *Wisconsin Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 492, 235 N.W.2d 648 (1975). The main public purpose of the grants under sec. 70.395(2), Stats., as discussed above, is the promotion and protection of public health and safety. Such grants would therefore not violate the internal improvements clause.

BCL:DDS

Cities; Home Rule; Libraries; Villages; Municipal libraries are a matter of paramount local concern as opposed to a statewide concern and are subject to otherwise constitutionally legal local legislative enactments under the home-rule provisions of the state constitution. Acting pursuant to Wis. Const. art. XI, sec. 3, sec. 66.01, Stats., a city or village governing body can change the composition of its municipal library board and can limit powers of such board granted by ch. 43, Stats., where the municipal library is not part of a library system. OAG 15-81

March 23, 1981.

DR. BARBARA THOMPSON, *State Superintendent*
Department of Public Instruction

You request my opinion whether a city council or village board in the exercise of home-rule powers, under Wis. Const. art. XI, sec. 3, and sec. 66.01, Stats., can lawfully change the composition of its municipal library board and can limit powers of such board granted by ch. 43, Stats., in the following specific areas:

1. By enlargement of the number of members beyond those specified in sec. 43.54(1)(a), Stats.
2. By appointment of more than one member of the municipal governing body to such board where sec. 43.54(1)(c), Stats., provides “[n]ot more than one member of the municipal governing body shall at any one time be a member of the library board.”
3. By restricting the library board from acquiring certain library materials or equipment, where sec. 43.58(1), Stats., provides that “[t]he library board shall have exclusive control of the expenditure of all moneys collected, donated or appropriated for the library fund.”
4. By granting the municipal clerk power to disapprove vouchers for library expenditures which have been audited and approved by the library board pursuant to sec. 43.58(2), Stats.
5. By assumption of powers of appointment and establishment of compensation of librarians and library employes where sec. 43.58(4), Stats., provides that such powers are to be exercised by the library board.

In my opinion, the answer is yes as to all of the subquestions.

In *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526-30, 253 N.W.2d 505 (1977), the court held that an ordinance providing for withholding of rent payments by tenants until premises are free of violations of city building and zoning ordinances is primarily and paramountly an enactment which is a matter of the city’s “local affairs and government” and, thus, authorized by the home-rule amendment. The court reviewed:

[T]he reach and impact of the municipal home rule amendment to the Wisconsin Constitution, providing:

“Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of legislature of state-wide concern as shall with uniformity affect every city or every village. ...”

Our court has held at an early date that this home rule amendment accomplishes two things, in some measure distinct: (1) It makes a direct grant of legislative power to municipalities; and (2) it limits the legislature in the exercise of its general grant of legislative power. It does the first "... by expressly giving cities and villages the power 'to determine their local affairs and government.'" It does the second "... by limiting ... the legislature in its enactments in the field of local affairs of cities and villages." Such a constitutional expression of the will of the people is to be liberally construed.

In defining what is or is not a matter for such empowerment, which is constitutionally granted to cities and villages in this state "to determine their local affairs and government," our court has outlined three areas of legislative enactment: (1) Those that are "exclusively of state-wide concern"; (2) those that "may be fairly classified as entirely of local character"; and (3) those which "it is not possible to fit ... exclusively into one or the other of these two categories."

As to the third "mixed bag" category of situations, our court has recognized "... that many matters while of 'state-wide concern,' affecting the people and state at large somewhat remotely and indirectly, yet at the same time affect the individual municipalities directly and intimately, can consistently be, and are, 'local affairs' of this [home rule] amendment."

Whether a challenged legislative enactment, state or local, possessing aspects of "state-wide concern" and of "local affairs," is primarily or paramountly a matter of "local affairs and government" under the home rule amendment or of "state-wide concern" under the exception thereto is for the courts to determine.

....

Since the ordinance here challenged is held to be in the field of "local affairs and government" under the home rule amendment, the doctrine of preemption does not apply. In an area solely or paramountly of state-wide concern, the legislature may either delegate to local units of government "... a limited authority or responsibility to further proper public interests," or may preempt the field by expressly banning local legislative action as

to such matter of statewide concern. As to an area solely or paramountly in the constitutionally protected area of "local affairs and government," the state legislature's delegation of authority to legislate is unnecessary and its preemption or ban on local legislative action would be unconstitutional.

Even if there were conflict or potential for conflict between the challenged ordinance—enacted to secure compliance with the local building and zoning code, and the state statute—providing for receivership to abate nuisances, it would be the doctrine of paramountcy, not the concept of preemption, that would here be applicable.

Section 43.52, Stats., *permits*, but does not require, municipalities to establish, equip, and maintain a public library and levy a tax or appropriate money therefor. Sections 43.01 and 43.05, Stats., provide that the Department of Public Instruction shall provide certain services in the nature of planning, coordination, and development of public library services, but does not grant the state supervisory power over municipal libraries. State aid is granted to *library systems rather than to municipal libraries* under sec. 43.24, Stats. The provisions of secs. 43.52(1), (2), 43.54(1), 43.58, 43.62, Stats., are evidence of a legislative intent that municipal libraries be primarily operated by and for the inhabitants of the municipality. The Legislature has not included any statement within ch. 43, Stats., to the effect that municipal libraries, or for that matter, library systems, are a matter of statewide concern. Services provided by a municipal library primarily affect the individual municipalities, and the inhabitants therein, "directly and intimately." They do affect the general public of the state and state at large "somewhat remotely and indirectly."

In *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 530, 271 N.W.2d 69 (1978), it was held that "the quality of waters of Lakes Mendota and Monona has a clear non-local impact and is emphatically a matter of state-wide concern" and not a local affair. The court stated: "'Local affairs' has been construed to include matters which primarily affect the people of the locality, in contrast to matters of 'statewide concern' which affect all the people of the state."

I conclude that whereas the state has an interest in municipal libraries, they are a matter of paramount local concern as opposed to a statewide concern and are subject to *otherwise constitutional* local legislative enactments under the home-rule provisions of the state constitution.

You inquire whether a local library's membership in a library system would change my answer to these questions.

It would. Your letter does not set forth sufficient facts to determine whether the library in question is part of a library system, or if so, whether a federated or consolidated system is involved. I am of the opinion that secs. 43.09, 43.13-43.24, Stats., are legislative enactments of statewide concern insofar as they relate to library systems. Participation in such a system *by a municipal library* would probably change its status from that which is primarily a local affair. See discussion in 63 Op. Att'y Gen. 317, 319 (1974). Section 43.18, Stats., provides for a method of orderly withdrawal from a public library system at the option of the governing body of the municipality. A court might hold that although withdrawal could be effected, that as long as the library was a part of the system, the municipal library is required to be structured and operated in the manner prescribed by the Legislature under applicable statutes.

Finally, irrespective of whether municipal libraries are matters of paramount local concern or whether they are matters of statewide concern, special care must be exercised by local and state authorities to avoid infringement of first amendment rights of readers. Although neither the state nor local authorities are required to operate libraries, a constitutionally protected interest may be created once a library is in operation and in order to remove a book from circulation, officials must demonstrate some substantial and legitimate governmental interest. The right to read and be exposed to controversial thoughts and language is a valuable right subject to first amendment protection. *Right To Read Defense Com. v. School Com., Etc.*, 454 F. Supp. 703 (D. Mass. 1978).

BCL:FJS

Criminal Law; Gambling; Lotteries; Games such as “Las Vegas nights” wherein participants must make a payment or donation in order to gamble with play money and then use the play money at the end of the evening to bid on prizes constitute illegal lotteries under Wisconsin law. The law does not exempt benevolent and nonprofit organizations. OAG 16-81

April 3, 1981.

FRANK J. ENDEJAN, *District Attorney*
Fond du Lac County

You have requested an opinion on the legality of a group holding a “Las Vegas night” wherein the participants gamble with play money and utilize their winnings at the end of the evening by bidding for prizes that have been donated by local merchants or other sponsors. The participants are asked either to pay an entry fee to the event or make a contribution at the door to enable them to participate in the gambling event.

It is my opinion that whoever conducts this event is guilty of violating sec. 945.02(3), Stats. That section provides in part:

Whoever does any of the following is guilty of a Class B misdemeanor:

....

(3) Conducts a lottery, or with intent to conduct a lottery, possesses the facilities to do so.

Section 945.01(2)(a), Stats., defines a lottery as “an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill.” In my opinion, all three elements, consideration, prize and chance are present in the event you describe.

The consideration is the payment of a fee or the giving of a donation in order to participate in the event. The prize in this case is the

ability to use the play money at the end of the event for the purchase of prizes. Lastly, the play money is acquired largely by chance.

Several other statutory provisions may also be applicable.

Section 945.04, Stats., provides:

Whoever intentionally does any of the following is guilty of a Class A misdemeanor:

(1) Permits any real estate owned or occupied by him or under his control to be used as a gambling place; or

(2) Permits a gambling machine to be set up for use for the purpose of gambling in a place under his control.

In addition, sec. 945.05, Stats., which makes it a felony to commercially transfer any device that is designed exclusively for gambling purposes, may be applicable to the promoter of a "Las Vegas night" depending upon the facts.

Consideration, depending upon the circumstances, may also be given to sec. 945.02(1), (2), Stats., which makes it a misdemeanor to bet or to enter or be in a gambling place to participate in a lottery or to play a gambling machine.

Section 945.03, Stats., which makes commercial gambling as therein defined a felony, may also be applicable depending upon the facts.

Finally, I would call your attention to another problem which may exist for the owner of a building, if the building or premises on which the "Las Vegas night" is being conducted is covered by intoxicating liquor or fermented malt beverage licenses. *See* sec. 945.041, Stats.

You do not state in your letter who is conducting these Las Vegas nights, and it may be that they are being conducted by benevolent and nonprofit organizations for charitable purposes. If this is the case, these events are still in violation of Wisconsin law since there is no exception made in the law for such groups.

BCL:WHW

Public Assistance; Attorney's fees are not chargeable against public assistance recovered in an action under sec. 49.65, Stats. (1979). OAG 17-81

April 7, 1981.

MARK S. GEMPELER, *Corporation Counsel*
Waukesha County

You have asked my opinion whether attorney's fees are chargeable against public assistance recovered in a personal injury action under the terms of sec. 49.65(4), Stats.

In my opinion the answer is no.

Section 49.65, Stats., establishes the rights of the Department of Health and Social Services, counties, and municipalities to recover from a tort-feasor for public assistance benefits paid under ch. 49, Stats., to the person injured by the tort. These units of government are subrogated to the rights of the injured benefit recipient. Sec. 49.65(1), Stats. Further, they may require the recipient to execute to them an assignment in order to make claim against the third-party tort-feasor. The unit of government and the public assistance recipient may jointly prosecute the claim, in which case each has an equal voice in the prosecution. Sec. 49.65(3), Stats.

The subsections of sec. 49.65, Stats., which are particularly material to your question are (4), (5), and (6), which provide:

(4) Reasonable costs of collection including attorney's fees shall be deducted first. The amount of assistance granted as a result of the occurrence of the injury, sickness or death shall be deducted next and the remainder shall be paid to the public assistance recipient. The amount of the medical assistance funds recovered shall be subject to fees and proration as is set forth in sub. (6).

(5) The department shall enforce its rights under this section and may contract for the recovery of any claim or right of indemnity arising under this section.

(6) The county agency shall be entitled to retain from the total amount recovered an amount equal to one-tenth of the funds received. The remaining amount shall be deposited in the state treasury to the respective appropriation from which the assistance was paid and this amount shall be prorated between the federal government and the state government on the basis of the proportionate amount each contributed.

In allocating the recovery among attorney's fees, the public assistance benefit paid, and the amount recoverable by the recipient, subsec. (4) on its face indicates that the full amount of the public assistance benefit shall be deducted after reasonable attorney's fees first have been deducted. The phrase "[t]he amount of assistance granted ... shall be deducted" is not modified for attorney's fees. In contrast, the recipient is to receive "the remainder." The use of the word "remainder" indicates that it is the amount otherwise recoverable by the recipient which is reduced first by attorney's fees and then by the public assistance granted. By using the word "remainder" in this way, and by not using a similar qualifier in regard to the public assistance benefit, the more reasonable construction is that only the recovery by the recipient and not recovered public assistance is subject to reduction for attorney's fees.

This statute contemplates that a private attorney will bring suit on behalf of the injured recipient of assistance. Out of the judgment obtained the attorney first takes his fees. Then the assistance claim is paid in full. Then the injured person takes the remainder. Assume the judgment is for \$10,000. The attorney's contingent fee is one-third of the judgment, and the assistance claim is \$2,000. It would divide as follows:

Judgment	\$10,000.00
1/3 attorney's fees	<u>-3,333.00</u>
Balance	\$6,667.00
Assistance claim	<u>-2,000.00</u>
Balance to injured person	\$4,667.00

Clearly the assistance claim is to be paid in full. However, there is no reason to conclude that the attorney is not to get his one-third contingent fee computed upon the whole judgment. While the attorney

takes his one-third fee from the whole judgment, he does not take a further fee from the amount of the assistance claim, unless the county has so contracted with him as authorized by sec. 49.65(5), Stats.

This conclusion is fortified by the other two subsections referred to. Subsection (5) empowers the Department to contract for the recovery of any claim. If the Department's recovery under subsec. (4) automatically were reduced by the cost of collection, subsec. (5) would not be needed to enable the Department to agree to pay attorney's fees for obtaining a recovery of the public assistance benefit it has granted. Of course, the unit of government does not retain the recipient's counsel simply by giving him or her notice of its rights of subrogation under sec. 49.65, Stats., even though counsel then proceeds to see that the governmental share correctly is computed and disbursed from a final payout or judgment.

Finally, this conclusion is reinforced by reading in tandem the whole of subsec. (6) with the last sentence of subsec. (4). Subsection (4) provides the only qualifier to the amount of the public benefit recovered. It states that this amount is subject to "fees and proration as is set forth in sub. (6)." And subsec. (6) in turn makes no reduction for attorney's fees. Rather, it gives the pursuing county a fee of one-tenth of the recovery, deposits the remainder in the state treasury, and further divides this remainder between the applicable state and federal program contribution rates.

The statutory scheme grants the unit of government the right to full reimbursement, after costs of collection, prior to any disbursement to the plaintiff-recipient. However, the Department of Health and Social Services in the interest of settlement may compromise its priority, at least in part, to enable the recipient to benefit from commencing the litigation by realizing an appreciable recovery. It has not to date, I am advised, been the Department's policy in settling cases to permit costs of collection to come from what otherwise would be the Department's reimbursement.

In conclusion, having reduced the public benefit recovered only by the fee to the pursuing county and having reduced only the recipient's recovery by reasonable attorney's fees, it is my opinion that the Legis-

lature did not intend to reduce the public benefit recovered by attorney's fees.

BCL:CDH

County Board; Discrimination; Ordinances; A county may enact an ordinance requiring its contractors to agree to a policy of non-discrimination in employment, even though such an ordinance provides broader protection than that afforded by state and federal equal employment opportunity laws, as long as such ordinance does not conflict with such laws. OAG 18-81

April 7, 1981.

GLENN L. HENRY, *Corporation Counsel*
Dane County

You request my opinion on the following question:

Does the county board have authority to enact an ordinance requiring its contractors to agree to a policy of non-discrimination in employment which expands the number and nature of protected groups beyond those protected by state and federal equal employment opportunity laws?

Counties are not "contracting agencies of the state" within the meaning of sec. 16.765(1), Stats., which requires the insertion of a provision in state contracts obligating the contractor not to discriminate in employment because of "age, race, religion, color, handicap, sex, physical condition, developmental disability ... or national origin." 68 Op. Att'y Gen. 306 (1979). As you point out, however, other present federal and state regulations and laws prohibit various kinds of discrimination in employment. For instance, subch. II (Fair Employment) of ch. III, Stats., generally prohibits discrimination in employment because of "age, race, color, handicap, sex, creed, national origin, ancestry, arrest record or conviction record." Your concern relates to ordinance provisions which go further than state or federal law would require, and you question whether the statutes give a county authority to enact its own legislation in the area of employment discrimination, except as necessarily implied as incidental to

compliance with and enforcement of its obligations under state and federal laws and regulations.

Counties are creatures of the Legislature and their powers must be exercised within the scope of authority ceded to them by the state. *Dane County v. H & SS Dept.*, 79 Wis. 2d 323, 255 N.W.2d 539 (1977). Thus, it is said that county boards only exercise such powers as are expressly granted or necessarily implied. *Dodge County v. Kaiser*, 243 Wis. 551, 557, 11 N.W.2d 348 (1943); *Spaulding v. Wood County*, 218 Wis. 224, 229, 260 N.W. 473 (1935). Nevertheless, the Legislature has been increasingly more willing to broaden the areas of authority and the powers of counties, and today that traditional view of limited county power can no longer be generally applied to every statute which grants power to counties. See, for instance, 69 Op. Att'y Gen. 87 (1980), interpreting the provisions of sec. 59.07, Stats.

A number of statutory provisions appear to relate to your question. Section 59.01(1), Stats., specifically provides that: "Each county in this state is ... empowered ... to make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it." Section 59.07, Stats., which sets forth the general powers of county boards, further provides, in part, as follows:

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 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.

....

(7) Purchasing Agent. ... The board may require that all purchases be made in the manner determined by it.

Section 59.08(1), Stats., which applies to certain contracts for public work, reads as follows:

All public work, including any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind where the estimated cost of such work will exceed \$5,000 shall be let by contract to the lowest responsible bidder. The contract shall be let and entered into pursuant to s. 66.29 This section does not apply to highway contracts which the county highway committee is authorized by law to let or make.

Further, sec. 66.29, Stats., which sets forth provisions relating to certain public contracts, states:

(2) **BIDDER'S PROOF OF RESPONSIBILITY.** Every municipality, board or public body upon all contracts subject to this section may ... require such person to submit a full and complete statement sworn to before an officer authorized by law to administer oaths ... of such other matters as the municipality, board, public body or officer thereof may require for the protection and welfare of the public in the performance of any public contract.

....

(6) **SEPARATION OF CONTRACTS.** ... The municipality may set out in any public contract reasonable and lawful conditions as to the hours of labor, wages, residence, character and classification of workmen to be employed by any contractor.

While the policy of combatting discrimination is given high priority at both the federal and state level, it is not an area of the law which can be said to have been preempted by one government to the exclusion of the other, particularly where there exists a rational doubt that preemption exists. *See Goodyear Tire & Rubber Co. v. DILHR*, 87 Wis. 2d 56, 273 N.W.2d 786 (1978).

In my opinion, neither state nor federal employment discrimination law would preclude a county from enacting a complimentary ordinance requiring its contractors to agree to a policy of non-dis-

crimination in employment. Such an ordinance may be enacted under existing statutory authority, even though it provides broader protection than that afforded by state and federal equal employment opportunity laws, as long as such ordinance does not conflict with such laws.

BCL:JCM

Juvenile Court; Natural Resources, Department Of; Citation and forfeiture procedures for juveniles as affected by chs. 300 and 359, Laws of 1979, are discussed. OAG 19-81

April 16, 1981.

CARROLL BESADNY, *Secretary*
Department of Natural Resources

Your predecessor forwarded to me a series of questions from the DNR Bureau of Law Enforcement regarding interpretation of recent legislative changes in the Juvenile Code, ch. 48, Stats. I will first discuss the Bureau's specific questions, which I have rephrased in some cases, and will then attempt to give you a summary and overview of the changes. Most of the changes were effected by ch. 300, Laws of 1979, although that law was further amended, to a limited extent, by ch. 359, Laws of 1979. In the most general terms, the new laws (1) lower to fourteen the age at which *some* form of citation and forfeiture procedure can be used; (2) place that forfeiture procedure primarily in the juvenile code; and (3) remove the circuit court's former concurrent jurisdiction over most DNR juvenile forfeiture actions. [Note: All references to sections of ch. 48 will concern the statutes; all references to chs. 300 and 359 will concern the Laws of 1979. I will omit any discussion of municipal ordinance violation procedures and will focus entirely on DNR civil forfeitures.]

1. *Does the juvenile court have jurisdiction over violations of the boating and snowmobile laws (secs. 30.50 to 30.80 and ch. 350, Stats., respectively)? Yes, but only if the offender is fifteen or younger.*

By way of introduction, I should note first that subch. III of ch. 48, including secs. 48.12 through 48.185, Stats. (1977), concerns jurisdiction over juvenile offenders. Section 48.17 concerns "jurisdiction over traffic and boating, civil law and ordinance violations." Section 48.17, para. (1), was not directly amended by chs. 300 and 359, Laws of 1979. That paragraph continues to give adult courts (referred to in ch. 48 as "Courts of criminal and civil jurisdiction") exclusive jurisdiction over sixteen- and seventeen-year-olds alleged to have violated snowmobile or boating laws.

Before the 1979 amendments, para. (2) of sec. 48.17, Stats., gave adult and juvenile courts concurrent jurisdiction over civil forfeiture actions involving sixteen- and seventeen-year-olds. Both courts were able to use the civil forfeiture procedures in secs. 23.50 to 23.85, Stats. Civil forfeitures, as they relate to your Department, are defined in sec. 23.50(1), Stats., to include circuit court actions to recover forfeitures for violations of chs. 23, 26 through 31, and 350; sec. 134.60; and any administrative rules promulgated under those laws. Under the 1979 amendments, adult courts no longer have jurisdiction over any DNR civil forfeiture actions involving juveniles, except the boating and snowmobile violations specified in sec. 48.17(1) above. The juvenile court's authority to use a civil forfeiture/citation procedure is expanded to include juveniles fourteen or older who are charged with any of the violations specified in sec. 23.50(1), Stats.

2. Can juveniles be issued citations pursuant to sec. 23.50, Stats.? Yes, provided the child is fourteen or older and new sec. 48.237 is observed.

Old sec. 48.17(2) allowed juvenile and adult courts to use the DNR civil forfeiture procedures of secs. 23.50 to 23.85, Stats., with specified variations, for actions involving children sixteen or older. The 1979 amendments created a new section, numbered 48.237, on "civil law and ordinance proceedings initiated by citation" in juvenile court. Under amended sec. 48.17(2)(b), the juvenile citation procedure is available only if the child is fourteen or older, and is merely available as an alternative to the filing of a petition under sec. 48.125 ("Jurisdiction over children alleged to have violated civil laws or ordinances"). Although new sec. 48.237 governs the juvenile citation

procedure, I stated that a citation can be issued under sec. 23.50, Stats., because sec. 48.237 expressly provides that: (1) the citation form under sec. 23.54 may be used; and (2) the procedures for issuance and filing of the citation, and for forfeitures, stipulations and deposits in sec. 23.50 to 23.67 and in 23.75(3) and (4) "shall be used as appropriate." Note, however, that ch. 48 governs taking and holding a child in custody; sec. 48.37 governs costs and penalty assessments; and a *capias* is substituted for an arrest warrant (sec. 48.237(2)).

You may have noticed that sec. 48.237(2) refers to citations issued by a "law enforcement officer." That term is not defined in ch. 48, and differs from the term, "peace officer," defined in sec. 939.22(22), Stats., and used in the criminal code, and from the term "enforcing officer," defined in sec. 23.51(3), Stats., and used in secs. 23.50 to 23.85, Stats. Section 23.51(3), Stats., defined "enforcing officer" as "peace officer as defined by s. 939.22(22), or a person who has authority to act pursuant to a specific statute." I have construed "peace officer" narrowly, and have concluded that DNR wardens have the powers of a peace officer only under limited circumstances. 68 Op. Att'y Gen. 326, 329 (1979). For purposes of this opinion, and in the absence of a legislative definition of "law enforcement officer" as used in ch. 48, I am assuming that "law enforcement officer" in sec. 48.237(2) has the same meaning as "enforcing officer" in sec. 23.51(3), Stats.

If a juvenile to whom a citation has been issued does not submit a deposit, or a stipulation and deposit, note that ch. 48 governs further proceedings, as detailed in new sec. 48.237(3).

3. *What court is to handle the juvenile cases, and what does "court assigned" mean, in ch. 300? One or more branches of the circuit court is assigned to handle juvenile cases.*

The new laws simply mean "juvenile court" when they say "court assigned to exercise jurisdiction under this chapter." As stated in sec. 48.125, the juvenile court exercises exclusive jurisdiction over all DNR civil forfeiture actions against juveniles, except the boating and snowmobile violations mentioned in sec. 48.17(1).

4. *Must the DNR keep juvenile records confidential and separate from adult records?* No.

Records of children made by "peace officers" must be kept separate from adult records, under sec. 48.396, old and new, and are not open to the public generally. Under sec. 48.396(2), records of the juvenile court are to be kept in books and files maintained for juvenile records purposes only, and are not to be opened, or have their contents disclosed, except by order of the juvenile court. There is no confidentiality requirement for records concerning a juvenile proceeded against in adult court.

New sec. 48.396(4) prohibits *the Department of Transportation* from disclosing information concerning the revocation, suspension or restriction of a juvenile's motor vehicle operating privilege to anyone except specified persons and agencies. In reading the seven other statutes which are referred to directly or indirectly in the new subsection, you may have noticed that all but one or two of the incorporated sections also refer to suspension or revocation of licenses issued under ch. 29, by the DNR. New sec. 48.396(4) does not contain a comparable limitation on disclosure of information by DNR, concerning restriction of licenses issued to juveniles under ch. 29, Stats.

Courts frequently hold that the express mention of one thing implies the exclusion of another. Since the Department of Transportation is mentioned and DNR is not, I believe the prohibitions in new sec. 48.396(4) do not apply to DNR. There is a general legislative policy against disclosure of adverse information concerning juveniles. However, there is also a strong presumption "that public policy, and hence the public interest, favors the right of inspection of documents and public records." *Beckon v. Emery*, 36 Wis. 2d 510, 516, 153 N.W.2d 501 (1967), citing *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 682, 137 N.W.2d 241 (1965). Section 19.21(4), Stats., imposes a mandatory civil forfeiture, in addition to any other civil or criminal penalties, upon the public officer who denies access to public records. As a general rule, therefore, I suggest that you follow the literal directions of new sec. 48.396(4), and treat DNR juvenile records as public. If an interested party urges you to keep particular records confidential, you should follow the following process as stated in *Beckon*, 36 Wis. 2d at 516:

It is only in the unusual or exceptional case, where the harm to the public interest that would be done by divulging matters of record would be more damaging than the harm that is done to public policy by maintaining secrecy, that the inspection should be denied. Accordingly, we said in *Youmans, supra*, page 682:

“...it is incumbent upon [the public officer] to refuse the demand for inspection and state *specifically* the reasons for this refusal.” (Emphasis supplied.)

5. *Can penalty assessments be used in juvenile cases? No, except for snowmobile and boating code violations handled in adult court under sec. 48.17 (1).*

Chapter 300, Laws of 1979, added the following sentence to sec. 48.37: “Courts of civil and criminal jurisdiction exercising jurisdiction under s. 48.17 may assess the same costs and penalty assessment [*sic*] against children as they may assess against adults, except that witness fees shall not be charged to the child.” This sentence applies to sixteen- and seventeen-year-olds charged with boating and snowmobile violations.

New sec. 48.237(2), Stats., removes juvenile cases from the civil forfeiture procedures of secs. 23.50 to 23.85, Stats., by stating, “s. 48.37 shall govern costs and penalty assessments.” However, old sec. 48.37 only prohibits assessment of *costs* by a juvenile court. The new sentence quoted above *allows* penalty assessments in adult court, in specified cases, but does not address the question of separate penalty assessments in juvenile court. Since sec. 48.343 does not include penalty assessments among its permissible “civil law” violation dispositions, I conclude that the Legislature was attempting, in sec. 48.237(2), to prohibit penalty assessments in juvenile court.

In light of this conclusion, another question arises from the language of new sec. 48.237(2): The new subsection provides that the forfeiture, stipulation, and deposit procedures in secs. 23.50 to 23.67 “shall be used as appropriate, except that ... s. 48.37 shall govern costs and penalty assessments.” Sections 23.66(2) and 23.67(3), setting out procedures to follow when a person makes a deposit and does not appear at the time set in the citation, state that a nonappear-

ance, or the filing of a stipulation of no contest, are deemed to be submission by the person to “a forfeiture *and a penalty assessment plus costs* not to exceed the amount of the deposit.” Since I conclude that sec. 48.237(2), read in conjunction with old sec. 48.343, is an attempt to prohibit penalty assessments and costs in juvenile court, then a deposit plus nonappearance by a juvenile may be deemed submission to a forfeiture not to exceed the amount of the deposit, but *not* to a penalty assessment or costs. Therefore, the terms “penalty assessment” and “costs” should be crossed out of the citations or other papers given to a juvenile whose civil forfeiture action will be heard in juvenile court.

6. Can natural resource assessments be levied in juvenile cases? Yes, if “natural resource assessment” is synonymous with “forfeiture” as used in sec. 23.50 (1), Stats., for the reasons set forth in the preceding paragraph.

If the child does *not* submit either a stipulation or deposit, new sec. 48.237(3) specifies the procedure to be followed by the juvenile court: If, after a fact-finding hearing, the court finds that the child violated a law punishable by forfeiture under sec. 48.237, the court may enter any dispositional orders under sec. 48.343.

7. Can natural resource restitutions be required in juvenile cases? Yes, under sec. 48.34 or 48.343.

The dispositions authorized under sec. 48.343 include: a forfeiture *not to exceed \$25.00*; an order to participate in a supervised work program; an order to make repairs or reasonable restitution; if a boating violation is involved, an order to attend a safety course under sec. 30.74(1), Stats.; and for a violation of ch. 29, Stats., suspension of the license(s) of the child under that chapter for not *more* than (the old law read “not *less* than”) one year. Chapter 300 adds two other natural resources dispositions: for a firearms violation, require the child to attend a safety course under sec. 29.225, Stats., and for a snowmobile violation, order the child to attend a safety course under sec. 350.055, Stats. Sec. 48.343(7) and (8).

Note that, if the prosecutor has opted to proceed under sec. 48.17(2)(b)2., by a sec. 48.125 petition, sec. 48.34 provides various

dispositions, including repair and restitution, a maximum forfeiture of \$50.00, with alternative license suspension, and an order to participate in a supervised work program.

If the child fails to contest the citation, amended sec. 48.335(1) requires the court to proceed under sec. 48.237(2).

You may wish to seek legislative clarification of the portions of ch. 300, Laws of 1979, highlighted in this opinion. The table in the following appendix may help to summarize the changes effected by chs. 300 and 359, Stats.

BCL:MVB

Appendix

<i>SECTION</i>	<i>OLD</i>	<i>NEW</i>
48.17(1), jurisdiction	Adult courts have exclusive jurisdiction over sixteen- and seventeen-year-olds alleged to have violated snowmobile or boating laws.	
48.17(2), jurisdiction	Adult and juvenile courts have concurrent jurisdiction in civil forfeitures over children sixteen and over. Both courts may use the DNR forfeiture procedures of 23.50-.85, with specified variations.	Juvenile court has exclusive jurisdiction in civil forfeiture actions over children fourteen and over. Court may follow citation procedure, with some modifications, or proceed with sec. 48.125 petition.
48.237, procedure	No old counterpart. Chapter 48 stated any variations from sec. 23.50 procedure.	DNR forfeiture statutes govern, except as to custody, costs and arrest warrants. Sub. (3) spells out procedure where no

*SECTION**OLD**NEW*

		deposit or stipulation is submitted.
48.396, records	If case was handled in adult court, no special restriction on records. If handled in juvenile court, sec. 48.396 restricted access to records.	Since all DNR cases (except snowmobile and boating) must be in juvenile court, sec. 48.396 applies at all times, but DNR is omitted from new restrictions for motor vehicle license suspension cases.
Penalties and Costs	If handled in adult courts, secs. 23.66, 23.67, and 23.82 provided for forfeiture, penalty, and costs to be paid by defendant.	Costs and penalties may not be assessed in juvenile court, but deposit and stipulation procedures of secs. 23.66 and 23.67 apply. If those procedures are not applicable (<i>i.e.</i> , a contested case under secs. 48.237(3) and 48.125), court may assess a maximum forfeiture of \$25 under citation procedure or \$50 under petition procedure. Other dispositions are available, such as repair restitution and work programs.

Counties; Indigent; Public Defenders; Under sec. 977.08(5)(f), Stats., trial representation costs are incurred whenever services which give rise to a legal obligation to pay compensation are rendered between January 1 and June 30, 1981. OAG 20-81

April 20, 1981.

DAVID C. NIBLACK
State Public Defender

The State Public Defender Board has requested my opinion concerning the interpretation of sec. 977.08(5)(f), Stats., as it relates to payment of private attorney bills for trial representation in the three counties (Douglas, Monroe, Sheboygan) that have elected to be covered under that provision. Specifically, the Board is interested in whether the state or the particular county is liable for payment of attorney fees under the following circumstances:

- (1) Cases appointed before January 1, 1981, but submitted for payment after that date, regardless of when the work was done;
- (2) Cases appointed before January 1, 1981, but submitted for payment after that date involving services performed both before and after January 1, 1981;
- (3) Cases appointed before June 30, 1981, but submitted after that date involving services performed both before and after June 30, 1981.

Section 977.08(5)(f), Stats., created by ch. 356, sec. 31, Laws of 1979, authorized counties in which a percentage of the legal services for indigent persons were provided by the office of the State Public Defender, to elect, on or before October 1, 1980, to have all cases handled by private counsel as of January 1, 1981. Section 977.08(5)(f), Stats., provides in part:

Prior to January 1, 1981, the county shall establish a sum sufficient appropriation to cover its costs under this paragraph. ... The county is liable for all costs under this chapter for trial representation, including costs under sub. (6) (b), for that county incurred between January 1, 1981, and June 30, 1981, which exceed the amount specified in this paragraph:

.....	
Douglas:	\$53,500.
.....	
Monroe:	\$27,200.
.....	
Sheboygan:	\$57,200.

The liability of the state and the various counties subject to payment of attorneys fees under this statutory provision depends on whether costs for trial representation between January 1 and June 30, 1981, are "incurred" when private counsel is assigned, when services are performed pursuant to such authorization, or when the bill of the appointed attorney, submitted at the conclusion of the case, is finally approved and paid.

Absent a definition of "incurred" as used in the statutes involved, the term will be given its common-sense meaning, *i.e.*, that which it has obtained in ordinary usage. Sec. 990.01(1), Stats. In common usage, the word "incur" means to become liable to or subject to, to bring on, occasion, cause, or become liable or subject to through one's own action. *American Indemnity Company v. Olesijuk*, 353 S.W.2d 71, 71 (Tex. Civ. App. 1961).

When private counsel is first appointed and assigned to the defense of a particular case, a contractual relationship is established which may result in future liability. However, that contract is to be distinguished from the liability which is subsequently incurred thereunder by act or operation of law. *Boise Development Co. v. City of Boise*, 26 Idaho 347, 143 P. 531 (1914).

A cost is normally "incurred" when the obligation to pay for the service received arises, even though the exact amount of that cost may not then be known and payment may be at a later date. *See Standard Oil Co. v. Federal Energy Administration*, 465 F. Supp. 274, 280-81 (N.D. Ohio 1978). For instance, in *Reliance Mutual Life Insurance Co. of Ill. v. Booner*, 166 So. 2d 222, 224 (Fla. App. 1964), where a medical insurance policy covered medical expenses "incurred" within fifty-two weeks from the date of injury, the court granted or denied recovery for such expenses, depending on whether the medical services were performed within that period, saying:

An expense is the same as a debt, and it has been incurred when liability for payment attaches. A contingent expense has been incurred when the contingency upon which the payment depends has occurred. *Stuyvesant Insurance Co. of New York v. Nardelli*, 5 Cir. 1961, 286 F.2d 600. The plaintiff's engagement of the services of the surgeon for his future services constituted a contingent promise to pay for his services, and the expense was not incurred until the contingency occurred, which was the surgeon's performance of the services.

See also Greenspan v. Travelers Ins. Co., 98 Misc. 2d 43, 412 N.Y.S.2d 1009, 1011 (1976).

In the context of sec. 977.08(5)(f), Stats., therefore, trial representation costs are incurred whenever services which give rise to a legal obligation to pay compensation are rendered between January 1 and June 30, 1981, even though under sec. 977.08(4), Stats., a bill including such services will not be submitted until the conclusion of the case.

BCL:JCM

Cities; Insurance; A city council of a city other than the first class does not have legal authority to obligate the city and authorize the use of city funds for payment of health insurance premiums on policies for the benefit of alderpersons and other elected officials, irrespective of their years of service, who have left office. OAG 21-81

April 27, 1981.

ED JACKAMONIS, *Speaker*
State Assembly

The Committee on Assembly Organization has forwarded a proposed ordinance which was introduced before the Common Council of the City of West Allis, and, without specifically setting forth any question, requests my opinion thereon.

The ordinance would provide in material part:

(5) Aldermen and Other Elected Officials retiring upon the completion of three (3) four-year terms shall be eligible for full payment of Health Insurance premiums by the City upon attaining sixty (60) years of age.

....

This ordinance shall take effect and be in force from and after its passage and publication.

It would appear that the question which needs to be answered is whether a city council can obligate the city and authorize the use of city funds for the full payment of health insurance premiums for the benefit of alderpersons and other elected officials who have left office after completion of three four-year terms.

It is my opinion that it cannot.

Correspondence from the West Allis Director of Administration and Finance attached to your request suggests that the city attorney was of the opinion that passage of the ordinance would result in a change of compensation of elected officials during their current terms and therefore "should not be passed."

As to the alderpersons and mayor, such attorney may have been concerned about the impact of sec. 66.196, Stats., which provides in part:

An elected official of any county, city, town or village, who by virtue of his office is entitled to participate in the establishment of the salary attending his office, shall not during the term of such office collect salary in excess of the salary provided at the time of his taking office.

I am not aware of any other statute which would limit the council from increasing the salary or compensation of elected officials other than the mayor and alderpersons, so as to be effective during their terms, if we are in fact concerned with compensation. Section 62.09(6), Stats., requires that any salaries for mayor and alderpersons be paid only when ordered by a three-fourths vote of all members of the council; that salaries heretofore established shall so remain until changed by ordinance; and that the council must act not later

than the first regular meeting in February to fix the salary for each officer who may "be elected or appointed for a definite term during the ensuing year." The statute does not provide for payment of deferred compensation, but rather contemplates that salary be established on an annual or term basis and that it be paid in monthly installments unless the council by ordinance shall establish payment at more frequent intervals.

In my opinion, however, we are not concerned with right to compensation, present or deferred, but with a benefit which is to be paid after a person has ceased to hold an office. It may be referred to as a retirement benefit by some persons. I am informed that the City of West Allis elected to be included in the Wisconsin Retirement Fund (WRF) in 1944. In 67 Op. Att'y Gen. 153, 160 (1978), it is stated: "Where a city or village has elected participation in the WRF, its authority to provide a supplemental plan arises from 'home rule' or the duty to bargain collectively under subch. IV of ch. 111, Stats." Since the ordinance involves alderpersons and other elected officials we are not concerned with a labor contract.

In my opinion the question of whether a city can give supplemental benefits in the nature of payment of health insurance premiums to alderpersons and other elected officials after they are no longer in office is a matter of statewide concern. On the basis of the specific treatment of employes and officers, and separate treatment of retired employes, without mention of retired officers, in sec. 66.185, Stats., and the specific reference to retired officers and employes in sec. 66.186, Stats., which relates only to cities of the first class, I am of the opinion that cities other than those of the first class do not have legal authority to obligate the city and authorize the use of city funds for the payment of health insurance premiums on policies for the benefit of alderpersons and other elected officials who have left office.

Section 66.185, Stats., provides:

Nothing in the statutes shall be construed to limit the authority of the state or municipalities, as defined in s. 345.05, to provide for the payment of premiums for hospital, surgical and other health and accident insurance and life insurance *for employes and officers* and their spouses and dependent children, and such authority is hereby granted. A municipality may

also provide for the payment of premiums for hospital and surgical care *for its retired employes*.

Section 66.186, Stats., provides:

The common council of any city of the first class may, by ordinance or resolution, provide for general hospital, surgical and group insurance for both active and retired city officers and city employes and their respective dependents and for payment of premiums therefor in private companies. Contracts for such insurance may be entered into for active officers and employes separately from such contracts for retired officers and employes. Appropriations may be made for the purpose of financing such insurance. Moneys accruing to such fund, by investment or otherwise, not be diverted for any other purpose than those for which such fund was set up or to defray management expenses of such fund or to partially pay premiums so as to reduce costs to the city or to persons covered by such insurance, or both.

It is presumed that the Legislature had an adequate basis for the different treatment of active employes and officers as opposed to employes and officers who are no longer in service in cities of less than the first class and the similar treatment authorized for active and retired city officers and employes in cities of the first class.

BCL:RJV

Prisons; Reapportionment; Redistricting; Institutional populations, as well as other populations which may include persons disenfranchised for some reason, are part of the total population included in the 1980 federal decennial census of population and may not be disregarded for congressional or state legislative redistricting purposes. U.S. Const. art. 1, sec. 2; Wis. Const. art. IV, sec. 3. Although the Legislature may constitutionally authorize the use of voter population or citizen population for local apportionment purposes, when total population is used for the purpose of equal population redistricting of county supervisory or city aldermanic districts on the basis of the 1980 census population, institutional populations cannot be excluded from the total population count. OAG 22-81

April 27, 1981.

MARCEL DANDENEAU, *Chief Clerk*
State Assembly

On behalf of the Committee on Assembly Organization, you have submitted the following opinion request concerning the inclusion or exclusion of institutionalized populations for reapportionment purposes:

The results of the 1980 federal Census of Population, to be certified to the State of Wisconsin on or before April 1, 1981, will include institutionalized populations in a number of municipalities. In some instances, such institutionalized populations, though "inhabitants" of this state, are constitutionally disenfranchised by Section 2 of Article III of the Wisconsin Constitution; e.g. convicted felons or persons "non compos mentis or insane."

QUERY: How are institutionalized populations to be treated, for the purpose of equal population redistricting based on the results of the 1980 CENSUS [sic] of Population:

- (a) for congressional redistricting;
- (b) for state legislative redistricting;
- (c) for redistricting of county supervisory districts; and
- (d) for redistricting of city aldermanic districts?

Congressional Redistricting

United States Constitution art. I, sec. 2, clause 3, as amended by sec. 2 of the fourteenth amendment to the United States Constitution, provides in part: "Representatives ... shall be apportioned among the several States ... according to their respective numbers, which shall be determined by adding ... the whole number of free persons"¹

¹ Initially, "free Persons" and those "bound to Service for a Term of Years" were counted in determining representation, Indians not taxed were not counted, and "three

United States Constitution art. I, sec. 2, further provides in part that: "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."

Although it has not squarely decided the issue, the United States Supreme Court has directly questioned "whether distribution of congressional seats except according to total population can ever be permissible under Art. I, 2." *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 (1969). And for purposes of congressional apportionment and representation under the provisions of U.S. Const. art. I, sec. 2, population has in fact been treated as the apparent singular controlling factor to be considered. *Reynolds v. Sims*, 377 U.S. 533, 567 (1964). Thus, in *Wesberry v. Sanders*, 376 U.S. 1, 8-9, 13-14 (1964), the court discusses the matter as follows:

The history of the Constitution, particularly that part of it relating to the adoption of Art. I, 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.

....

The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent "people" they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure "fair representation of the people," an idea endorsed by Mason as assuring that "numbers of inhabitants"

fifths of all other Persons" (slaves) were included in the States' populations. U.S. Const. art. I, sec 2. For current apportionment purposes those several distinct categories of persons are no longer of significance. Even the exclusion of "Indians not taxed" is obsolete since there apparently no longer are any Indians who should be classed as "not taxed." United States Bureau of the Census, *Sixteenth Census of the United States: 1940*, vol. 1, 7. In Wisconsin, in fact, an identical and equally obsolete exclusion of Indians from the "number of inhabitants" to be counted in determining the population for apportionment purposes was stricken from Wis. Const. art. IV, sec. 3, by vote of the electorate in 1962. *Wisconsin Blue Book* 771 (1964).

should always be the measure of representation in the House of Representatives.

Congress has consistently provided, by law, for the implementation of the enumerations contemplated by the United States Constitution. The Census Act which governs the current decennial census, provides, in part, as follows:

(a) The Secretary [of Commerce] shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date".

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

13 U.S.C. 141.

The detail of the enumeration is delegated by Congress. 13 U.S.C. 4 and 5. After the President receives the decennial report from the Secretary of Commerce, "the President shall transmit to the Congress a statement showing the whole number of persons in each State ... as ascertained under the ... decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment." 2 U.S.C. 2a(a). Congress, in turn, reports such information to the chief executive of each state. 2 U.S.C. 2a(b).

Historically, the "whole number of persons in each State," under the Constitution and the various acts of Congress, has been interpreted by the Bureau of the Census to include those persons whose usual place of residence is in a particular state on the date of the census, and, in addition, those persons present in the state who have no usual place of residence. See *Borough of Bethel Park v. Stans*, 449 F.2d 575, 578 (3rd Cir. 1971). The basic criterion used by the Bureau of the Census to determine such usual place of residence is that persons are enumerated at the place in which they generally eat, sleep, and work, and that persons are counted as residents of their

usual place of abode even though temporarily absent therefrom. This criterion was held by the court in *Borough of Bethel Park* to be a reasonable means of interpreting said constitutional and legislative mandate to enumerate the "whole number of persons in each State." 449 F.2d at 578.

More specifically, for the purpose of determining institutionalized populations under the 1980 decennial census, persons are considered as residents of institutional group quarters under the following rule:

These are persons under care or custody at the time of enumeration. They are persons in homes, correctional schools, specialized hospitals, or wards for juveniles, the physically handicapped, or the mentally handicapped; persons in homes or hospitals for mental, tuberculosis, or other chronic diseases; residents of homes for unmarried mothers, nursing (convalescent and rest) homes; homes for the aged and dependent; and correctional institutions. These persons are enumerated as residents of an institution — regardless of their length of stay in the particular place.

United States Bureau of the Census, *20th Decennial Census-1980, Questionnaire Reference Book* (D-561), at 90.

The method of counting institutionalized persons, as well as the propriety of counting aliens and persons otherwise denied the right to vote, under the foregoing criteria for determining total population for congressional reapportionment purposes, has been upheld in a number of court challenges. Generally, these cases have been decided on the basis of lack of standing or lack of evidentiary support.

In *Borough of Bethel Park*, the court concluded that the Bureau of the Census acted rationally in enumerating persons confined to institutions where individuals usually stay for long periods of time (such as penitentiaries or correctional institutions, mental institutions, homes for the needy or aged or hospitals for the chronically ill) as residents of the state where confined. 449 F.2d at 582.

In addition, it has been held that under the present state of the law, Congress is not required to prescribe that the census includes infor-

mation relating to disenfranchisement. *United States v. Sharrow*, 309 F.2d 77, 79-80 (2d Cir. 1962), *cert. denied* 372 U.S. 949 (1963). In fact, the present federal statutes relating to the census and the apportionment of Representatives in the House of Representatives neither direct nor authorize the Bureau of the Census to exclude disenfranchised citizens in taking the census or to compute a statement showing a reapportionment of Representatives on the basis of such exclusion. See *Lampkin v. Connor*, 239 F. Supp. 757, 766 (D.D.C. 1965), *aff'd on other grounds*, 123 U.S. App. D.C. 371, 360 F.2d 505 (1966).

Finally, more recently it was held that the constitutional requirement of counting the "whole number of persons" for congressional apportionment purposes includes both illegal as well as legal aliens. *Federation For Am. Imm. Reform v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980), *appeal dismissed for want of jurisdiction*, 100 S. Ct. 3005 (1980). This case arose in the context of the 1980 decennial census, which was conducted largely by mail, using two questionnaire forms. One form, sent to eighty percent of American households, contained no questions concerning citizenship, and the remaining form would not directly disclose the legal status of any alien in a household. The court discussed the merits of the case in the abstract, at 486 F. Supp. 576, 577, as follows:

The language of the Constitution is not ambiguous. It requires the counting of the "whole number of persons" for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly "persons." By making express provision for Indians and slaves, the Framers demonstrated their awareness that without such provisions, the language chosen would be all-inclusive. According to James Madison, the apportionment was to be "founded on the aggregate number of inhabitants" of each state. *The Federalist*, No. 54, at 369 (J. Cooke ed. 1961). The Framers must have been aware that this choice of words would include women, children, bound servants, convicts, the insane—and aliens, since the same article of the Constitution grants Congress the power "to establish a uniform rule of naturalization." Art. I, section 8, cl. 4. We see little on which to base a conclusion that *illegal* aliens should now be excluded, simply

because persons with their legal status were not an element of our population at the time our Constitution was written.

The defendants' interpretation of the constitutional language is bolstered by two centuries of consistent interpretation. The Census Bureau has always attempted to count every person residing in a state on census day, and the population base for purposes of apportionment has always included all persons, including aliens both lawfully and unlawfully within our borders. ... Although the language "the whole number of persons" finally adopted in the fourteenth amendment is identical to the original choice of words in article I, section 2, other options were considered and expressly rejected, after considerable debate, including the options of "voters" or "citizens."

During the first half of this century, a variety of proposals were made to exclude aliens from the apportionment base, and it appears to have been generally accepted that such a result would require a constitutional amendment.

Based on the foregoing, it is evident that the formulation of the procedures to be used in taking the federal decennial census is a matter exclusively covered by the authority of Congress as implemented by the Bureau of the Census, and that congressional redistricting is based on the federal census report of total population, which includes certain institutional as well as other populations which may be disenfranchised for some reason. Since said total population, as determined according to federal law, is the basis for the allotment of congressional districts to the state, it is also evident that the institutional populations identified as part of that population may not be disregarded for congressional redistricting purposes.

State Legislative Redistricting

Apportionment of the Wisconsin Legislature is principally governed by Wis. Const. art. IV, secs. 2, 3, 4, and 5. The provision most directly relating to your question is Wis. Const. art. IV, sec. 3, which read as follows when originally adopted as part of our constitution in 1848:

Census and apportionment SECTION 3. The legislature shall provide by law for an enumeration of the inhabitants of the

state in the year one thousand eight hundred and fifty-five, and at the end of every ten years thereafter, and at their first session after such enumeration, and also after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants, excluding Indians not taxed, and soldiers and officers of the United States army and navy.

Today, Wis. Const. art. IV, sec. 3, provides:

Apportionment. SECTION 3. At their first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants, excluding soldiers, and officers of the United States army and navy.²

Generally speaking, state legislative apportionment need not be based on total population in order to comply with the Equal Protection Clause. As explained in *Burns v. Richardson*, 384 U.S. 73, 91-92 (1966):

The holding in *Reynolds v. Sims*, as we characterized it in the other cases decided on the same day, is that "both houses of a bicameral state legislature must be apportioned substantially on a population basis." We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. ... At several points, we discussed substantial equiv-

² Exclusion of all military persons, without more being shown, would be constitutionally impermissible. *Davis v. Mann*, 377 U.S. 678, 691-92 (1964). However, exclusion of any such persons not meeting a residence standard would be a permissible classification. See *Burns v. Richardson*, 384 U.S. 73, 92 n. 21 (1966). The 1970 Census "usual place of abode" standard, used by the Bureau of the Census in the case of members of the Armed Forces, has been found to have a rational basis. *Borough of Bethel Park*, 449 F.2d at 581. Military personnel may freely establish a bona fide residence in Wisconsin for all purposes, including the exercise of the franchise, and this military exclusion apparently has not been generally applied in Wisconsin legislative redistricting. Technically, under the 1980 census, persons in military barracks are counted as residents of "noninstitutional group quarters." United States Bureau of the Census, *20th Decennial Census-1980, Questionnaire Reference Book* (D-561), at 90.

alence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population. ... Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., e. g., *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby.

However, I am satisfied that legislative apportionment “according to the number of inhabitants,” under Wis. Const. art. IV, sec. 3, must be based on total state population as shown by the federal decennial census and that legislative districts are to be apportioned on the basis of that population.

Initially, of course, legislative apportionment under Wis. Const. art. IV, sec. 3, took place every five years based on alternating state and federal decennial censuses. Since historically the federal census was based on total resident population and the first census after the adoption of the Wisconsin Constitution was the 7th Census of the United States in 1850, the need for consistency and uniformity in legislative apportionment suggests that the constitutional requirement to enumerate “according to the number of inhabitants” was simply intended to provide for a count of total resident population.

Viewing the term “inhabitant” in the context of legislation contemporaneous with and immediately following the adoption of the Constitution of 1848, I note that the statutory rules of construction set forth in ch. 4, sec. 1, 1849 Revised Statutes, provided that: “The word ‘inhabitant’ shall be construed to mean a resident in the particular locality in reference to which that word is used.” Such definition is, of course, consistent with the underlying historical criterion for the

federal decennial census, *i.e.*, residency, and when the Constitution was implemented by the taking of the first state census or enumeration, pursuant to ch. 71, Laws of 1855, it was evident that, with the exception of the exclusion of certain Indians, all “residents” were to be counted, even though they might not then be entitled to exercise the franchise under Wis. Const. art. III, secs. 1 and 2. Chapter 71, secs. 1, 2, 3, and 4, Laws of 1855, thus provided as follows:

SECTION 1. The town clerks of the several towns in this state, under the direction of the clerk of the board of supervisors of their respective counties, are hereby authorized and required to take an enumeration of the inhabitants in their respective towns, omitting in such enumeration, Indians not entitled to the right of suffrage under the constitution and laws of the state. ...

SEC. 2. The secretary of state shall prepare appropriate forms, distinguishing therein persons of each sex, deaf and dumb, blind, insane, and persons of color, and ... shall forward the requisite number of such forms to the town clerks ... to enable them to take said census in a uniform manner.

SEC. 3. The town clerks and assistants shall severally take and subscribe an oath ... that they will well and truly cause to be made a just and perfect enumeration of all the persons resident within their city, town or division, as the case may be. ...

SEC. 4. The said enumeration shall be made by an actual enquiry, by the person taking such census, at every dwelling or by personal enquiry of the head of every family, in their several cities, towns or districts ... and said enumeration shall include only those whose place of residence shall be in said cities, towns or districts, on the first day of June aforesaid ... and shall embrace the several families by the name of the head thereof, and the aggregate population therein.

Subsequent decisions of our supreme court have likewise held that, while the constitution commits the Legislature to apportion representatives by districts as nearly equal in population as possible, total population, as determined according to the applicable decennial federal or state census, must be used for such legislative redistricting purposes. *The State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 484, 51 N.W. 724 (1892); *The State ex rel. Lamb v. Cun-*

ningham, Secretary of State, 83 Wis. 90, 53 N.W. 35 (1892). In the latter case, the court further pointed out that since the Legislature is bound by the figures set forth in the census, it cannot disregard that standard so as to apportion based on other computations or considerations, such as the nature and character of the population, saying:

It seems to be well established that courts will take judicial notice of a census, whether taken under the authority of the state or United States. ... The apportionment is to be "according to the number of inhabitants," and made *at the next session after* the state or United States enumeration; *and the enumeration is evidently intended as the basis of apportionment.* ... *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 510. ...

Thus it is very obvious, under the rulings of this court in the previous case, that it is not permissible for the defendant here to allege and prove that in making the last apportionment the legislature acted upon the theory that the counties of Chippewa, Florence, Forest, Oneida, Langlade, Price, and Taylor contained 12,777 more inhabitants than appears from the census of 1890, for to do so would open the door on the other side to prove that the other counties of the state, or some of them, contained less inhabitants than appears from the census. Besides, if proved, it would only show that the legislature purposely disregarded the standard of population thus conclusively fixed by the constitution, and based their action upon other computations, estimates, or considerations. The same may, in substance, be said in relation to that part of the proposed answer to the effect that the legislature was induced to make the fourth senate district as they did by reason of the excessive wealth therein, and the nature and character of its population and business interests. But, as we shall in another part of this opinion undertake to show, such considerations cannot justify a disregard of the standards of population fixed in the constitution

83 Wis. at 140-41.

More recently, in *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964), the court again emphasized that under our constitution legislative apportionment is based on total state population, saying:

Sec. 3, art. IV of the constitution, lays down a standard in unambiguous terms for the apportionment of Wisconsin legislative districts. The assembly and senate districts are to be apportioned "according to the number of inhabitants." ... Thus the constitution itself commits the state to the principle of per capita equality of representation subject only to some geographical limitations in the execution and administration of this principle.

....

... As we have seen, sec. 3, art. IV, Wis. Const., contains a precise standard of apportionment—the legislature shall apportion districts according to the number of inhabitants.

The "rationality" of apportioning representatives in direct ratio to the population was affirmed when the constitution, embodying the specific standard of sec. 3, art. IV, was ratified.

....

Of course, the theoretical norm, or average district population, is obtained by dividing the total state population by number of assembly and senate districts. For the senate districts, the figure predicated upon the 1960 census figures is 119,780, and for assembly districts, 39,528.

22 Wis. 2d at 555-56, 564-65, 567.

It is my opinion, therefore, that Wis. Const. art. IV, sec. 3, requires that total population, as determined according to the federal decennial census, must be used for legislative redistricting purposes and that it would be inappropriate to exclude any institutional population identified as a part of that total population when reapportioning the Legislature.

*Redistricting of County Supervisory
and City Aldermanic Districts*

In *Avery v. Midland County*, 390 U.S. 474 (1968), the "one person, one vote" doctrine, developed in federal cases dealing with congressional and state apportionment under the equal protection clause was extended to local governmental units with general powers of government. In Wisconsin, the supreme court had also previously held

that the equal-protection clause of the fourteenth amendment of the federal constitution and Wis. Const. art. I, sec. 1, required apportionment of county supervisory districts on an equal population basis. *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 48-49, 59-61, 132 N.W.2d 249 (1965).³ However, *Burns v. Richardson*, 384 U.S. 73 (1966), clearly indicates that the fourteenth amendment does not require that total population from the federal census be the only test which may be used to satisfy this substantial population equivalency standard. That case holds that "voter population or citizen population" may also be an acceptable test.⁴ Since "there is no substantial difference between [the equal protection provisions of] the two constitutions," *Sonneborn*, 26 Wis. 2d at 50, I feel the same result would be reached under Wis. Const. art I, sec. 1. Furthermore, despite the fact that Wis. Const. art. IV, secs. 2, 3, 4, and 5, provide that apportionment of the state senate and assembly must result in legislative districts bounded by local governmental boundary lines, and be of as equal population as possible according to the last federal decennial census, said provisions relate specifically to state legislative apportionment and do not clearly require that apportionment of local governmental bodies must be on the basis of total population.

In 60 Op. Att'y Gen. 438, 446 (1971), which discussed the reapportionment of county supervisory districts under the then current law, it was stated that: "although some other type of population basis

³ Subsequently, in *Abate v. Mundt*, 403 U.S. 182 (1971), a population variation of 11.9 percent between county legislative districts created to correspond with the county's five towns was found constitutionally permissible, in light of the absence of a built-in bias tending to favor any particular area or interest and in light of the legitimate interest of the state in preserving the integrity of political subdivisions.

⁴ The use of a "permissible population basis," such as voter population or citizen population, must be distinguished from a "registered voter or actual voter basis." *Burns v. Richardson*, 384 U.S. at 91-93. Although *Burns* sustained a state legislative apportionment which the constitution of Hawaii required be based on the number of registered voters, it soundly criticized the use of registered voters as "susceptible to improper influences" and subject to considerable fluctuation, and upheld the apportionment "only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." 384 U.S. at 93. In *Ellis v. Mayor and City Council of Baltimore*, 352 F.2d 123 (4th Cir. 1965) and *Calderon v. City of Los Angeles*, 93 Cal. Rptr. 361, 4 Cal. 3d 251, 481 P.2d 489 (1971), both courts invalidated councilmanic districting schemes which utilized a registered voter standard because they produced distributions that significantly diverged from an apportionment based on population. See also *Marshall v. Edwards*, 582 F.2d 927, 937 (5th Cir. 1978), which found an apportionment plan for a Louisiana parish to be infirm because based on voter registration rather than population.

may be constitutionally permissible, in Wisconsin the total population figures derived from the Federal decennial census has been established as the basis for apportionment. In the absence of demonstrated fraud, etc., then, such data should be utilized without alteration or adjustment." The statutes continue to require that local apportionment be based on the federal census. See secs. 5.15, 59.03(2)(a), (3)(b), and 62.08(1), Stats., and there are many compelling practical reasons for continuing to do so. However, it is my opinion that the Legislature could constitutionally permit the use of a population basis such as voter population or citizen population for apportionment of local governmental bodies.

On the other hand, the redistricting of local government using the voter population or citizen population test is entirely different from a redistricting of local government based on a scheme which would rely on total population, but would exclude institutional populations therefrom. The latter test would bear no reasonable relationship to the goal of equal representation for equal numbers of people, since institutional populations normally include persons who are voters or citizens.

As your opinion request points out, some institutionalized populations include residents who are disenfranchised because they are convicted felons, *non compos mentis* or insane. Wis. Const. art. III, sec. 2. Apparently, it is the local impact of the inclusion of these specific institutional populations in the total population count which provides the impetus for your inquiry.

However, any plan of local apportionment based on the exclusion of just those specific institutional populations from the total population count would probably fare no better on equal protection grounds than a total exclusion of institutional population, for it would likewise fail to treat all persons similarly situated in the same manner. For instance, such a plan would not exclude any noninstitutionalized persons who are nevertheless disenfranchised for one of the reasons listed, nor would it exclude persons who are denied the franchise for other reasons, such as their legal status as minors or aliens. Wis. Const. art. III, secs. 1 and 6; secs. 6.02 and 6.03, Stats. In addition, even the populations of correctional institutions and institutions for

the mentally handicapped or diseased may include persons who are not denied the franchise.

For the reasons stated, it is my opinion that institutional populations cannot be excluded from total population, when total population is used for the purpose of equal population redistricting of county supervisory or city aldermanic districts on the basis of the 1980 census of population. Although such figures may be hard to obtain or extrapolate from the census, the Legislature is not constitutionally barred from choosing voter population or citizen population rather than total population as the standard to insure equal representation for equal numbers of people for local apportionment purposes. Thus, a decision by the Legislature to base local equal population redistricting of county supervisory and city aldermanic districts on the number of citizens entitled to the franchise, is clearly a choice which it may constitutionally make as long as such test is based on thorough documentation and uniformly applied throughout the local governmental unit involved in a systematic, not an *ad hoc* manner. See *Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969).

BCL:JCM

Condemnation; Wisconsin Relocation Assistance Act; Condemnors may not offer displaced persons a loan or alternative assistance in lieu of payments authorized in sec. 32.19, Stats. Also, condemnors do not have the authority to obtain written waivers of relocation assistance benefits as a condition for participation in a particular acquisition program. OAG 23-81

May 18, 1981.

JOSEPH NOLL, *Secretary*
Department of Industry, Labor and Human Relations

You have requested my opinion concerning the administration of the Wisconsin Relocation Assistance Act (secs. 32.19 to 32.25, Stats.). Specifically, you ask whether the Department of Industry, Labor and Human Relations may approve a relocation plan submitted under sec. 32.25(1), Stats., that requires persons to execute a

waiver of the relocation benefits provided by the act as a condition of participation in the program.

You have presented me with the following facts:

A municipality wishes to begin a public project involving “voluntary acquisitions” and the relocation of persons to better housing. The project has no defined boundaries and the properties are to be selected solely on the basis of visible signs of serious housing deterioration. Participation in the program requires:

1. An owner-occupied property which is uneconomical to rehabilitate; and
2. The owner must meet certain income guidelines and be willing to waive the relocation benefits provided by sec. 32.19, *et seq.* in exchange for a deferred loan.

The project intends to reimburse an owner for the fair market value of his property in cash and offer a deferred loan and an additional \$500.00 designated as a moving and dislocation allowance. The loan and allowance are given in lieu of relocation assistance benefits. You indicate that the program is entirely voluntary on the part of the property owner and the municipality has no intention of acquiring the property unless the owner is willing to waive relocation benefits.

The Legislature has declared it to be in the public interest that persons displaced by such a public project be fairly compensated for the loss of property and other losses incurred as the result of a taking by a condemnor. Sec. 32.19(1), Stats. The “other losses,” known as relocation payments, are specifically set forth in sec. 32.19, *et seq.*, Stats., and are designed to compensate an owner for the inconvenience and losses as a result of the taking by the condemnor. 63 Op. Att’y Gen. 201, 202 (1974).

The relevant statute reads in part:

Any condemnor which proceeds with the acquisition of real and personal property for purposes of any project for which the power of condemnation may be exercised, shall make fair and reasonable relocation payments to displaced persons, business

concerns and farm operations under this section. Payments shall be made as follows:....

Section 32.19(3), Stats.

These payments include reimbursement for moving expenses (sec. 32.19(3)(a) and (b), Stats.), replacement housing (sec. 32.19(4), Stats.), business or farm replacements, (sec. 32.19(4m), Stats.), and incidental expenses incurred in the transfer of the property (sec. 32.19(5), Stats.).

In my opinion, the proposed relocation plan does not comply with the applicable statutes and your department is not authorized to approve the plan. Therefore, it is unnecessary to decide whether the municipality has authority to undertake the project in question.

The municipality proposing the relocation plan is a "condemnor" for the purposes of the Relocation Assistance Act (sec. 32.185, Stats.), even though it does not intend to exercise its eminent domain powers. As a condemnor, the municipality must strictly adhere to the requirements of ch. 32, Stats., in spite of its announced intention to proceed by voluntarily negotiated purchases. Intent is immaterial under those circumstances. 68 Op. Att'y Gen. 3, 4 (1979).

As noted above, sec. 32.19(3) Stats., enumerates the types of benefits available to displaced persons. Also, sec. 32.19(2m), Stats., requires the condemnor to provide displaced persons with pamphlets describing in detail their rights under eminent domain laws, including rights to relocation assistance under sec. 32.19, Stats. The statutes do not expressly authorize any other procedure to be used or any other types of benefits to be paid. In my review of those provisions I find no authority to justify the loan concept which this project envisions. As a result, I can only conclude that the Legislature, by specifically enumerating the types and amounts of payments authorized to be paid to owners for the taking of their property, intended to exclude all other forms of payment. See *Gottlieb v. Milwaukee*, 90 Wis. 2d 86, 95, 279 N.W.2d 479 (Ct. App. 1979).

It has been suggested that displaced persons may be free to waive statutory rights and benefits and that such waivers, if truly voluntary, might justify a departure from the statutory schedule of relocation

benefits. The question of an individual's right to waive these benefits is a close one. The statutes do not address the issue except to provide that a person's failure to present a relocation assistance claim within two years after the condemnor takes possession of the property results in the loss of benefits. There is judicial authority for the proposition that individuals may waive statutory rights and benefits. *Faust v. Lady Smith-Hawkins School Systems*, 88 Wis. 2d 525, 533, 277 N.W.2d 303 (1979). However, that decision also said that "when a statutorily private right serves a public policy purpose the persons or entities protected by the statute cannot waive that right." *Id.* at 533.

By its careful attention to the coverage and structure of benefits it is apparent that the Legislature established a strong public policy in favor of uniform and mandatory procedures to be employed by all condemnors regarding payment of relocation benefits. As a consequence no condemnor in Wisconsin has the authority to tailor a relocation plan or offer of benefits to its own citizens less in scope than provided in the applicable statutes even though the displaced person might be willing to go along with that plan. The issue is not whether the displaced person can choose to waive relocation assistance rights, but whether the condemnor has the power to request or require such a waiver in the first place. I conclude that it has not.

In summary, it is my opinion that a condemnor may not offer displaced persons a loan or alternative assistance in lieu of payments authorized in sec. 32.19, Stats. Moreover, condemnors do not have the authority to obtain written waivers of relocation assistance benefits as a condition for participation in a particular acquisition program.

I recognize that these conclusions substantially reduce the flexibility of condemnors in shaping relocation assistance plans to fit particular situations and public objectives. It might well be that over a decade of experience with the administration of the Relocation Assistance Act indicates that in some cases alternative kinds of benefits and a waiver procedure might serve the best interest of both displaced persons and the general public interest. However, given the express language of the statutes, I believe that only the Legislature

itself may address the question of when and how alternative benefits and procedures should be allowed.

BCL:DSF

Children; Contempt Of Court; Courts; Words And Phrases; Courts of record in the State of Wisconsin have the authority to hold juveniles in contempt of court; limited circumstances under which sanction of imprisonment may be imposed discussed. OAG 24-81

May 20, 1981.

FRANK VOLPINTESTA, *Corporation Counsel*
Kenosha County

You have asked my opinion on several questions concerning the power of the court assigned to exercise jurisdiction under Children's Code, ch. 48, Stats., to find juveniles in contempt of court. Before proceeding to your specific inquiries, it is necessary to briefly discuss the present status of the statutory contempt laws in this state.

Until mid-1979, the statutory law of contempt was contained in ch. 295, Stats. (civil contempt), and secs. 757.03 through 757.07, Stats. (criminal contempt). In 1979, by virtue of ch. 32, Laws of 1979, effective July 20, 1979, ch. 295, Stats., was renumbered as ch. 785, Stats., while secs. 757.03 through 757.07, Stats., remained unchanged. A larger revision, not relevant to your questions, had taken place by virtue of the enactment of ch. 401, Laws of 1975.

Throughout this period of change and revision the statutes continued to maintain the historical distinction between criminal and civil contempt, a distinction which has been the source of constant difficulty and confusion for judges and lawyers alike. *State v. King*, 82 Wis. 2d 124, 262 N.W.2d 80 (1978); *Comments, Contempt of Court: Some Considerations for Reform*, 1975 Wis. L. Rev. 1117, 1119-1244.

Emerging from this confusion was a growing recognition of the need for reform. An objective of reform was elimination of this distinction, a distinction which was not made on the basis of the type of

conduct involved but was predicated upon the nature and purpose of the penalty imposed. Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev. 183, 247 (1971).

Wisconsin recognized this need for reform and has now responded to it. By virtue of ch. 257, Laws of 1979, effective May 10, 1980, the Legislature repealed and recreated the statutory law of contempt in this state which is now contained in ch. 785, Stats., entitled simply "Contempt of Court." This legislation removed the historical distinction between criminal and civil contempt.

Your first specific question asks: May a circuit court judge exercising jurisdiction over juvenile matters, under ch. 48 of the Wisconsin Statutes, find a juvenile in contempt of court? It is my conclusion that the answer to this first question is yes.

It has long been held that it is within the inherent power of a court to find persons in contempt in order that the court may see that its orders are carried out and that proper decorum is maintained in the court. *State ex rel. Rodd v. Verage*, 177 Wis. 295, 187 N.W. 830 (1922) and *In re Hon. Charles E. Kading*, 70 Wis. 2d 508, 235 N.W.2d 409, 238 N.W.2d 63, 239 N.W.2d 297 (1975). As stated in 17 C.J.S. *Contempt* sec. 33: "While a party to an action may be more strictly accountable for contemptuous or contumacious acts performed in the course of the proceedings than a stranger, *all persons who interfere with the proper exercise of a court's judicial functions, whether parties or strangers, are punishable for contempt*" (emphasis supplied; footnotes omitted).

Our supreme court has further held that even though such power to find persons in contempt of court is an inherent power of the court it is, nonetheless, subject to being reasonably regulated by the Legislature. In *State ex rel. Attorney General v. Circuit Court for Eau Claire County*, 97 Wis. 1, 8, 72 N.W. 193 (1897), our court stated:

Doubtless, this power may be regulated, and the manner of its exercise prescribed, by statute, but certainly it cannot be entirely taken away, nor can its efficiency be so impaired or abridged as to leave the court without power to compel the due respect and obedience which is essential to preserve its character as a judicial tribunal.

More recently the supreme court has affirmed that the Legislature may impose reasonable regulations upon the contempt power of the courts, and upon the exercise of that power by the courts, but only insofar as they do not render the contempt power ineffectual. *King*, 82 Wis. 2d at 124.

The Wisconsin Legislature has enacted such regulations regarding the contempt powers of courts which are contained in the aforementioned ch. 785, Stats. Section 785.02, Stats., provides: "A court of record may impose a remedial or punitive sanction for contempt of court under this chapter." Subsequent sections, which will be referred to later in this opinion, set forth the sanctions which a court is authorized by statute to impose following a finding of contempt and the procedures to be used in arriving at such finding.

I find no indication in ch. 785, Stats., or in any other section of the statutes, that the Legislature intended to treat juveniles differently, in this limited area, than all other persons or to prohibit courts from finding juveniles in contempt. It appears to be generally held, apparently in the absence of any express legislative prohibition, that juveniles are generally subject to the same contempt power of a court as are other persons. *In re Grand Jury Proceedings*, 491 F.2d 42 (D.C. Cir. 1974).

It has also been held, by at least one court, that statutes which give juvenile courts exclusive jurisdiction over offenses committed by minors do not preclude a judge of a criminal branch of that court from holding a seventeen-year old girl in contempt for her refusal to answer questions before a grand jury which was in the process of investigating a homicide. *Young v. Knight*, 329 S.W.2d 195 (Ky. 1959).

It has been stated that "Juvenile courts generally have the same power as other courts to punish for contempt." 47 Am. Jur. 2d *Juvenile Courts, Etc.* sec. 5 (footnote omitted). Therefore, I conclude that juveniles are generally subject to the same contempt powers and provisions of the courts as are other persons.

In your second question you ask what acts or conduct would form the basis for finding a juvenile in contempt of court if the answer to your first question is in the affirmative.

Section 785.01, Stats., entitled "Definitions" provides:

(1) "Contempt of court" means intentional:

(a) Misconduct in the presence of the court which interferes with a court proceeding or with the administration of justice, or which impairs the respect due the court;

(b) Disobedience, resistance or obstruction of the authority, process or order of a court;

(c) Refusal as a witness to appear, be sworn or answer a question; or

(d) Refusal to produce a record, document or other object.

It is thus clear that, depending upon the particular circumstances involved, the above enumerated types of conduct may form the basis for a finding of contempt of court by a juvenile as well as by other persons. It also appears that such enumeration is not intended to be exclusive. In the Legislative Council's Notes contained in the legislation it was stated in part:

The definition of contempt of court is intended to be broad and general. Wisconsin Statutes formerly included a lengthy list of acts which were included in the definition of criminal contempt (s. 256.03 (1975)). This list was shortened by ch. 401, Laws of 1975 (s. 757.03 (1977)). The intention of this new section is not to exclude any acts which were previously defined as contempt of court, but to make it more inclusive by being less specific and less wordy.

The note went on to state that scattered throughout the statutes are numerous other sections specifically stating that certain types of conduct may be punishable as contempt of court. In most cases it was felt that that other described conduct probably falls within the language of sec. 785.01, Stats., but that if it does not there is, expressly, no legislative intent to repeal the other sections.

Therefore, it is apparent that there is a wide range of possible grounds upon which a finding of contempt of court may be predicated depending upon the particular circumstances and acts or omissions involved, which must be determined upon a case-by-case basis.

Your third and final question asks: What sanctions are available to the court if the juvenile is found in contempt?

The sanctions which a court is authorized to impose following a finding of contempt of court are set forth in sec. 785.04, Stats. These sanctions are classified as remedial sanctions and punitive sanctions.

Although I perceive from your letter that the central focus of this question is actually narrower than at first appears, which will be discussed shortly, I set forth below for your assistance the entire spectrum of sanctions available to a court upon its making a finding of contempt, pursuant to ch. 785, Stats.

785.04 Sanctions authorized. (1) REMEDIAL SANCTION. A court may impose one or more of the following remedial sanctions:

(a) Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.

(b) Imprisonment if the contempt of court is of a type included in s. 785.01(1)(b), (c) or (d). The imprisonment may extend only so long as the person is committing the contempt of court or 6 months, whichever is the shorter period.

(c) A forfeiture not to exceed \$2,000 for each day the contempt of court continues.

(d) An order designed to ensure compliance with a prior order of the court.

(e) A sanction other than the sanctions specified in pars. (a) to (d) if it expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(2) PUNITIVE SANCTION. (a) *Nonsummary procedure.* A court, after a finding of contempt of court in a nonsummary procedure under s. 785.03(1)(b), may impose for each

separate contempt of court a fine of not more than \$5,000 or imprisonment in the county jail for not more than one year or both.

(b) *Summary procedure.* A court, after a finding of contempt of court in a summary procedure under s. 785.03(2), may impose for each separate contempt of court a fine of not more than \$500 or imprisonment in the county jail for not more than 30 days or both.

(3) PAST CONDUCT. A punitive sanction may be imposed for past conduct which was a contempt of court even though similar present conduct is a continuing contempt of court.

It should be observed, according to the note following sec. 785.04, Stats., that the sanctions are not mutually exclusive. Subsection (3) was enacted and included for the expressed purpose of making that proposition clear.

As I alluded to above, what I perceive to be the real focus of your third question is: When may a court of record, following a finding of contempt of court by a juvenile, impose the remedial sanction of imprisonment contained in sec. 785.04(1)(b), Stats., or the punitive sanctions of imprisonment contained in sec. 785.04(2)(a) and (b), Stats.?

In general, it appears that the paramount consideration in determining whether to commit a juvenile to any kind of custodial facility is that of the child's welfare. "Commitments under the general terms of the statute are upheld where the best interest and welfare of the child seem to require it." *See Annot.*, 45 A.L.R. 1533, 1534 (1926).

The corollary to that proposition is found at 1535 of the annotation where it is said: "Conversely, a commitment which disregards the best interest and welfare of the child, as a rule, it [sic] has not been upheld." *In re Alley*, 174 Wis. 85, 182 N.W. 360 (1921), involved a juvenile trying to explode dynamite caps which had been abandoned in order to frighten other children. The prank resulted in a child being injured after picking up one of the dynamite caps. It was held under all of the circumstances in the case that commitment to a cus-

todial facility was not warranted as not being in the best interest of the child. *See also* 47 Am. Jur. 2d *Juvenile Courts, Etc.* sec. 32 ("Clearly, the interests of the child should be a dominant factor in determining whether or not the juvenile court should commit it to a correctional institution" (footnote omitted)).

The Wisconsin Legislature has expressly adopted this general policy in sec. 48.01(2), Stats.: "This chapter shall be liberally construed to effect the objectives contained in this section. *The best interest of the child shall always be of paramount consideration*, but the court shall also consider the interest of the parents or guardian of the child and the interests of the public." With those general thoughts in mind, we move to the specific statutory provisions which govern holding juveniles in physical custody in this state.

The basic criteria for holding a child in physical custody are set forth in sec. 48.205, Stats., which, although lengthy, is set forth in full below because of its importance to this discussion.

Criteria for holding a child in physical custody. (1) A child may be held under s. 48.207, 48.208 or 48.209 if the intake worker determines that there is probable cause to believe the child is within the jurisdiction of the court and:

(a) Probable cause exists to believe that if the child is not held he or she will commit injury to the person or property of others or cause injury to himself or herself or be subject to injury by others;

(b) Probable cause exists to believe that the parent, guardian or legal custodian of the child or other responsible adult is unavailable, unwilling or unable to provide adequate supervision and care; or

(c) Probable cause exists to believe that the child will run away or be taken away so as to be unavailable for proceedings of the court or its officers or proceedings of the department for revocation of aftercare supervision.

(2) The criteria for holding a child in custody specified in this section shall govern the decision of all persons responsible for determining whether the action is appropriate.

Sections 48.207, 48.208 and 48.209, Stats., discuss respectively places where a child may be held in nonsecure custody, criteria for holding a juvenile in secure detention and criteria for holding a child in a county jail. The latter section, sec. 48.209, Stats., which sets forth the criteria for holding a child in a county jail sets forth the criteria pursuant to which a county jail may be used as a secure detention facility.

Section 48.208, Stats., provides the criteria which must be used in determining whether a child may be held in a secure detention facility which is the type of facility which would be utilized if the child were ordered incarcerated for contempt. Those criteria are as follows:

A child may be held in a secure detention facility if the intake worker determines that one of the following conditions applies:

(1) Probable cause exists to believe that the child has committed a delinquent act and either presents a substantial risk of physical harm to another person or a substantial risk of running away as evidenced by a previous act or attempt so as to be unavailable for a court or revocation hearing for children on departmental aftercare. For children on departmental aftercare, the delinquent act referred to in this section may be the act for which the child was committed to a secured correctional facility.

(2) Probable cause exists to believe that the child is a fugitive from another state or has run away from a secured correctional facility and there has been no reasonable opportunity to return the child.

(3) The child consents in writing to being held in order to protect him or her from an imminent physical threat from another and such secure custody is ordered by the judge in a protective order.

(4) Probable cause exists to believe that the child, having been placed in nonsecure custody by an intake worker under s. 48.207 or by the judge or juvenile court commissioner under s. 48.21 (4), has run away or committed a delinquent act and no other suitable alternative exists.

(5) Probable cause exists to believe that the child has been adjudged or alleged to be delinquent and has run away from another county and would run away from nonsecure custody pending his or her return. A child may be held in secure custody under this subsection for no more than 24 hours unless an extension of 24 hours is ordered by the judge for good cause shown. Only one extension may be ordered by the judge.

It is apparent from a reading of those provisions that egregious, and in some instances potentially harmful, circumstances must exist before a child can be held in a secure detention facility, including a county jail being used as such a facility.

The most recent reported case which we have been able to find which discusses not only the authority of a court to find a juvenile in contempt but also the circumstances under which that juvenile may be imprisoned for that contempt is *State ex rel. L.E.A. v. Hammergren*, 294 N.W.2d 705 (Minn. 1980).

In that case, several juveniles, in separate lower court cases, were placed in secure detention facilities after being found in "constructive contempt of court" for failing to comply with the court's orders. The juveniles then petitioned the lower court for habeas corpus, which petitions were dismissed. The juveniles appealed the dismissal to the Minnesota Supreme Court.

The Minnesota Supreme Court found, as I have earlier concluded in this opinion, that juvenile courts do have the authority to find juveniles in contempt of court and to impose the sanctions which the court finds appropriate under the circumstances. The Minnesota court then went on to say: "But, given the Legislature's expressed disapproval of the practice of confining status offender juveniles in secure facilities, juvenile courts should not direct such confinement for contempt of court unless they first find specifically that there is no less restrictive alternative which could accomplish the court's purpose." *Hammergren*, 294 N.W.2d at 706-07 (footnotes omitted).

The Minnesota court went on to say, at 707-08:

In light of the foregoing, we hold that only under the most egregious circumstances should the juvenile courts exercise

their contempt power in such a manner that a status offender will be incarcerated in a secure facility. If such action is necessary, the record must show that all less restrictive alternatives have failed in the past.

The United States Supreme Court has put forth the same general philosophy in dealing with sanctions for contempt of court, not just for juveniles but for all contemnors, in *United States v. Wilson*, 421 U.S. 309 (1975), when it said: “ “[T]he least possible power adequate to the end proposed” ’ ” should be used in cases involving contempt of court. I thus perceive, as alluded to earlier, in secs. 48.205 and 48.208, Stats., a legislative object and purpose that courts order juveniles imprisoned only under the most egregious circumstances.

Those sections and the imprisonment sanctions contained in secs. 785.04(1)(b) and (2)(a) and (b), Stats., are to be considered *in pari materia*. As considered in regard to the questions at hand, all of those sections relate to the same purpose or object, that is, incarceration of persons, and must therefore be read together. That is to say, the imprisonment sanctions in the contempt statutes must be read together with, and in light of, the criteria for imprisonment which must be followed in determining whether to “imprison” a juvenile in ch. 48. See 2A Sands, *Statutes and Statutory Construction*, sec. 51.03 (4th Ed.).

Therefore, I conclude, based upon the foregoing, that while courts in this state have the authority to find juveniles in contempt of court, the sanctions of imprisonment provided for in sec. 785.04(1)(b) and (2), Stats., should be imposed only under the criteria contained in secs. 48.205 and 48.208, Stats., or in situations where the act of contempt is egregious and the imposition of less restrictive sanctions have already failed or would fail. It would be my further conclusion, based upon the foregoing, that courts may not order the imprisonment of juveniles as a disposition in a juvenile proceeding under the guise of exercise of its powers of contempt. For example, it would be my conclusion that a court could not imprison a juvenile under the guise of its contempt powers for being habitually truant from school unless the criteria set forth in sec. 48.208, Stats., are present, that is, the

courts cannot substitute imprisonment for contempt for appropriate dispositional orders covering status offenses under ch. 48, Stats.

BCL:JM

Public Service Commission; Public Utilities; Utility rate increases granted under an automatic fuel adjustment without a sec. 196.20(2), Stats., hearing probably would not be illegal if the automatic adjustment clause were limited to purchased fuel or power. OAG 25-81

June 4, 1981.

FRED A. RISSER AND ED JACKAMONIS, *Legislators*
State Legislature

You have asked whether the Public Service Commission violates sec. 196.20(2), Stats., by granting utility rate increases under automatic fuel adjustment clauses without hearings.

It is my opinion that the granting of utility rate increases under automatic fuel adjustment clauses without hearings probably does not per se violate sec. 196.20(2), Stats. Whether there would be a violation would depend upon the type of adjustment clause being considered.

Section 196.20(2), Stats., provides: "No change in schedules which constitutes an increase in rates to consumers shall be made except by order of the commission, after an investigation and hearing."

The Wisconsin Supreme Court, in *Wis. Environmental Decade v. Public Service Comm.*, 81 Wis. 2d 344, 260 N.W.2d 712 (1978), discussed the procedural requirements mandated in sec. 196.20(2), Stats., in reference to an "expanded adjustment clause." The expanded adjustment clause requested by Wisconsin Electric Power Company would have included, in addition to fuel, such expense items as purchased power, labor, supplies, steam, electric expenses, and supervision. The clause would have permitted the increases in the

cost of these items to be passed on to consumers automatically and without further hearings. The court ruled that the expanded adjustment clause violated sec. 196.20(2), Stats., in that it circumvented the public hearing requirement imposed by that statute and stated that if expanded adjustment clauses are to be used as a regulatory tool, they will first have to be approved by the Legislature.

The court went out of its way to note that the validity of the traditional fuel adjustment clause was not at issue in the case before it, and emphasized that it expressed no opinion as to the permissibility of the fuel adjustment clause under the Wisconsin regulatory scheme. The court stated:

We find the expanded adjustment clause in this case to be invalid, because it circumvents the public hearing requirement mandated by the statute. We note, however, that the clause includes aspects typical of the more traditional fuel adjustment clause. We re-emphasize the fact that the validity of fuel adjustment clauses is not at issue in this case. The clause involved here is invalid because of the additional elements which it contains.

81 Wis. 2d at 352 n. 4.

In my opinion, the court probably would not hold traditional adjustment clauses limited to fuel illegal. Adjustment clauses related to purchased power present a closer question.

The court noted that limited adjustment clauses have been used in Wisconsin for a long time:

Adjustment clauses have been used by utilities in Wisconsin at least since 1918. *Milwaukee Electric Railway & Light Co.*, 21 W.R.C.R. 749 (1918). During the early days of utility regulation, adjustment clauses which included such items as labor costs were occasionally approved. *Milwaukee Electric Railway & Light Co.*, 21 W.R.C.R. 749 (1918); *Wisconsin Gas & Electric Co.*, 25 W.R.C.R. 191 (1920); *Milwaukee Electric Railway & Light Co.*, 26 W.R.C.R. 288 (1922). With the exception of these early cases, however, adjustment clauses have traditionally been of a much more limited scope than the clause

involved in this case. Typically, these clauses have provided for automatic adjustment of rates for changes in the price of purchased fuel, such as coal, oil, or natural gas, or adjustment for the price of power which the utility itself purchases from another utility and then resells. Limited adjustment clauses have also been the general rule in other states. Trigg, *Escalator Clauses in Public Utility Rate Schedules*, 106 U. Pa. L. Rev. 964, 987 (1958).

“Adjustment clauses of this more limited variety, which may be called ‘fuel adjustment clauses,’ have been widespread since World War I, and they are currently in use in more than forty states. 18 Ariz. L. Rev. 454-55 (1976).” 81 Wis. 2d at 347-48.

Thus, the Public Service Commission has, for a number of years, interpreted the statutory provision in question as allowing adjustments without hearing for purchased fuel or power. This interpretation has the apparent acquiescence of the Legislature, and is thus entitled to great weight in construing the statutory provision. *Dunphy Boat Corp. v. Wisconsin E. R. Board*, 267 Wis. 316, 64 N.W.2d 866 (1954).

The Public Service Commission, in deciding whether a particular automatic adjustment clause is legal may be guided by factors alluded to by the court in *Wis. Environmental Decade*: (1) public interest in participating in the rate-making process, and (2) the controllability of the items within the adjustment clause.

Such factors as advances in technology and industry practice may place historical practice in a new factual and legal context. Thus, to the extent that purchases of power may presently be considered within the control of the utility by appropriate planning and selection of generator technology, the historical exception from sec. 196.20(2) hearings for such adjustment clauses may be a proper subject for careful Public Service Commission reconsideration.

Finally, I would point out that these matters are not entirely free from doubt. If the Legislature believes that the Public Service Commission practice of allowing automatic adjustment clauses is no

longer good public policy, the Legislature may wish to consider this issue.

BCL:RJ-M:FJS

Indians; Worker's Compensation; Workman's Compensation; Indian persons receiving relief under sec. 49.046, Stats., and participating in a Work Experience Program under sec. 49.047, Stats., are not automatically covered by the Workers' Compensation Law. OAG 26-81

June 9, 1981.

DONALD E. PERCY, *Secretary*
Department of Health and Social Services

You have asked several questions regarding the applicability of the worker's compensation law contained in ch. 102, Stats., to elected tribal governing bodies administering relief under sec. 49.046 and sec. 49.047, Stats. You asked:

1. Are benefits recoverable under the worker's compensation law from an elected tribal governing body or an appropriate Indian organization appointed by the Department to administer relief under s. 49.046, Wis. Stats. when recipients of relief are participating in an established work experience program as a condition of eligibility under s. 49.046, Wis. Stats.?

It is my opinion that benefits are not recoverable under the worker's compensation law in the circumstance you pose.

Section 49.046(1), Stats., provides in part: "[T]he department [of health and social services] shall grant relief to needy Indian persons not eligible for aid under s. 49.177, 49.19, 49.46 or 49.47 and residing on tax-free lands or in Menominee county, except that a person who fails to comply with s. 49.047 may be denied aid under this section." This section contemplates that the program will be administered by either an elected tribal governing body or an appropriate Indian organization appointed by the Department to administer the program. The Department, however, retains the responsibility for

establishing rules governing administration and is responsible for the overall supervision of the program. If any legal dispute arises regarding administration, the Department is a necessary party.

Section 49.047(3), Stats., provides: "A body appointed by the department to administer relief under s. 49.046 shall operate a work experience program authorized and sponsored by the appointed body for eligible recipients of relief under s. 49.046." Before this section was added by ch. 418, sec. 331m, Laws of 1977, the general Work Relief Program, sec. 49.05, Stats., applied to the Relief of Needy Indian Persons Program. *See* 41 Op. Att'y Gen. 289 (1952). In that opinion, persons involved in work relief were considered employees and therefore eligible for benefits recoverable under the worker's compensation law. When sec. 49.047, Stats., was enacted, the Work Relief Program was specifically made inapplicable to the Relief of Needy Indian Persons Program. Sec. 49.047(6), Stats.

It is my opinion that when the Legislature established the special Work Experience Program for persons receiving relief pursuant to sec. 49.046, Stats., it recognized the unique status of Indian tribes and tribe members, which status necessitated the separate Work Experience Program. By comparing sec. 49.047 and sec. 49.05, Stats., it is clear there was no legislative intent to extend worker's compensation benefits under the new Work Experience Program.

The Work Experience Program is mandatory. Sec. 49.047(4), Stats. The Work Relief Program, however, is optional. Sec. 49.05(1), Stats. The Work Experience Program is designed to "provide a useful work experience, and when possible, work training opportunities which may lead to gainful employment for the persons receiving relief under s. 49.046, Stats." Sec. 49.047(1), Stats. Clearly, the purpose of the Work Experience Program is to train persons for permanent employment similar to other on-the-job training programs. In comparison, the Work Relief Program has little, if any, training objective. Where work relief is in effect, persons entitled to relief may be required to work for the administering body rather than simply receiving relief payments. Such persons may work alongside skilled tradesmen who are regular employees. Without question, persons involved in work relief programs are paid wages for the work they perform which, in effect, are in lieu of relief payments.

Under the Relief of Needy Indian Persons Program, the amount of aid is determined independent of the individual's participation in a work experience program. In fact, as already indicated, the main focus of the Work Experience Program is on training under a program authorized and sponsored not by the Department but by the body appointed to administer relief under sec. 49.046, Stats.

These are only some of the differences between sec. 49.047 and sec. 49.05, Stats. In my opinion, these differences can lead to no other conclusion than that the Legislature intended to remove the Relief of Needy Indian Persons Program and the related Work Experience Program from the mandated effects of coverage under the Work Relief Program, including the worker's compensation liability provision of sec. 49.05(4), Stats.

The Legislature no doubt also was aware of the jurisdictional problems inherent in tribal-state relations. Had the Legislature intended to extend worker's compensation benefits to persons involved in a work experience program under sec. 49.047, Stats., they no doubt would have specifically made provision for the reimbursement of costs associated with the administration and payment of worker's compensation benefits by a body appointed by the Department to administer relief under sec. 49.046, Stats. There, of course, is nothing in sec. 49.046 or sec. 49.047, Stats., to support an inference of legislative intent to require, by contract or otherwise, an elected tribal governing body or other administrative body to incur such costs. This is in stark contrast to sec. 49.05(4), Stats., which specifically makes municipalities or counties liable to persons granted work relief for worker's compensation benefits.

You have also asked:

2. Are benefits recoverable under the worker's compensation law from the Department of Health and Social Services when recipients of relief are participating in an established work experience program as a condition of eligibility under s. 49.046, Wis. Stats.?

In 41 Op. Att'y Gen. 289, 293 (1952), it is stated:

From the foregoing cases, it is apparent that there must be at least two prerequisites before a person engaged upon work relief

may recover benefits under the workmen's compensation law: (1) the project must be duly authorized; and (2) there must be either an express contract of hire, or circumstances from which such a contract may be implied.

That opinion makes it clear that a work project must be duly authorized by the body administering a work relief program. Thus, assuming for the sake of discussion that the Work Experience Program can be considered equivalent to work relief under sec. 49.05, Stats., it, nevertheless, is clear from the legislation that the Department is not involved in the authorization of any particular work project that may be part of a work experience program. It is the administering body and not the Department that must authorize and sponsor the work experience program.

Also, it is clear that there is no employer-employee relationship between the Department and the persons who participate in a work experience program in order to remain eligible for aid under sec. 49.046, Stats. As 41 Op. Att'y Gen. 289 (1952) concludes, liability for worker's compensation does not arise out of the mere furnishing of relief, but out of the relationship which ensues between the agency administering relief and the recipient.

In *Kress Packing Co. v. Kottwitz*, 61 Wis. 2d 175, 212 N.W.2d 97 (1973), the court identified a number of criteria utilized in determining whether there is an employer-employee relationship. The principal criterion is whether the employer has a right to control details of the work done. Secondary criteria are "(1) The direct evidence of the exercise of the right of 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." *Id.* at 182.

Under sec. 49.047, Stats., it is the agency appointed by the Department of Health and Social Services, and not the Department itself, which actually controls any work that may be involved in a work experience program. As already indicated, benefits under sec. 49.046, Stats., are determined independent of sec. 49.047, Stats. Although benefits may be denied to persons who choose not to participate in a work experience program, the Department has no

involvement in any decision to terminate the relationship between, for example, a tribal governing body and a person receiving benefits under sec. 49.046, Stats.

Since neither prerequisite is met, it is my opinion that, assuming for the sake of discussion worker's compensation applies to the Work Experience Program, the Department is not liable for any benefits for persons receiving aid pursuant to sec. 49.046, Stats.

In your final question, you asked:

3. If the elected tribal governing body, the appropriate Indian organization appointed by the Department, or the Department of Health and Social Services are liable for benefits recoverable under the worker's compensation law, what is the limitation of the liability, particularly when eligibility for relief under s. 49.046, Wis. Stats. continues to exist?

In view of the answers to your first two questions, your third question need not be considered.

BCL:JDN

Circuit Court; Criminal Law; Circuit courts do not possess inherent powers, in the absence of statute, to order the expunction or destruction of criminal conviction records. OAG 27-81

June 22, 1981.

HOWARD G. BJORKLUND, *Administrator*
Law Enforcement Services Division
Department of Justice

You have asked my opinion on the following question:

Does a circuit court in the State of Wisconsin have inherent authority to order expunction of criminal conviction records where sec. 973.015, Stats., is not applicable?

I have concluded for the reasons set forth below that it does not.

Section 973.015(1), Stats., entitled Misdemeanors, special disposition, provides as follows:

(1) When a person under the age of 21 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum penalty is imprisonment for one year or less in the county jail, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition.

A crime for which the maximum penalty is stated as "imprisonment for not more than one year in the county jail," *i.e.*, not in the state prison, is by definition a misdemeanor. Secs. 939.60 and 973.02, Stats.

This statute specifically grants to courts in this state power to expunge misdemeanor convictions of certain defendants provided there is compliance with the requirements and qualifications contained in that statute. The only other expunction statute in this state, sec. 165.84(1), Stats., is of very limited application. It provides for the return of fingerprint records to persons arrested or taken into custody "and subsequently released without charge, or cleared of the offense through court proceedings," *i.e.*, expunction of exonerated persons' fingerprint records.

These two statutes are the only legislative statements regarding expunction of criminal records in this state. Because there is, therefore, no explicit legislative provision of authority in the circumstances you raise, an affirmative answer to your question may only rest on an analysis of the inherent or implied powers of a court.

Our supreme court has recently discussed the nature of such inherent powers at length in *State v. Braunsdorf*, 98 Wis. 2d 569, 286 N.W.2d 14 (1980). Because of its value to this discussion, the court's comprehensive analysis merits quotation:

We had occasion to review our previous statements on the doctrine of inherent power in *Jacobson v. Avestruz*, 81 Wis.2d 240, 244-46, 260 N.W.2d 267 (1977), wherein it is stated:

“This court has previously discussed the scope of the inherent powers of the courts of this state, In *State v. Cannon*, 196 Wis. 534, 536-37, 221 N.W. 603 (1928) this court summarized the nature of the powers inherent to the courts as follows”

“ ‘In order that any human agency may accomplish its purposes, it is necessary that it possess power. The executive must have power to direct and control his business. The superintendent of the works must have power to direct his men. In order to accomplish the purposes for which they are created, courts must also possess powers. From time immemorial, certain powers have been conceded to courts because they are courts. Such powers have been conceded because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence. These powers are called inherent powers. In *In re Court Room*, 148 Wis. 109, 121, 134 N.W. 490, it was said:

“ ‘ “The authorities, insofar as any can be found on the subject, are to the effect that a constitutional court of general jurisdiction has inherent power to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency. A county board has no power to even attempt to impede the functions of such a court, and no such power could be conferred upon it.”

“ ‘In *In re Bruen*, 102 Wash. 472, 172 Pac. 1152, the supreme court of Washington said:

“ ‘ “The inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy had been granted or not; the power to promulgate rules for its practice; and the power to provide process where none exists. It is true that the judicial power of this court was created by the constitution, but upon coming into being under the constitution, this court came into being with inherent powers.” ’

“Since *State v. Cannon*, this court has made reference to the inherent powers of the courts in various contexts. In *In re Can-*

non, 206 Wis. 374, 393, 240 N.W. 441 (1932), this court discussed the concept of the judiciary's inherent powers and the immunity of these powers from legislative abrogation. In *Latham v. Casey & King Corp.*, *supra* at 314-15, this court stated:

“It is considered well established that a court has the inherent power to resort to a dismissal of an action in the orderly administration of justice. *The general control of the judicial business before it is essential to the court if it is to function.* “Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort.” 14 Am. Jur., Courts, p. 371, sec. 171, Inherent Powers of Courts, 1963 Supp., p. 77.’ (Emphasis supplied.)”

98 Wis. 2d at 578-80.

Our supreme court then went on to point out what is learned from these cases and writings is that the inherent powers of a court are those powers without which the courts cannot properly function, that is, they are those powers which are *necessary to the very existence* of the court as a court. Other jurisdictions have reached similar results. In *In Re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937), the Nebraska Supreme Court stated that those powers are inherent which are essential to the dignity, functions and very existence of the courts as courts. In *Brydonjack v. State Bar of California*, 208 Cal. 439, 281 P. 1018 (1929), the California Supreme Court held that the fact that courts have all the inherent or implied powers necessary to properly and effectively function and exist does not mean that the courts are independent of the Legislature in the exercise of those powers.

Your question then is distilled to the following:

Is the power to order expunction of criminal conviction records a power necessary to the very existence of our courts without which power they could not properly function? I conclude not. I do not perceive that the inherent power to destroy records of criminal convictions is in any way necessary to the efficient and orderly exercise of

jurisdiction or is any way essential to the continued existence of our courts. Those courts will continue, without that power, to exist, to exercise jurisdiction over subject matters and persons and to duly administer the law of this state.

There are also sound policy bases underlying the conclusion to not vest courts with the implied power to destroy records of criminal convictions. As one commentator has noted:

Neutral identification information contained in the records, such as fingerprints and photographs, can be quite helpful to local police if the individual is ever under investigation again. Positive identification is often essential to link a suspect to a crime or to protect a person who is innocent. Also, imputational information such as the arrest notation can indicate a pattern of conduct that may be the basis for a future arrest or for a decision to press charges. If a rearrest is made, the arrest record may furnish facts concerning prior conduct which, although not sufficient to warrant conviction in the previous case, may still be useful to trained interpreters of records.

Comment, 38 U. Chi. L. Rev. 850, 854 (1971). *See also Morrow v. District of Columbia*, 417 F.2d 728 (D.C. Cir. 1969) and *United States v. Kalish*, 271 F. Supp. 968 (D.P.R. 1967).

It is notable that these statements were made in comments regarding the justification for retaining arrest records of *exonerated or uncharged* arrestees. Such reasoning applies even more vigorously in the case of *convicted* criminals. In addition, criminal conviction records are of critical importance in considering questions involving bail and pretrial release (sec. 969.01(4), Stats.), the habitual offender or repeater statute (secs. 973.12 and 939.62, Stats.), and sentencing in general.

Finally, although constitutional due process and privacy arguments are properly being raised in many contexts, (*see, e.g.*, 1 LaFave *Search and Seizure*, 1.9 Expungement of Arrest Records (1978)) they have apparently simply not been accepted and applied to cases involving records wherein the persons were convicted. For example, in *Alderman v. Shiawassee County Sheriff*, 66 Mich. App.

649, 653, 239 N.W.2d 696, 698 (1976), it is stated: "Plaintiffs have not shown us any case, nor has our independent research disclosed any case, in which an individual, after conviction, had a claim based upon privacy to return of arrest records."

In fact, at least one court has rejected such constitutional arguments raised in support of claims for expunction of records in regards to a *non-convicted* person on both due process and privacy grounds. *Hammons v. Scott*, 423 F. Supp. 618 (N.D.Cal. 1976) (relying on *Paul v. Davis*, 424 U.S. 693 (1976)).

Therefore, it is my opinion that circuit courts in the State of Wisconsin do not possess the inherent or implied powers, in the absence of authorizing or enabling statutes, to order the destruction or expunction of criminal conviction records.

BCL:JM

Wisconsin Relocation Assistance Act; Words And Phrases; A tenant who rents or leases a new parcel of property in reasonable anticipation of displacement prior to actual displacement is entitled to receive replacement payments as provided by sec. 32.19(4m)(b), Stats. OAG 28-81

June 22, 1981.

FRED A. RISSER, *President*
State Senate

You have requested an interpretation of sec. 32.19(4m)(b), Stats., created by ch. 221, Laws of 1979, relating to replacement payments for displaced tenants. You ask whether a tenant who rents or leases a new parcel of property in anticipation of displacement prior to the service of the jurisdictional offer and who is subsequently displaced is entitled to receive replacement payments as provided by sec. 32.19(4m)(b), Stats.

For the purposes of responding to your question, I will assume the tenant in question is a displaced person as set out in sec. 32.19(2)(c),

Stats., has resided on the premises for the required time period (sec. 32.19(4m)(b), Stats.), comparable replacement property is involved (sec. 32.19(2)(g), Stats.), and the tenant enters into the new lease because of the pending condemnation which actually takes place.

A “displaced person” for the purposes of sec. 32.19, Stats., is defined by sec. 32.19(2)(c), Stats., as:

[A]ny person who moves from real property or who moves his personal property from real property ... as a result of the acquisition of such real property, in whole or in part or subsequent to the issuance of a jurisdictional offer under this chapter, for public purposes or, as the result of the acquisition for public purposes of other real property on which such person conducts a business or farm operation

Thus, the statute clearly conditions the “displaced person” status upon movement from the property either after the date of acquisition or after the date of the jurisdictional offer. Persons who vacate the property before any of those dates are not eligible for relocation assistance.

It is noteworthy that the definition of a “displaced person” once covered persons who moved in anticipation of the acquisition. Section 32.19(2)(c), Stats. (1969), read in part: “ ‘[D]isplaced person’ means any person who moves from real property ... as a result of the acquisition or reasonable expectation of acquisition of such real property in whole or in part, which is subsequently acquired in whole or in part for public purposes.” However, ch. 103, Laws of 1971, deleted the “reasonable expectation” language and substituted “subsequent to the issuance of a jurisdictional offer” for the words “which is subsequently acquired in whole or in part.”

Section 32.19(4m)(b), Stats., reads as follows:

Tenant-occupied business or farm operation. In addition to amounts otherwise authorized by this chapter, the condemnor shall make a payment to any tenant displaced person who has owned and occupied the business operation, or owned the farm operation, for not less than one year prior to initiation of negotiations for the acquisition of the real property on which the busi-

ness or farm operation lies, and who actually rents or purchases a comparable replacement business or farm operation for the displaced business or farm operation within 2 years after the date the person vacates the acquired property.

Your inquiry asks whether the language of this statute requires that comparable replacement property be rented or purchased only *after* the date on which the person vacates the premises?

It appears that the language "within 2 years after the date the person vacates the acquired property" is ambiguous in that reasonable persons could interpret it in more than one way. See *Aero Auto Parts Inc. v. Dept. of Transp.*, 78 Wis. 2d 235, 238, 253 N.W.2d 896 (1977). On the one hand, this provision could be interpreted as establishing a time period, two years after the person vacates, *within which* a person must rent or purchase replacement premises. On the other hand, it is also reasonable to interpret this language as creating a time *beyond which* the rent or purchase of replacement premises may not be taken without any attempt to fix a first point in time when such rent or purchase must be taken.

I believe that the meaning of the phrase "within 2 years after the date the person vacates the acquired property," although not without ambiguity, should not be interpreted to mean that the displaced tenant must wait until he actually vacates his old premises in order to secure replacement premises.

It is well recognized that the word "within" may be interpreted to mean not beyond, not later than, or a time beyond which an action shall not be taken. *Adams v. Ingalls Packing Co.*, 30 Wash. 2d 282, 191 P.2d 699, 701 (1948); *Jensen v. Nelson*, 236 Iowa 569, 19 N.W.2d 596, 598 (1945). It prescribes the end of the time period within which the action shall be taken, but it does not necessarily fix the beginning or the first point in time when the action *may* be taken. *Reifke v. State*, 296 N.Y.S.2d 667, 670, 31 A.D.2d 67 (1968).

I believe a fair and reasonable interpretation of the phrase "within 2 years after the date the person vacates the acquired property" intends to fix only the *terminus ad quem*, the limit beyond which the

action may not be taken, and does not fix or set the *terminus a quo*, or the first point in time. See *Davies v. Miller*, 130 U.S. 284 (1889).

In construing this ambiguity, I find the declaration of the legislative purpose to be persuasive, and to further support the interpretation which fixes only the *terminus ad quem*, a time limit beyond which the action may not be taken. See *State ex rel. Harvey v. Morgan*, 30 Wis. 2d 1, 10, 139 N.W.2d 585 (1966).

Moreover, the cardinal rule of statutory construction is that the purpose of the whole act will be sought and favored over a construction which would defeat the manifest object of the act. See *State ex rel. State Public Defender v. Percy*, 97 Wis. 2d 627, 635, 294 N.W.2d 528 (Ct. App. 1980). The Legislature has clearly revealed its purpose in enacting section 32.19 of the Relocation Act, which reads in part as follows:

(1) The legislature declares that it is in the public interest that persons displaced by any public project be fairly compensated by payment for the property acquired and other losses hereinafter described and suffered as the result of programs designed for the benefit of the public as a whole; ... payment of such relocation assistance and assistance in the acquisition of replacement housing are proper costs of the construction of public improvements.

Thus, it has been found to be in the public interest that persons who are displaced by any public project be fairly compensated for the loss of their property and those relocation expenses specifically enumerated in secs. 32.19-32.195, Stats.; 63 Op. Att'y Gen. 201, 202 (1974). Further, because this is a remedial statute, I believe it is to be liberally construed so as to do justice to the legislative intent and to effect the evident purpose of the Legislature. See *Pella F. Mut. Ins. Co. v. Hartland R. T. Ins. Co.*, 26 Wis. 2d 29, 41, 132 N.W.2d 225 (1965) and *Holl v. Merrill*, 251 Wis. 203, 209, 28 N.W.2d 363 (1947).

I conclude that if this provision of the statute is interpreted to permit reimbursement only for a lease entered into *after* the date the person vacates the acquired property, the result would frustrate the legislative declaration of purpose which is to fairly compensate per-

sons displaced by public projects. Under such an interpretation, a person might suffer serious financial losses from the date the tenant vacates the property until such time as he is able to secure a new lease. Since there is no provision in the statute for reimbursement of any of these interim expenses, I do not believe the Legislature would intend such a result as it is clearly contrary to its declared purpose.

Thus, it is my opinion that a displaced person is entitled to relocation assistance benefits if he rents or purchases replacement premises before he actually vacates the premises provided he satisfies the other criteria set forth in ch. 32, Stats.

BCL:JRS

Municipalities; Ordinances; Codification and publication of municipal ordinances discussed. OAG 29-81

June 22, 1981.

FRANK VOLPINTESTA, *Corporation Counsel*
Kenosha County

You state that:

Several years ago, Kenosha County codified its municipal code and the time has now come to bring that code up to date and also to renumber all of the sections contained within that code in order to reflect a better organizational structure. In addition, a few new ordinances that have not heretofore been passed by the county board of supervisors are being incorporated into the new code as well as a comprehensive revision of the Kenosha County Zoning Ordinance.

You therefore ask four questions concerning the application of secs. 59.09 and 66.035, Stats.:

1. May the county board in adopting an ordinance pursuant to section 66.035 ... effectively renumber its entire code of municipal ordinances without the need for a rather lengthy and cumbersome revisor's ordinance;

2. May the county board of supervisors in adopting an ordinance pursuant to 66.035 effectively incorporate new ordinances into the code without any further publication pursuant to section 59.09 of the Wisconsin Statutes; and

3. May a comprehensive revision of the Kenosha County Zoning Ordinance enacted pursuant to the provisions of section 59.97(5)(d) be incorporated in the municipal code of ordinances as a general ordinance along with all of the other ordinances ... and by use of the provisions of section 66.035 of the Wisconsin Statutes avoid further publication of what has turned out to be a rather lengthy ordinance and very costly to have published. This assumes that the public hearing requirements called for by section 59.97 have been complied with along with notices of the holding of the public hearing.

4. In the event that the section 66.035 in the ordinance provided for therein cannot be used as a substitute for publication of the full text of the ordinance as a special supplement in a newspaper, how many publications are required of the ordinance and must the zoning ordinance be published both before and after publication?

For the reasons which follow, it is my opinion that the answer to the first three questions is yes. It is therefore unnecessary to answer your fourth question.

Your questions require a determination as to the circumstances when sec. 66.035, Stats., exempts a county from the publication requirements contained in sec. 59.09, Stats.

Section 59.09, Stats., provides, in material part:

(1) Whenever any county board passes any ordinance under this chapter the county clerk shall immediately publish it as a class 1 notice, under ch. 985; and such clerk shall procure and distribute copies of such paper to the several town clerks, who shall file the same in their respective offices.

(2) Said board shall, by ordinance or resolution, provide for publication in one or more newspapers in the county as a class 1 notice, under ch. 985, a certified copy of all its proceedings had

at any meeting, regular or special; said publication to be completed within 60 days after the adjournment of each session.

Section 66.035, Stats., provides:

The governing body of any city, town, county or village may authorize the preparation of a code, or part thereof, of general ordinances of such municipality. Such code, or part thereof, may be adopted by an ordinance referring thereto and may be published in book or pamphlet form and such publication shall be sufficient even though the ordinances contained therein were not published in accordance with ss. 59.09, 60.29 (9), 61.50 (1) and 62.11 (4) (a). A copy of such code, or part thereof, shall be permanently on file and open to public inspection in the office of the clerk after its adoption and for a period of not less than 2 weeks before its adoption. A code adopted by a county in accordance with the procedure provided in this section prior to April 30, 1965 shall be valid notwithstanding failure to comply with s. 59.09.

Section 66.035, Stats., applies only when the county is engaged "in the preparation of a code." Your first three questions seek to ascertain whether sec. 66.035, Stats., applies to renumbered, revised, and newly created ordinances.

Any generally accepted definition of the word "code" encompasses the renumbering of ordinances. "A Code implies, first, a compilation of existing laws, their systematic arrangement into chapters or articles and sections, with subheads, table of contents, and index for ready reference; second, a revision such as to harmonize conflicts, supply omissions, and generally clarify and make complete the [relevant] body of laws." *Gibson v. State*, 214 Ala. 38, 106 So. 231, 235 (1925). See also *State v. Pitet*, 69 Wyo. 478, 243 P.2d 177, 184 (1952); *Chumbley v. People's Bank & Trust Co.*, 166 Tenn. 35, 60 S.W.2d 164, 166 (1933). In addition, a body of laws can be codified more than once. *Shelp v. National Surety Corporation*, 333 F.2d 431, 438 (5th Cir. 1964). Because Kenosha County is again restructuring the organization of its ordinances, the renumbering of those ordinances in connection with such a reorganization is part of the "preparation of a code" within the meaning of sec. 66.035, Stats. Therefore, the answer to your first question is that those ordinances

which are being renumbered need not be published in a revisor's ordinance.

The legislative history of sec. 66.035, Stats., indicates that revised ordinances also need not be published when such revisions are part of the codification process. Section 66.035, Stats., was first enacted "to eliminate inconsistencies and surplusage and to clarify existing statutes ... relating to city and village government." Ch. 560 (intro.), Laws of 1957. Section 62.11(4)(c), Stats. (1955), had provided that:

Whenever the governing body of any city shall, by resolution, authorize the preparation of *a code consolidating and revising the general ordinances* of such city, or any portion thereof, it shall not be necessary to print such code at length in the official journal following its introduction in such governing body, but the same may be referred to therein by title, and after the adoption and passage of any such code, the same *may be published in book form and such publication shall be sufficient even though the ordinances thus consolidated and revised were not published* in accordance with the provisions of paragraph (a) of subsection (4) of this section; a copy of such code shall be kept on file and open for public inspection in the office of the city clerk.

Similar language had been contained in sec. 61.50(3), Stats. (1955), which was applicable to villages. Both of these sections were repealed and replaced by sec. 66.035, Stats. See ch. 560, Laws of 1957. Section 66.035, Stats., was later made applicable to counties and towns by ch. 32, Laws of 1965. No substantive change in procedure was contemplated by the passage of sec. 66.035, Stats. Predecessor statutes clearly indicate that codified revised ordinances were exempt from newspaper publication requirements. Section 66.035, Stats., authorizes the preparation of "a code or part thereof, of general ordinances." Since a zoning ordinance constitutes a part of the general ordinance of a municipality, the answer to your third question is that a comprehensive revision of a county's zoning ordinance under sec. 59.97(5)(d), Stats., is exempt from the publication requirements contained in sec. 59.09, Stats., if the comprehensive revision is part of the codification process. This answer makes it unnecessary to answer your fourth question.

It is an extremely close question as to whether the enactment of newly created ordinances constitutes part of "the preparation of a code" within the meaning of sec. 66.035, Stats. Modern authority suggests that codification can encompass the passage of entirely new legislation. "A *code* is to be distinguished from a *digest*. Digests of statutes consist of a collection of existing statutes, while a code is promulgated as one new law covering the whole field of jurisprudence." *Black's Law Dictionary* 323 (4th ed. 1968). *Accord, Shelp v. National Surety Corporation*, 333 F.2d 431, 438 (5th Cir. 1964). *But see Bassett v. United States*, 137 U.S. 496, 506 (1890). The Legislature appears to have concluded that the availability of a complete set of ordinances in the office of the clerk, as mandated by sec. 66.035, Stats., constitutes a sufficient substitute for the publication of those ordinances as a class 1 notice under sec. 59.09(c), Stats., and similar statutes. The notice provided under sec. 66.035, Stats., is just as effective for newly created ordinances as it is for revisions to existing ordinances. I, therefore, conclude that the answer to your second question is that newly created ordinances which are enacted pursuant to the codification process need not be published in the manner specified in sec. 59.09, Stats.

BCL:FTC

Cities; Villages; An incorporation referendum, held pursuant to sec. 66.018, Stats., is effective immediately if a majority of the votes cast are for incorporation. OAG 30-81

June 22, 1981.

VEL PHILLIPS
Secretary of State

You have requested my opinion "as to exactly when a city or village becomes incorporated under the s. 66.018 procedure."

It is my opinion that a city or village becomes incorporated under a referendum when the majority of the votes cast are for incorporation.

Prior to ch. 261, Laws of 1959, secs. 61.01 through 61.11, Stats. (1957), governed the procedure for incorporating areas of towns into villages, and sec. 61.08, Stats. (1957), provided that "the court ... shall make an order declaring that such territory ... shall be an incorporated village by the name specified in such application, if the electors thereof shall assent thereto as hereinafter provided." And, sec. 61.10(1), Stats. (1957), provided that:

[I]f a majority of such votes shall be in favor of incorporation the inhabitants of such territory shall, from the time of the recording of the order of the court aforesaid in the office of the register of deeds, be deemed a body corporate by the name specified in such order.

Under these provisions, a city or village became incorporated when the order of the court was recorded. *See* 9 Op. Att'y Gen. 540 (1920).

Sections 61.01 through 61.11, Stats. (1957), were repealed by ch. 261, Laws of 1959, and the current law governing incorporation into villages or cities is secs. 66.013 through 66.018, Stats. There is no specific statutory pronouncement as to the effective date of the incorporation.

Since there is no specific provision as to when the referendum for incorporation goes into effect, the general rule of law prevails: when there is no provision as to when a referendum goes into effect, it takes effect immediately without any further action. *See* McQuillin, *Municipal Corporations* 16.70 (Rev. Vol. 3rd Ed. 1969). *Also see* 44 Op. Att'y Gen. 108 (1955). While this opinion dealt with the effective date of a constitutional amendment, the reasoning and authorities therein are equally applicable to the effective date of local referenda.

Basically, the general rule is that when the will of the electorate has been expressed, it is beyond the power of any legislative body or public officer to alter the effectiveness of the referendum. As stated in *Bradley v. Union Bridge & Construction Co.*, 185 F. 544, 546 (Cir. Ct. D. Oregon 1911):

When the people exercise such right and enact a law at the polls, it becomes the expressed will of one branch of the lawmaking power, and it cannot be postponed or delayed by the other. If the Legislature may lawfully postpone the taking effect of an initiative measure until the vote has been canvassed and the Governor's proclamation issued, or for any other length of time, the right reserved to the people to propose and adopt laws is not "independent" of, but subservient to, the Legislature; and, if the Legislature may postpone the taking effect of such a law at all, it may do so for any length of time, and thus thwart the will of the people and render nugatory the constitutional provision reserving to them the right to propose and adopt laws. The canvass of the vote and the proclamation of the Governor is only official and authoritative evidence of the result of the election, and is not made necessary to the enactment of the law itself. The law is adopted or rejected at the time the vote is cast, and not when the official canvass is made. It may be suggested that under this view a law may in fact be in force without those affected thereby being aware of it; but this may be and often is true of acts of Congress and other lawmaking bodies which take effect from and after the date of their passage.

There is some indication that the Legislature, in enacting the current law, secs. 66.013 through 66.018, Stats., intended that a successful referendum become immediately effective. Section 66.018(5), Stats., provides in part: "If a majority of the votes in an incorporation referendum are cast in favor of a village or city, the clerk of circuit court shall *certify the fact* to the secretary of state." While it could be argued that this certification refers to the results of the referendum, it is more reasonable, in view of the general rule, to construe "certify the fact" as meaning the fact of incorporation.

To conclude that incorporation occurs at some other time, *i.e.*, when, under sec. 66.018(5), Stats., the clerk of circuit court certifies to the secretary of state or when the secretary of state certifies and records the incorporation, would put the effective date of the referendum at the whim of other officers who are under no specific time constraint within which to perform their strictly ministerial tasks. I do not believe the Legislature intended this.

The matter is not free of doubt and specific legislation on the point would be desirable.

BCL:JYG

Advertising; Engineering; Words And Phrases; Whether use of terms "engineer" or "engineering" in a business title violates ch. 443, Stats., depends on a case-by-case analysis of the circumstances to determine whether these terms tend to convey the impression that a person or business is offering professional engineering services when it is not certified to do so. OAG 31-81

July 2, 1981.

ANN HANEY, *Secretary*

Department of Regulation and Licensing

Your Department has asked whether a business firm which uses the term "engineering" in its business name without any other description of the services offered and which has no professional engineer retained by the firm is in violation of ch. 443, Stats.

An analysis of the applicable statutory and case law indicates that your question cannot definitely be answered "yes" or "no," but that the answer depends on the particular circumstances under which the business uses the term "engineering."

Section 443.08(5), Stats., forbids a firm, partnership, or corporation from, among other things, "assum[ing], us[ing] or advertis[ing] any title or description tending to convey the impression that it is engaged in the practice of architecture or professional engineering" unless the firm employs professional engineers certified under this chapter and has received a certificate of authorization to perform professional engineering services. Sec. 443.08(2), Stats.

Likewise, no person shall "assume, use or advertise any title or description tending to convey the impression that he or she is an architect or professional engineer" unless he or she is certified under this chapter. Sec. 443.02(3), Stats.

Finally, a person who “represents” himself or herself as a professional engineer who has not been certified under this chapter is subject to fine or imprisonment. Section 443.18(1)(a), Stats.

These statutes indicate that neither a business nor a person may assume, use or advertise a title or description which tends to convey to the public the *impression* that such business or person is a professional engineer when said business or person is not certified under this chapter. The focus in considering whether the use of the word “engineering” in a business title violates this chapter must thus be on the likely impression conveyed to the public as to whether that person is a professional engineer. The statutory language indicates that the determination must depend on the facts and circumstances surrounding the business’ or person’s use of that term.

In *State ex rel. Wis. R. Bd. of A. & P. E. v. T.V. Engineers of Kenosha, Inc.*, 30 Wis. 2d 434, 141 N.W.2d 235 (1966), the supreme court overturned an injunction against T.V. Engineers, Inc., on the basis that T.V. Engineers, Inc., did not use a name that tended to convey the impression that it practiced professional engineering. The court, on page 443 of the opinion, indicated that the use of the term “engineer” or “engineering” in a business title *could* tend to convey the impression that the business offers professional engineering services. The court indicated that: “Whether the use of the word ‘engineer’ or ‘engineering’ in a business title tends to convey the impression of practicing or offering to practice professional engineering must then be determined as a matter of fact by the circumstances of the case under consideration.” *Id.*, 30 Wis. 2d at 443.

The supreme court has thus interpreted the statute to require examination of facts on a case-by-case basis. This is consonant with a prior attorney general’s opinion on a matter similar to the present one, 53 Op. Att’y Gen. 81 (1964), where it is stated at 89:

“The question of whether the company ‘implies’ or ‘represents’ or ‘holds itself out’ as able to practice professional engineering is then a question of fact and must be decided on the basis of the individual circumstances including, but not exclusively based on, the use of the word ‘engineering’ in its corporate name.”

Although *T.V. Engineers* and 53 Op. Att'y Gen. 81 (1964) were written under statutes which were repealed prior to the adoption of the present ch. 443, Stats., the former statutes were substantially similar to the present statutes on this matter. Thus the above authority remains relevant and useful in considering your question.

In conclusion, the above authority and analysis should make it clear why your question does not lend itself to a "yes" or "no" answer. Such questions must rather be determined on a case-by-case basis. Evidence which may be relevant to the above inquiry may include such things as advertisements, the services actually offered by the business (53 Op. Att'y Gen. 81, 89 (1964)), and yellow-page listings (*T.V. Engineers*), among others.

BCL:JDJ:EWJF

Chiropractors; Wisconsin Industrial Development Law; Words And Phrases; A chiropractic clinic may qualify for financing under the Wisconsin Industrial Development Law. OAG 32-81

July 9, 1981.

CHANDLER L. MCKELVEY, *Secretary*
Department of Development

You ask whether a chiropractic clinic qualifies for industrial development bond financing under sec. 66.521(2)(b)7., Stats. The answer is yes. You also ask whether the definition of chiropractic clinic under sec. 66.521, Stats., is determined by reference to the definition promulgated by the Chiropractic Examining Board. The answer is no.

Section 66.521(2)(b)7., Stats., defines "[h]ospital, clinic or nursing home facilities" as projects which are eligible for industrial development bond financing. It is my opinion that a chiropractic clinic is encompassed within the term "clinic" as found in sec. 66.521(2)(b)7., Stats.

“Clinic” is a vague and ambiguous word. *People v. Dobbs Ferry Medical Pavillion, Inc.*, 40 A.D.2d 324, 340 N.Y.S. 2d 108, 112 (1973). Where ambiguity exists, resort may be made to other acts of the Legislature to determine its intent in utilizing the ambiguous term. 82 C.J.S. *Statutes* 365 (1953).

A review of the statutes reveals that the Legislature does not consider the word “clinic” to refer exclusively to a facility operated by physicians. As examples, sec. 446.04(5)(e), Stats., permits use of the term “clinic” in a chiropractor’s office sign if the office meets the requirements of a clinic as defined by the Chiropractic Examining Board. Section 447.06(2), Stats., permits dental students to practice under direct supervision in a clinic. And sec. 50.39(3), Stats., exempts the “offices and clinics” of physicians, dentists, and chiropractors from the operation of secs. 50.32 to 50.39, Stats.

Furthermore, when the Legislature desires to restrict the operation of a statute to a particular type of clinic, it is fully capable of doing so. In sec. 141.07, Stats., counties are authorized to establish dental clinics. Section 46.21(2)(a), Stats., directs county boards of public welfare to supervise the operation of guidance clinics. Particularly instructive are secs. 67.01(7) and 67.04(1)(a), Stats., which authorize municipal borrowing for medical clinics. Section 67.01(7), Stats., contains the term “medical clinic” and defines the term as “an ambulatory health care facility which is operated as part of the practice of a physician, partnership of physicians, unincorporated medical group or service group of physicians as defined in s. 180.99 and which includes the offices of such physicians.” Thus, the Legislature clearly expressed its intent to restrict municipal borrowing for clinics exclusively to those operated by physicians. If the Legislature had any intent to restrict the use of industrial development bonds to physician’s clinics, it could have incorporated into sec. 66.521, Stats., a definition similar to the one utilized in sec. 67.01(7), Stats.

That the Legislature intended to include chiropractic clinics is also supported by the recent legislative history of sec. 66.521(2)(b)7., Stats. Chapter 362, Laws of 1979 (1980 Special Session Senate Bill 4), made various amendments to sec. 66.521(2)(b)7., Stats. During the course of the Legislature’s consideration of the bill, amendments

were introduced in both houses to specifically exclude chiropractor's offices from sec. 66.521(2)(b)7., Stats. The assembly amendment was rejected and the senate amendment was tabled. The failure of those amendments is an indication that the Legislature intends the term "clinic" to encompass chiropractor's clinics. See 2A C. Sands, *Statutes and Statutory Construction*, sec. 48.18 (4th ed. Rev. 1973) and *Estate of Sauer*, 216 Wis. 289, 293-94, 257 N.W. 28 (1934).

It is therefore my opinion that the Legislature's use of the word "clinic" in sec. 66.521(2)(b)7., Stats., evinces an intent to include facilities operated by various health professionals, including chiropractors.

It is also my opinion that the definition of clinic under sec. 66.521(2)(b)7., Stats., cannot be determined solely by reference to section Chir. 3.04 Wis. Adm. Code. That rule defines "clinic" pursuant to the directive set forth in sec. 446.04(5)(e), Stats. The purpose of that section is to prohibit misleading advertising of chiropractic services. On the other hand, promotion of industry in the state was the legislative purpose in enacting sec. 66.521, Stats. Given the differing objectives of the two statutes, reference to the Chiropractic Examining Board's rule to determine the meaning of "clinic" under sec. 66.521, Stats., is not appropriate, except for the limited purpose discussed below.

In 64 Op. Att'y Gen. 133 (1975), I discussed the meaning of the term "clinic" in view of the legislative intent of the Wisconsin Industrial Development Law. The matters discussed therein apply with equal force here. I concluded in that opinion that "clinic" means a form of group practice where practitioners "work in cooperative association, formally affiliated with each other in a professional business enterprise with a predetermined arrangement for the distribution of the income." 64 Op. Att'y Gen. at 136.

A question not resolved by my earlier opinion is the number of chiropractors that must be involved in a practice for it to be characterized as a group practice. In that opinion, I relied upon an American Medical Association definition which required the involvement of three or more physicians. Thus, with reference to chiropractors, resort to the Chiropractic Examining Board's definition relative to

the number of practitioners that must be involved in a clinic appears to be reasonable. Section Chir. 3.04 Wis. Adm. Code requires a clinic to have at least two practitioners. I therefore conclude that in order to qualify as a clinic under sec. 66.521(2)(b)7., Stats., a chiropractic clinic must at the minimum involve two chiropractors, and must otherwise meet the requirements set forth in 64 Op. Att'y Gen. 133 (1975).

BCL:DDS

Counties; County Corporation Counsel; District Attorney; The duty to represent the county department of social services rests solely with the district attorney or corporation counsel and county boards lack the authority to engage and compensate any other person or entity for such work. OAG 33-81

July 24, 1981.

DONALD E. PERCY, *Secretary*
Department of Health and Social Services

You ask:

1. May a county department of social services or public welfare obtain legal representation from a source other than the district attorney's or corporation counsel's office where no statute, rule, or regulation provides for such outside representation, no conflict of interest disqualifies the DA and corporation counsel staff, and the legal work falls within the statutory duties authorized for the DA or corporation counsel staff? In particular:

a. May the county department of social services or public welfare contract with a private law firm for the provision of legal services under the above circumstances?

b. May the county department of social services or public welfare secure legal services from an attorney directly employed on that department's staff and solely supervised by that department, whether or not the attorney is labeled as a

district attorney, corporation counsel, assistant district attorney, or assistant corporation counsel?

In the absence of a statute specifically providing otherwise,¹ the answer to your question and its subparagraphs (a) and (b) is no, assuming that the term "legal services" in subparagraphs (a) and (b) refers to "legal representation" in paragraph one.

You state that the Department of Health and Social Services may reimburse counties for expenses, including legal services expense, connected with certain public welfare and social services programs. *See* secs. 46.25, 49.52, Stats.

As pointed out in 65 Op. Att'y Gen. 245 (1976), the authority to advise and represent county officers and agencies rests solely with the district attorney or corporation counsel.

A district attorney has the responsibility to prosecute and defend all civil or criminal actions in the courts of his or her county in which the state or county may be an interested party. Sec. 59.47, Stats. By virtue of sec. 59.07(44), Stats., county boards may employ corporation counsels and assistant corporation counsels to handle civil matters. In counties where the office of corporation counsel has been created, that office has the responsibility to prosecute and defend those civil matters which formerly were the responsibility of the district attorney. 49 Op. Att'y Gen. 97 (1960). This would include carrying out the provisions of state law as they relate to health, welfare, and social services.

If the staff of the district attorney or corporation counsel is insufficient to provide legal services required by the county department of social services, an attorney can be appointed by the district attorney as an assistant district attorney or by the corporation counsel as an assistant corporation counsel to do the legal work required by the county department of social services provided the appointment is authorized by the county board. Such position can be, in effect, funded or partially funded by the county with funds it receives under the provisions for reimbursement for services performed pursuant to,

¹ *E.g.*, sec. 49.26(3), Stats. (1971), now repealed.

for example, sec. 49.52, Stats. But the attorney must be under the supervision and control of the district attorney or corporation counsel. See 65 Op. Att'y Gen. 245 (1976).

You also ask:

2. Where legal work done on behalf of the county department of social services or public welfare is performed by a full-time district attorney or corporation counsel or one of their assistants, may the county department provide compensation or commission to that DA or corporation counsel beyond the DA or corporation counsel's official salary, where no statute, rule, or regulation provides for the extra compensation or commission?

In counties where there is no corporation counsel, the district attorney is required to provide all needed legal services. 25 Op. Att'y Gen. 549 (1936). The district attorney takes that office *cum onere* and is not entitled to any extra compensation not provided by law. 30 Op. Att'y Gen. 245 (1941). As provided in sec. 59.15, Stats., the county board must fix the salary of the district attorney prior to the earliest time for filing nomination papers for that office.

In counties where the office of corporation counsel has been established, the duties of the corporation counsel and compensation therefore are established by the county board. If a county board has transferred all civil work to the office of corporation counsel, civil work done on behalf of the county department of social services would be included in the compensation established by the county board.

If the duties of the corporation counsel have been specified and do not include performing services for the county department of social services, and it is contemplated that the responsibilities of the corporation counsel be expanded to include such work, under sec. 59.07(44), Stats., a county board may transfer such duties and adjust the compensation to be paid to the corporation counsel or assistant corporation counsel.

The county board can increase or decrease the compensation of a county corporation counsel at any time pursuant to sec. 59.15(2)(c), Stats. The board can increase but not decrease the compensation of

an elected district attorney at any time during his or her term pursuant to sec. 66.197, Stats.

Next, you ask:

3. Does the answer to #2 differ if the DA or corporation counsel is a part-time DA or corporation counsel? For example, if a part-time DA finds he is unable to complete the necessary work for the county agency within the hours contemplated by his part-time employment, may the DA assess the agency a fee for the extra hours spent performing the agency's legal work?

The answer to question two does not differ if the county employs a part-time district attorney or corporation counsel. A "part-time" district attorney or corporation counsel may be allowed to practice law or pursue other gainful endeavors when not actually engaged in performing duties as district attorney or corporation counsel. "In so far as they are not working for the county, their time is their own, and they would be permitted to keep whatever they earn in performing services that are clearly not rendered on behalf of the county." 30 Op. Att'y Gen. 275, 277 (1941). Where work is done on behalf of the county, district attorneys or corporation counsels are not permitted to receive additional compensation beyond that provided by their salary.

Subsequently, you have asked:

1. Where the county maintains an action to collect moneys owed a higher level of government or to collect moneys owed both the county and a higher level of government, may any representative or department of the county deduct an attorney fee or collection fee from the collected funds before remitting the remaining funds to the state or federal government, where the statute concerning the collection action does not provide for such a fee, whether or not such fees are turned over to the county treasury?

2. Does the answer to the above question vary depending upon the type of county legal representative used (part-time versus full-time; district attorney/corporation counsel versus some other source of legal representation)?

Where the county maintains an action to collect monies owed a higher level of government or to collect monies owed both the county and a higher level of government, the county may not deduct an attorney fee or collection fee from the collected funds before remitting the remaining funds to the state or federal government unless the statute concerning the collection provides for such a fee. There is no common-law right of a county to obtain repayment of public relief; right to recover of relief payments is statutory. *Whitwam v. Whitwam*, 87 Wis. 2d 22, 273 N.W.2d 366 (1978). Section 49.195, Stats., which covers recovery of AFDC funds, makes no provision for deduction of a collection fee. Specifically, sec. 49.195(2), Stats., states that amounts recovered shall be paid to the United States, the state, and its subdivisions, proportionally, "in the same manner as amounts recovered for old-age assistance are paid." Where the statute authorizing the collection of monies owed the government does provide for such a fee (*see* sec. 49.65(4), Stats., which authorizes deduction of reasonable costs of collection, including attorneys' fees, where the collection is made from an insurer of a public assistance recipient or from a party against whom the recipient has a claim in tort), deducted fees must go into the county treasury rather than to the district attorney or corporation counsel as an individual.

BCL:WHW

Clinical Practice Plan, University Of Wisconsin School Of Medicine; Open Meetings; Physicians And Surgeons; University; The Clinical Practice Plan Committee, Departmental Practice Plan Committees and University of Wisconsin Clinical Practice Association, which are components of the University of Wisconsin School of Medicine Clinical Practice Plan, are "governmental bodies" as defined in sec. 19.82(1), Stats., and subject to the open meetings law.
OAG 35-81

August 12, 1981.

JAMES E. DOYLE, JR., *District Attorney*
Dane County

You request my opinion whether the Clinical Practice Plan Committee, the Departmental Practice Plan Committees and the University of Wisconsin Clinical Practice Association, which are components of the University of Wisconsin School of Medicine Clinical Practice Plan, are "governmental bodies" as defined in sec. 19.82(1), Stats., and therefore subject to the provisions of secs. 19.81-19.98, Stats.

I am of the opinion that the answer is yes to both portions of your question.

You have enclosed a copy of the "University of Wisconsin School of Medicine Clinical Practice Plan" which describes the purpose, function and operation of the plan and its component groups.

I have reviewed the copy of the Clinical Practice Plan which you forwarded and agree with your statement of its content:

The Clinical Practice Plan is a method by which income ... [generated] by medical school members in their clinical practices is distributed. It has another stated purpose of providing financial support for the development of the clinical departments and the School of Medicine. It operates largely as a self-governing organization.

The Plan is closely associated with, and tied into, a public agency, the University of Wisconsin Medical School. Membership in the Plan is required of all full time members of the Medical School faculty who have clinical practice ... [responsibilities] and are based in Dane County. The determination as to whether other faculty members shall participate in the plan is made by the Department Chairman and the Dean. The Chairman of the Department serves as the Chairman of the Departmental Practice Plan Association and of the Departmental Practice Plan Committee. The Departmental Practice Plan Committee must provide semi-annual financial reports to the

Dean. The Plan required the approval of the University Administration and the Board of Regents. Any major revision of the Plan requires the approval of the Board of Regents.

The committees and associations, referred to above, meet from time to time to conduct the Plan's business.

Section 19.82(1), Stats., provides:

"Governmental body" means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. IV or V of ch. 111.

In my opinion the University Clinical Practice Association (UCPA) is a subunit of the University of Wisconsin School of Medicine; the Departmental Plan Committees (DPC) and Departmental Practice Plan Associations (DPPA) are subunits of their respective departments or of UCPA. The Clinical Practice Plan Committee (CPPC) which consists of the chairman, acting chairman or his designee of each DPPA and the dean of the School of Medicine or his designee is a subunit of the School of Medicine, the UCPA, or in itself constitutes a separate governmental body. The approval of the Plan by the Board of Regents was by resolution which is equivalent to a "rule" within the meaning of that term as used in sec. 19.82(1), Stats.

The Legislature clearly intended that law to apply to departments and subunits of the University of Wisconsin System institution. Section 19.84(5), Stats., provides: "Departments and their subunits in any university of Wisconsin system institution or campus are exempt from the requirements of subs. (1) to (4) but shall provide meeting notice which is reasonably likely to apprise interested persons, and news media who have filed written requests for such notice." *Also see 66 Op. Att'y Gen. 60 (1977).*

The plan appears to be, in part, an implementation of the various powers of the Board of Regents, the president of the University of

Wisconsin System, the chancellor and the faculty of each institution with respect to institutional governance. See secs. 36.09, 36.11, 36.13, 36.15, 36.23, 36.25(12), (13), Stats.

BCL:RJV

Criminal Law; Juvenile; Venue; Wisconsin courts have jurisdiction under ch. 48, Stats., over state resident juveniles alleged to be delinquent because they violated another state's criminal laws. OAG 36-81

August 13, 1981.

DARWIN L. ZWIEG, *District Attorney*
Clark County

You have requested my opinion whether a juvenile, who resides in the State of Wisconsin, can be prosecuted in this state for delinquent acts committed out of state; specifically, the theft and operation without owner's consent of a motor vehicle in North Dakota.

Before the 1977 repeal and recreation of sec. 48.12, Stats., the answer would certainly have been "yes." See 62 Op. Att'y Gen. 229 (1973). It is my opinion that the various changes in sec. 48.12, Stats., have not narrowed the juvenile jurisdiction of the courts. They retain juvenile jurisdiction over a Wisconsin resident child who commits crimes in another state. Former sec. 48.12, Stats. (1971), provided:

The juvenile court has exclusive jurisdiction, except as provided in s. 48.17 and 48.18 over any child:

(1) Who is alleged to be delinquent because he has violated any federal criminal law, criminal law of any state, or any county, town or municipal ordinance that conforms in substance to the criminal law.

This section was repealed and recreated by ch. 354, sec. 22, Laws of 1977, to read: "The court has exclusive jurisdiction, except as provided in ss. 48.17 and 48.18, over any child 12 years of age or older

who is alleged to be delinquent because he or she has violated any federal or state criminal law.”

Section 48.12, Stats., was amended by ch. 135, sec. 2, Laws of 1979, and was renumbered as sec. 48.12(1), Stats., by ch. 300, sec. 8(m), Laws of 1979. Therefore, sec. 48.12(1), Stats., now reads: “The court has exclusive jurisdiction, except as provided in ss. 48.17 and 48.18, over any child 12 years of age or older who is alleged to be delinquent as defined in s. 48.02(3m).”

Section 48.02(3m), Stats., was created by ch. 135, sec. 1, Laws of 1979. It provides: “‘Delinquent’ means a child who is less than 18 years of age and 12 years of age or older who has violated any state or federal criminal law, except as provided in ss. 48.17 and 48.18.”

At the same time that sec. 48.12, Stats., was repealed and recreated in the Laws of 1977, the Legislature also created sec. 48.125, Stats., ch. 354, sec. 23, Laws of 1977. That section, effective November 17, 1978, provides: “The court has exclusive jurisdiction over any child alleged to have violated a law punishable by forfeiture or a county, town or other municipal ordinance, except as provided under s. 48.17.”

These changes reflect the removal of the jurisdictional provision for ordinance violations from 48.12, Stats., and the creation of a separate statutory section, sec. 48.125, Stats., to deal with those matters. It appears that this change was the primary reason for the language change which raised the doubt in your mind as to whether jurisdiction still exists over juveniles who violate the criminal laws of other states.

The reference to violations of the “criminal law of any state” in former sec. 48.12(1), Stats., Laws of 1971, distinguished that phrase from the one which immediately followed it, “or any county, town or municipal ordinance that conforms in substance to the criminal law.” The phrase “criminal law of any state,” then, was a limiting phrase, excluding from jurisdiction juveniles involved in anything less than criminal law violations of other states. Therefore, the court would not have jurisdiction over juveniles alleged to have only violated an ordinance of another state, even though that violation might conform in substance to that state’s criminal law.

With the removal from sec. 48.12, Stats., of the language dealing with ordinance violations, there was no longer a need to provide such a sharp distinction when referring to state criminal law violations in sec. 48.12, Stats. The plain language still evidences legislative intent to vest the courts with broad juvenile jurisdiction based upon both in and out-of-state criminal conduct. The section still provides for jurisdiction over juveniles alleged to have violated *federal* criminal law. Clearly, the courts of this state normally cannot exercise jurisdiction over alleged violations of the United States Criminal Code. The provision granting jurisdiction over juveniles who violate "any" state criminal law is immediately before that providing jurisdiction over those who violate federal criminal law. When read together, these phrases appear to be identical in substance, if not in words, to the out-of-state jurisdictional provision of former sec. 48.12(1), Stats.

The only change of substance from old sec. 48.12(1), Stats., to the present law, therefore, appears to have been the removal of the jurisdictional provision for ordinance violations from that section to its own section, sec. 48.125, Stats. There is nothing to indicate that the Legislature went any further to limit the scope of juvenile jurisdiction to only those children alleged to have violated "any state *of Wisconsin* or federal criminal law" under sec. 48.02(3m), Stats.

Further, the venue statute, sec. 48.185, Stats., appears to contemplate this situation in which jurisdiction exists over out-of-state violators. Even though there is no direct reference in that provision to violations of the federal criminal law or of the criminal law of another state, it does provide that venue may be in "the county where the child resides, the county where the child is present *or*, in the case of a violation of a state law or a county, town or municipal ordinance, the county where the violation occurred." Sec. 48.185(1), Stats. Therefore, in the case of a federal or out-of-state criminal law violation, sec. 48.185, Stats., allows that venue be in the county where the child resides, or where he is present, even though the violation may have occurred elsewhere.

In reviewing sec. 48.12(1), Stats., a court might conclude that the language is unambiguous and clearly grants jurisdiction over Wisconsin resident juveniles alleged to have violated another state's criminal law. However, the 1977 changes may have created an ambiguity

resulting in the jurisdictional question which you now raise. Even assuming ambiguity, however, a court would probably find that sec. 48.12(1), Stats., still provides jurisdiction over alleged juvenile violators of another state's criminal law.

When one of several interpretations of a statute is possible, the court must determine the legislative intent from the language of the statute in relation to its scope, history, context, subject matter, and object intended to be accomplished. *Heaton v. Independent Mortuary Corp.*, 97 Wis. 2d 379, 394, 294 N.W.2d 15 (1980); *State ex rel. First National Bank & Trust Company of Racine v. Skow*, 91 Wis. 2d 773, 779, 284 N.W.2d 74 (1979).

The scope of the language which now appears at sec. 48.02(3m), Stats., is not expressly limited to violations of only *Wisconsin's* criminal statutes. Rather, it encompasses violations of "any state or federal criminal law."

The statutory history reveals that, at least from 1971 to 1977, sec. 48.12, Stats., did expressly confer jurisdiction on the courts over juveniles alleged to have violated criminal laws "of any state." See 62 Op. Att'y Gen. 229 (1973).

Again, one must consider the context in the former statute where the language immediately preceded the language referring to ordinance violations. In its present context, the language does not have to be distinguished from mere ordinance violations, since those have been given their own statutory section, sec. 48.125, Stats.

The subject matter of 48.12, Stats., is the exercise of juvenile jurisdiction over children alleged to be delinquent. The object intended to be accomplished by this and other provisions of the juvenile code is the antithesis of criminal prosecution; not to punish but to diagnose the cause of the child's problems and help resolve them. The court is to arrive at a result that will serve the best interests of the child, its parents, and the public. *State ex rel. State Public Defender v. Percy*, 97 Wis. 2d 627, 634-35, 294 N.W.2d 528 (Ct. App. 1980); *Winburn v. State*, 32 Wis. 2d 152, 158, 145 N.W.2d 178 (1966).

Read in this light, it appears that the language of secs. 48.12 and 48.02(3m) Stats., as it now stands, does permit the exercise of juve-

nile jurisdiction over children who are residents of this state but who violated the criminal laws of other states.

A constitutional challenge to this broad scope of juvenile jurisdiction, on the ground that the accused has the right to be tried in the state where the crime was committed, would be met by the fact that these are not criminal proceedings. While a criminal defendant does have the right to be tried in the state where the crime occurred, only principles of due process limit the exercise of juvenile jurisdiction.

The Wisconsin Court of Appeals recently reviewed the Wisconsin law which reflects the substantial difference in philosophy and approach of the juvenile courts from the criminal courts. In *Percy*, the court stated, at 634-35:

“[T]he role of the juvenile court is not to determine guilt or to assign fault, but to diagnose the cause of the child’s problems and help resolve those problems.” *State ex rel. Herget v. Waukesha Co. Cir. Ct.*, 84 Wis.2d 435, 451, 267 N.W.2d 309, 316 (1978). The code “can hardly be said to provide a remedy for a wrong.” *State ex rel. Koopman v. Waukesha Co. Ct. Judges*, 38 Wis.2d 492, 498, 157 N.W.2d 623, 626 (1968). ...

An adjudication of delinquency or the disposition of a delinquent is even less a “criminal liability for offenses committed” or a penalty or a forfeiture, as those terms are used in sec. 990.04, Stats., than it is a civil liability. Commitment of a juvenile to the department is not for the purpose of penalty or punishment, but to effect a result which will serve the best interests of the child, its parents, and the public. *In re Interest of J. K. (a minor)*, 68 Wis. 2d 426, 431, 228 N.W.2d 713 (1975). “The entire philosophy of the Children’s Code is avowedly the antithesis of criminal prosecution.” *Winburn v. State*, 32 Wis. 2d 152, 158, 145 N.W.2d 178, 180 (1966).

This broad jurisdictional scope does not conflict with the due process dictates of *In re Gault*, 387 U.S. 1 (1967), and *In re Winship*, 397 U.S. 358 (1970). See, 62 Op. Att’y Gen. at 231-32.

The safeguards mandated by those decisions are: notice of the charge, the right to counsel, the right of confrontation and cross-

examination, the privilege against self-incrimination, and proof by the state of guilt beyond a reasonable doubt. As long as these requirements are met (which, as a practical matter, will be more difficult in the case of an out-of-state criminal law violation), due process has been accorded the juvenile. Again, since this is not a criminal prosecution, but is, in fact, the very antithesis thereof, the state can prosecute and the court adjudicate a juvenile for delinquent acts alleged to have been in violation of another state's criminal laws.

BCL:DJO

Corporation Counsel; District Attorney; Health And Social Services, Department Of; District attorneys, whether compensated on a full-time or part-time basis, have a duty to represent the interests of the county and state in child support and paternity matters under sec. 46.25, Stats., petitions for a child alleged to be in need of protection or services under sec. 48.13, Stats., mental commitments pursuant to sec. 51.20, Stats., alcohol commitments under sec. 51.45, Stats., and petitions for appointment of a guardian under sec. 880.295(1), Stats., where the county board has not assigned such duties to a county corporation counsel. OAG 37-81

August 14, 1981.

MICHAEL J. DEVANIE, *District Attorney*
Rusk County

You request my opinion on whether sec. 59.47(14), Stats., requires a district attorney to handle all child support matters for the Department of Health and Social Services.

In general, if proper request is made, the answer is yes, assuming there is some substantial relationship with the county. Residence, venue or physical presence within the county of one or more of the persons or parties involved may be material factors.

Section 59.47, Stats., sets forth many of the duties of a district attorney.¹ Section 59.47(14), Stats., provides:

Cooperate, as necessary, with the county and the department of health and social services in establishing paternity and establishing and enforcing child support under the child support and establishment of paternity program under s. 46.25, including, but not limited to, representation of individuals not receiving assistance under s. 49.19. Upon the request and under the supervision and direction of the attorney general, brief and argue all such cases brought by appeal or writ of error or certified from his or her county to the court of appeals or supreme court.

Section 46.25(7), Stats., provides:

The department may represent the state or any individual in any action to establish paternity or to establish or enforce a child support obligation. The department shall delegate its authority to represent the state or any individual in any action to establish paternity or to establish or enforce a child support obligation under this section to the district attorney, or corporation counsel when authorized by county board resolution, pursuant to a contract entered into under s. 59.07(97), except that if the district attorney, or corporation counsel when authorized by county board resolution, neglects or refuses to represent the obligee in a child support or paternity action, the department may undertake the representation.

Limits of time available and human resources may make it impossible for a district attorney to handle every child support matter requested by the county or state departments. Such factors do not remove the duty to act or, in lieu thereof, to request the circuit court to appoint an attorney or attorneys to assist the district attorney in criminal or civil litigation pursuant to sec. 59.44(2), (3), (4), Stats. A district attorney has a great deal of discretion in determining whether to institute a criminal prosecution in a given situation. *State*

¹ Other statutes impose duties upon the office with respect to many specific areas of the law. See general index of the Wisconsin statutes under heading "DISTRICT ATTORNEY."

v. Kenyon, 85 Wis. 2d 36, 45, 270 N.W.2d 160 (1978). I am of the opinion that such officer also has discretion with respect to the prosecution of civil matters in which the county and the state are interested.

The county board has power to authorize a district attorney to appoint one or more assistant district attorneys pursuant to sec. 59.45, Stats., who may be compensated pursuant to sec. 59.15(2), Stats. The county board can also create the office of county corporation counsel pursuant to sec. 59.07(44), Stats., and provide that such officer carry out specified duties with respect to civil matters. Such subsection provides in part:

Whenever any of the powers and duties conferred upon the corporation counsel are concurrent with similar powers or duties conferred by law upon the district attorney, the district attorney's powers or duties shall cease to the extent that they are so conferred upon the corporation counsel and the district attorney shall be relieved of the responsibility for performing such powers or duties.

The duties of district attorneys are identical irrespective of whether the office is compensated on a part-time or full-time basis. Your concerns as to lack of sufficient personnel should be directed to the county board of supervisors and the circuit judge.

You also inquire what duty, if any, a district attorney has to represent the county in "CHIPS" petitions, alcohol commitments, mental commitments, guardianships and conservatorships.

Your questions are so general that complete answers cannot be given here. Please review 62 Op. Att'y Gen. Preface (1973), which sets forth the requirements to be observed by district attorneys and county corporation counsel when requesting an opinion of the Attorney General.

Your attention is directed to the following provisions of sec. 59.47, Stats., which provides in part:

The district attorney shall:

(1) Prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county in which the state or county is interested or a party; and when the place of trial is changed in any such action or proceeding to another county, prosecute or defend the same in such other county.

(2) Prosecute all criminal actions before any court for her or his county, other than those exercising the police jurisdiction of incorporated cities and villages in cases arising under the charter or ordinances thereof, when requested by the court; and upon request by the court, conduct all criminal examinations which may be had before the court, and prosecute or defend all civil actions before the courts in which the county is interested or a party.

....

(3) Give advice to the county board and other officers of his county, when requested, in all matters in which the county or state is interested or relating to the discharge of the official duties of such board or officers; examine all claims against the county for officers', interpreters', witnesses' and jurors' fees in criminal actions and examinations when presented to the county board, and report in writing thereto as to the liability of the county to pay the same.

....

(11) Perform any duties in connection with court proceedings in a court assigned to exercise jurisdiction under ch. 48 as the judge may request.

....

(14) Cooperate, as necessary, with the county and the department of health and social services in establishing paternity and establishing and enforcing child support under the child support and establishment of paternity program under s. 46.25, including, but not limited to, representation of individuals not receiving assistance under s. 49.19. Upon the request and under the supervision and direction of the attorney general, brief and argue all such cases brought by appeal or writ of error or certified from his or her county to the court of appeals or supreme court.

I assume that your reference to a "CHIPS" petition is concerned with sec. 48.13, Stats., which grants the court exclusive jurisdiction over "a child alleged to be in need of protection or services." Section 48.09, Stats., provides, in part:

The interests of the public shall be represented in proceedings under this chapter as follows:

....

(5) By the district attorney or, if designated by the county board, by the corporation counsel, in any matter arising under s. 48.13.

Alcohol commitments are made under sec. 51.45(12), (13), Stats., which are a part of ch. 51, Stats. I am of the opinion that sec. 51.20(4), Stats., which requires the district attorney to represent the public interest with respect to mental commitments, is applicable to proceedings under sec. 51.45, Stats., which is in the same chapter. It provides: "The district attorney or, if designated by the county board of supervisors, the corporation counsel or other counsel shall represent the interests of the public in the conduct of all proceedings under this chapter, including the drafting of all necessary papers related to the action."

This statute and sec. 59.47(1), Stats., make it the duty of the district attorney to act with respect to alcohol commitments where the county board has not assigned such duties to the corporation counsel. The duties imposed on the district attorney by sec. 51.20(4), Stats., are broader than those attending under sec. 51.02(3), Stats. (1967), which was discussed in 57 Op. Att'y Gen. 122 (1968).

It is impossible to set forth all of the circumstances under which a district attorney is allowed or required to initiate a guardianship petition. Section 880.295(1), Stats., utilizes the words "may apply" with respect to power of the district attorney. That subsection provides in part:

When a patient in any state or county hospital or mental hospital or in any state institution for the mentally deficient, or a resident of the county home or infirmary, appears in need of a guardian, and does not have a guardian, the department of

health and social services by its collection and deportation counsel, or the county corporation counsel or *district attorney if there is no corporation counsel, may apply* to the circuit court of the county in which the patient resided at the time of commitment or the circuit court of the county in which the facility in which the patient resides is located for the appointment of a guardian of the person and estate, or either, or for the appointment of a conservator of the estate, and the court, upon the application, may appoint the guardian or conservator in the manner provided for the appointment of guardians under ss. 880.08(1) and 880.33 or for the appointment of conservators under s. 880.31. If application is made by a district attorney or corporation counsel, a copy of the petition made to the court shall be filed with the department of health and social services. If application is made by a corporation counsel or district attorney for appointment of a guardian of the estate of the patient or resident, or by the patient or resident for appointment of a conservator of the patient's or resident's estate, *the court may designate the county as guardian or conservator* if the court finds that no relative or friend is available to serve as guardian or conservator

Under sec. 880.03, Stats., “[a]ll minors, incompetents and spendthrifts are subject to guardianship.” Section 880.07(1), Stats., specifically includes “[a]ny ... public official” in the list of persons eligible to petition for guardianship.

In 42 Op. Att’y Gen. 231 (1953), it was stated that county officers charged with the administration of social security aids have authority, under proper circumstances, to institute guardianship proceedings in behalf of recipients of social security aids and that in such cases, by reason of sec. 59.47, Stats., it is the duty of the district attorney to furnish legal services. Section 59.47(1), Stats., provides that a district attorney shall “[p]rosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county *in which the state or county is interested* or a party.”

I conclude that although the district attorney may have discretion as to whether to apply to a court for appointment of a guardian under sec. 880.295(1), Stats., such officer does have a duty to prosecute an

application for guardianship in cases where application is made by a county social services official, pursuant to secs. 880.07(1), 880.295(1), Stats., and where there is a state or county interest.

BCL:RJV

Governor; Legislation; The Governor may not alter vetoes on a partially approved and partially disapproved appropriation bill once the approved portion of the Act has been delivered to the Secretary of State pursuant to law and the disapproved portion returned to the house of origin. OAG 39-81

August 21, 1981.

ED JACKAMONIS, *Speaker*
State Assembly

On behalf of the Assembly Organization Committee, you request my opinion on the effect of the Governor's attempt to remove some of his vetoes on the recently enacted Budget Act.

The essential facts are as follows:

On July 27, 1981, enrolled Assembly Bill 66, the 1981 Budget Bill, was presented to the Governor for his action, *i.e.*, approval, partial approval and partial veto or veto. Governor Dreyfus partially approved and partially vetoed Assembly Bill 66 and on July 29 delivered the entire bill, technically at that time, an Act, with his vetoes thereon to the Secretary of State pursuant to law. On the same day, July 29, Governor Dreyfus sent his veto message to the Assembly. On July 30, ch. 20 was published in the Wisconsin State Journal. The publication showed the Governor's vetoes. On July 31 at the Secretary of State's office, Governor Dreyfus noted on several previously vetoed portions of ch. 20 that said provisions were not vetoed. On August 4, the Secretary of State republished that portion of ch. 20 previously vetoed, which publication showed no vetoes. The August 4 publication is denoted as a supplement to ch. 20 and contains the following explanation: "NOTE: This supplement contains those SECTIONS of Chapter 20, Laws of 1981, for which the Governor's

partial vetoes were erroneously shown in the original publication of that law on July 30, 1981.”

In my opinion, the Governor’s attempt to revoke or remove his vetoes on July 31 was ineffectual and his original vetoes remain in effect until and unless the Legislature overrides. Consequently, the Secretary of State’s August 4 publication was a legal nullity.

In my opinion, the matter is controlled by the following language from *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 701, 264 N.W.2d 539 (1978):

[The Governor] ... stated in his message to the Legislature that he had delivered the official copy of the enrolled bill to the Secretary of State. ... Accordingly, by that delivery and by that declaration of delivery, the Governor on that date put the bill beyond his own reach. By his own actions, the Governor was no longer in a position to reconsider or to revise his previous partial approval and partial disapproval of the bill. The Governor by the delivery and by his own statement to the Legislature terminated his time for deliberation on the bill.

Also see State v. Whisner, 35 Kan. 271, 10 P. 852 (1886), which held that after a bill has been signed by the Governor and has passed beyond his control, by placing it with the proper depository of state laws, its status has become fixed and unalterable as far as he is concerned.

In this case, Governor Dreyfus deposited the approved portion of the 1981 Budget Act with the Secretary of State on July 29 and on the same day returned the disapproved portion of the Act to the Assembly. Consequently, after that date he possessed no portion of the Budget Act upon which he could take any action. The portion approved is already law and publication only serves to make it enforceable. As stated in *Kleczka*, 82 Wis. 2d at 695:

Where there is but a partial approval, the Constitution provides, “the part approved shall become law.” This demonstrates that the Legislature’s concern with the portion of the legislation it and the Governor have approved is at an end. Only the mechanical steps to insure that there is an enforceable law in respect to

the parts approved remains. That mechanical process—publication by the Secretary of State—is constitutionally mandated and is independent of further legislative action on the same bill.

It has been suggested that since the Governor has six days within which to consider what he will return to the Legislature, he could properly take the subsequent July 31 action since it was within the six day period. The actual language of Wis. Const. art. V, sec. 10 reads: "If any bill shall not be returned by the governor within six days (Sundays excepted) after it shall have been presented to him, the same shall be a law unless the legislature shall, by their [sic] adjournment, prevent its return, in which case it shall not be a law."

But in this case, the Governor, by his veto message of July 29 has *already returned* the disapproved portion of the Budget Bill to the Assembly. *Klecza*, 82 Wis. 2d at 700-03.

BCL:WHW

Architects And Engineers; The examining board of architects, professional engineers, designers, and land surveyors is statutorily and constitutionally empowered to adopt a rule requiring an applicant for registration as a professional engineer to have practiced engineering in Wisconsin or have had contacts with the state such that the applicant is familiar with Wisconsin law and practice. It is not unconstitutional to register without a diploma applicants who have twelve or more years of experience in engineering work, nor is it unconstitutional to register without examination applicants who are not less than age thirty-five and who have twelve years of experience. Further, it would not be unconstitutional to impose a ten-day residence requirement prior to application. OAG 40-81

August 26, 1981.

ANN JANSEN HANEY, *Secretary*
Department of Regulation and Licensing

The examining board of architects, professional engineers, designers, and land surveyors is responsible for examination and registra-

tion of professional engineers. Secs. 15.405(2)(b), 443.04, 443.09, and 443.10(2)(c), Stats. An applicant for registration as a professional engineer must submit satisfactory evidence to the examining board of one of the three criteria enumerated in sec. 443.04(1), Stats.:

(a) A diploma of graduation, or a certificate, from an engineering school or college approved by the examining board as of satisfactory standing in an engineering course of not less than 4 years, together with an additional 4 years of experience in engineering work of a character satisfactory to the examining board and indicating that the applicant is competent to be placed in responsible charge of such work; or

(b) A specific record of 12 or more years of experience in engineering work of a character satisfactory to the examining board and indicating that the applicant is competent to be placed in responsible charge of such work; or

(c) A specific record by an applicant not less than 35 years of age of 12 years or more of experience in engineering work of a character satisfactory to the examining board and indicating that the applicant is competent to practice engineering.

Every registrant must be "of good character and repute," sec. 443.09(2), Stats. Every registrant must also pass an examination, except persons who are at least thirty-five years old and who have "12 years or more experience in engineering work of a character satisfactory to the examining board and indicating that the applicant is competent to practice engineering." Secs. 443.04(1)(c) and 443.09(4)-(5), Stats.

You ask four questions concerning the statutes which regulate the examination and registration of professional engineers, and concerning the authority of the examining board to adopt administrative rules to interpret the statutory phrase "engineering work of a character satisfactory to the examining board and indicating that the applicant is competent to practice engineering." Sec. 443.04(1)(c), Stats. Your first and fourth questions inquire whether the examining board may adopt an administrative rule interpreting the quoted statutory phrase, which would require a professional engineering applicant to have practiced engineering in Wisconsin for at least six

months or have had contacts with the state such that the applicant is familiar with Wisconsin law and practice. In my opinion, the answer is yes.

The examining board is empowered "to formulate rules ... for the guidance of the trade or profession to which it pertains." Sec. 15.08(5)(b), Stats. Rules interpret or make specific those statutes which are administered and enforced by the board. *Wis. Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 232, 287 N.W.2d 113 (1980); sec. 227.01(9), Stats. Rules must not be arbitrary or unreasonable. *Kachian v. Optometry Examining Board*, 44 Wis. 2d 1, 8, 170 N.W.2d 743 (1969). Moreover, the board may issue only such rules as are expressly or impliedly authorized by the Legislature, and any reasonable doubt of the existence of implied authority must be resolved against its exercise. *State v. ILHR Department*, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977).

In interpreting the statutory phrase "engineering work of a character satisfactory to the examining board and indicating that the applicant is competent to practice engineering," sec. 443.04(1)(c), Stats., it is my opinion that the examining board is empowered to adopt a rule requiring minimum engineering experience in Wisconsin or sufficient contacts with the state so as to ensure familiarity with Wisconsin law and practice. Such a rule would provide guidance to professional engineers concerning the character of engineering work which the examining board considers to be "satisfactory" and to indicate competence to practice engineering. The rule would not be arbitrary or unreasonable. The power to make the rule may be fairly implied since sec. 443.04(1)(c), Stats., provides that engineering work must be "satisfactory" to the board, and because the board is required to "promote the public welfare and ensure the safety of life, health and property." Sec. 443.09(5), Stats.

Although such a rule would be encompassed within the examining board's statutory latitude to adopt rules, the rule must also be constitutional. "This is because no governmental agency has any power to adopt an unconstitutional rule ... even though it may have been specifically authorized so to do." *Lawson v. Housing Authority*, 270 Wis. 269, 279, 70 N.W.2d 605 (1955). Insofar as the rule would distinguish between that class of persons who possess minimum Wis-

consin engineering experience or contacts, and that class of persons who do not, the classification would be measured against the "rational basis" standard which "has consistently been applied to state legislation restricting the availability of employment opportunities." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Under the rational basis standard, a statute is constitutional if it "rationally furthers some legitimate state purpose." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973).

A classification based on minimum Wisconsin engineering experience or contacts would not require more strict judicial scrutiny because it would not operate to the peculiar disadvantage of a suspect class or interfere with the exercise of a fundamental right. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). I assume for purposes of this opinion that a person could obtain the minimum Wisconsin engineering experience or contacts without being a resident of this state, perhaps under the permit procedure provided in sec. 443.10(1)(d), Stats. This is because some durational residence requirements, as opposed to actual residence requirements, might be held to impinge upon a fundamental right to travel, and require strict scrutiny. *Andre v. Board of Trustees of Maywood*, 561 F.2d 48, 52-53 (7th Cir. 1977); *Coolman v. Robinson*, 452 F. Supp. 1324, 1328 (N.D. Ind. 1978).

The rule clearly would satisfy the rational basis standard. It would ensure that applicants for registration as professional engineers would have familiarity with Wisconsin law and practice in the field of engineering. It is consistent with the statutory mandate that the examining board determine "that the applicant is competent to practice engineering." Sec. 443.04(1)(c), Stats. Thus, in my opinion, the examining board is authorized to adopt a rule which would require that applicants have practiced engineering in Wisconsin for at least six months or have had contacts with the state such that the applicant is familiar with Wisconsin law and practice.

Your second question inquires whether the classifications created by sec. 443.01(b)-(c), Stats., are unconstitutional. Subsection (b), in conjunction with sec. 443.09(4), Stats., provides that persons who have twelve or more years of experience in engineering work and who pass an examination may be registered as professional engineers

without a diploma from an engineering school approved by the examining board. Those persons who have less than twelve years of experience in engineering work must have a diploma from an engineering school approved by the examining board. In my opinion, this classification is not unconstitutional.

Since no suspect class or fundamental right is involved, the rational basis standard is applicable. In my view, the Legislature rationally could conclude that twelve years of experience in engineering work is an adequate substitute for a diploma from an approved engineering school, while at the same time concluding that a lesser amount of experience is not adequate. I take this view cognizant of the rules that a statute is presumed to be constitutional, that unconstitutionality must be demonstrated beyond a reasonable doubt, that any rational basis will sustain the constitutionality of a statute, and that courts are not concerned with the merits or wisdom of the statute being challenged. *State ex rel. Hammervill v. La Plante*, 58 Wis. 2d 32, 46-47, 205 N.W.2d 784 (1973).

Section 443.01(c), Stats., in conjunction with sec. 443.09(4), Stats., provides that persons who have twelve or more years of experience in engineering work and who are not less than thirty-five years of age may be registered as professional engineers *without examination*. Those persons who have twelve or more years of experience in engineering work but who are less than thirty-five years of age must pass an examination. Secs. 443.01(b) and 443.09(4), Stats. In my opinion, this classification is constitutional.

Age is not a suspect classification, *Murgia*, 427 U.S. at 313-14, and, therefore, the rational basis standard is applicable. The exemption from the examination requirement for applicants who are thirty-five years of age and older, sometimes referred to as an "eminence" provision, was created by ch. 510, Laws of 1949. The purpose of the provision is to recognize the experience of older applicants and to draw a line beyond the minimum twelve years of experience in engineering work where an examination no longer is considered necessary to protect public health, safety, and welfare. Cf. sec. 443.09(5), Stats.

Presumably all persons who have twelve or more years of experience in engineering work would be at least thirty years of age. Although there would appear to be little reason to distinguish between a thirty-five year old applicant and applicants between the ages of thirty and thirty-five, all of whom have twelve or more years of experience in engineering work, "the drawing of lines that create distinctions is peculiarly a legislative task and ... [p]erfection in making the necessary classifications is neither possible nor necessary." *Murgia*, 427 U.S. at 314. It is not for me to judge the "wisdom of what the legislature has done." *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 415, 147 N.W.2d 633 (1967). Consequently, in my view, there is a rational basis to sustain the age classification created by sec. 443.04(1)(c), Stats.

Your third question inquires whether it would be constitutional to require an applicant for registration as a professional engineer to be a resident of Wisconsin for ten days prior to applying for registration. In my opinion, the answer is yes.

It is not certain whether the classification created by such a requirement would be measured against a rational basis standard or against a strict scrutiny/compelling state interest standard. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court held unconstitutional a one-year residence requirement for welfare benefits on the ground that it unconstitutionally penalized the fundamental right to travel interstate. In so holding, the Court stated, 394 U.S. at 638 n. 21:

We imply no view of the validity of waiting-period *or* residence requirements determining eligibility ... to obtain a license to practice a profession Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

In *Sosna v. Iowa*, 419 U.S. 393 (1975), the Court upheld a one-year residence requirement for divorce without applying strict judicial scrutiny. Subsequent cases involving state-imposed durational residence requirements for employment opportunities have split with respect to the appropriate constitutional standard. *Costa v. Bluegrass Turf Service, Inc.*, 406 F. Supp. 1003, 1006 (E.D. Ky. 1975)

[strict scrutiny/compelling state interest standard]; *Coolman v. Robinson*, 452 F. Supp. 1324, 1328 (N.D. Ind. 1978) [rational basis standard]. This is true despite the Court's earlier observation in *Dandridge v. Williams*, 397 U.S. at 485, that the rational basis standard "has consistently been applied to state legislation restricting employment opportunities."

In my view, the question you pose is answered persuasively in *Golden v. State Bd. of Law Examiners*, 452 F. Supp. 1082 (D. Md. 1978), where the court upheld, under a rational basis standard, a requirement that an applicant be a resident of Maryland for twenty days prior to examination. The court noted that the residence requirement was not of excessive duration and that it furthered a legitimate state interest by allowing the state to assess the applicant's moral character. Other courts have reached the same conclusion. *Suffling v. Bondurant*, 339 F. Supp. 257, 260 (D. N.M. 1972); *Webster v. Wofford*, 321 F. Supp. 1259, 1262 (N.D. Ga. 1970); *Lipman v. Van Zant*, 329 F. Supp. 391, 402-04 (N.D. Miss. 1971); *Ward v. Bd. of Examiners of Eng., Etc., Com. of P.R.*, 409 F. Supp. 1258, 1260 (D. P.R. 1976). Moreover, in *Suffling*, 339 F. Supp. at 260, the court expressed "the view that a state does have a compelling interest in the quality and integrity of the persons whom it licenses ... and may impose regulations which promote that interest."

The examining board in Wisconsin is required to determine that an applicant for registration as a professional engineer is "of good character and repute." Sec. 443.09(2), Stats. Although I express no position with respect to the wisdom of imposing a ten-day residence requirement prior to application for registration as a professional engineer, I believe that the Legislature is constitutionally authorized to do so.

Educational Communications Board, Wisconsin; Funds; Under sec. 20.906(1), Stats., it would not be unlawful for Friends to hold funds for the ECB that were solicited through use of ECB facilities and resources. The ECB has statutory authority to contract with Friends to assist in raising funds for educational radio and television in this state. OAG 41-81

September 21, 1981.

ANTON J. MOE, *Executive Director*
Wisconsin Educational Communications Board

You have requested my opinion regarding the relationship of your agency (hereinafter ECB) with so-called "friends organizations" (hereinafter "Friends"), which you describe as nonprofit entities incorporated for the purpose of assisting and promoting the activities of the ECB as a licensee of educational radio and television stations. You ask the following questions:

Specifically, the Educational Communications Board is desirous of knowing what type of fiduciary relationship is appropriate with these types of organizations. Can these organizations hold funds for the ECB solicited from its viewers and listeners over the broadcast facilities licensed by the Federal Communications Commission to the ECB and/or funds solicited by direct mail through use of the facilities and resources of the ECB?

Is it permissible for the ECB to assist the friends by maintaining membership records and in raising funds with agency personnel and resources with a prior understanding that the funds, minus the amount needed by the friends for administrative costs, will be transferred directly to the ECB upon request for its disposition? The amount of administrative costs by the respective friends groups would vary according to the longevity and scope of activities engaged in by these friends organizations.

Because the ECB has special legal counsel regarding the legality of its broadcast and communications activities in light of Federal Communications Commission rules and regulations, this opinion will

not consider the possible application of such federal law to your questions.

The powers and duties of the ECB are set forth in sec. 39.11, Stats. The following subsections of that provision are pertinent to the questions which you raise:

39.11 *Educational communications board; duties.* The educational communications board shall:

(1) Receive and disburse state, federal and private funds and engage or contract for such personnel and facilities as it deems necessary to carry out the purpose of this section.

(2) Plan, construct and develop a state system of radio broadcasting for the presentation of educational, informational and public service programs and formulate policies regulating the operation of such a state system.

....

(4) Initiate, develop and maintain a comprehensive state plan for the orderly operation of a state-wide television system for the presentation of noncommercial instructional programs which will serve the best interests of the people of the state now and in the future;

....

(6) Furnish leadership in securing adequate funding for statewide joint use of radio and television for educational and cultural purposes, including funding for media programming for broadcast over the state networks. The educational communications board may submit joint budget requests with state agencies and other nonstate organizations or corporations for the purposes stated above;

....

(14) Coordinate the radio activities of the various educational and informational agencies, civic groups, and citizens having contributions to make to the public interest and welfare.

Your first question, in effect, asks whether or not Friends can hold funds for the ECB that were solicited by Friends through use of the

facilities and resources of the ECB. In this regard, sec. 20.906(1), Stats., provides:

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 and also at other times as required by the governor or the state treasurer and shall be accompanied by a statement in such form as the treasurer may prescribe showing the amount of such collection and from whom and for what purpose or on what account the same was received. All moneys paid into the treasury shall be credited to the general purpose revenues of the general fund unless otherwise specifically provided by law.

In 38 Op. Att'y Gen. 421 (1949), this office was called upon to interpret sec. 14.68(1), Stats. (1948), one of the forerunners of sec. 20.906(1), Stats. It was concluded that insofar as university campus organizations derived money from operations carried on by their members and not out of operations carried on by the university, their funds were not received for or in behalf of the state and, therefore, did not have to be deposited in the state treasury. The opinion specifically stated:

It is clear that the mere fact that student activity organizations are required to submit to an audit by a university representative does not render their activities functions of the university or state and does not render their funds university or state funds. It is also my opinion that the mere use of university facilities as a place in which to carry on their activities does not do so. Presumably the regents and the officers so authorized by them have used a proper discretion in permitting the use of university property for activities connected with student life and interests.

Id. at 422.

A similar presumption would apply here that the ECB and its authorized agents have acted properly in permitting the use of ECB facilities and resources to help secure adequate funding for statewide joint use of radio and television for educational and cultural purposes.

Sec. 39.11(6), Stats.; *Boles v. Industrial Comm.*, 5 Wis. 2d 382, 387, 92 N.W.2d 873 (1958).

This same rationale was followed in 39 Op. Att'y Gen. 495, 497 (1950), where upon examination of similar statutes, it was stated:

It may be that when these funds were collected by the various student groups on a voluntary basis some of these items were subject to student ownership and control and did not belong to the college nor to the state. As pointed out to the university in 38 O.A.G. 421, the auditing of student activity funds by a university representative and the use of university facilities do not of themselves render such funds state funds. The essential question to be decided as to each such organization is: Do its receipts arise out of operations carried on by the university?

Moreover, under the plain language of sec. 20.906(1), Stats., it is clear that the requirement of deposit into the state treasury does not exist until the moneys involved are actually "collected or received" by the state agency. Therefore, if the funds involved here are sent directly by the various contributors to the Friends, such funds would not be "collected or received" by the ECB until they are transferred to it by the Friends. At that time, these moneys would become part of the ECB's appropriation pursuant to sec. 20.225(1)(g), Stats.

Thus, the answer to your first question is that sec. 20.906(1), Stats., can be interpreted as allowing Friends to hold the above-described funds for a reasonable time agreed upon by the Friends and the ECB.

Your second question, in effect, asks whether or not the ECB can properly assist Friends in raising funds with a prior understanding that such funds, minus necessary Friends' administrative costs, would be transferred directly to the ECB upon request for its disposition.

Section 39.11(1), Stats., gives the ECB the power to "contract for such personnel and facilities as it deems necessary to carry out the purpose of this section." Under sec. 39.11(6), Stats., a primary purpose of the law is "securing adequate funding for statewide joint use of radio and television for educational and cultural purposes." It is my opinion that these provisions furnish ample authority for the ECB

to contract with Friends to assist in raising funds for educational radio and television in this state. The specific details of any such contract, of course, would have to be agreed to by the parties on a case-by-case basis.

There is, however, one important limitation to the state's power to contract that must be mentioned here. It is well-settled that a state cannot by contract bargain away its right to use the police power or by contract divest itself of power to provide for acknowledged objects of legislation falling within the domain of police power. 72 Am. Jur. 2d *States, Territories, and Dependencies* sec. 73, at 468; 81A C.J.S. *States* sec. 155, at 606. Thus, a contract whereby state officers delegate to another their power to make discretionary determinations is invalid. 81A C.J.S. *States* sec. 157b, at 613.

BCL:SMS

Discrimination; State Employment Labor Relations; A state agency may insist on the presence of legal counsel when making agency personnel available for informal interviews conducted by Personnel Commission equal rights officers in the course of investigating complaints of employment discrimination against such state agency, where the equal rights officer wishes to 1) conduct on the job interviews of nonmanagerial personnel, or 2) interview agency supervisors who are not named or "immediately" involved in the discriminatory actions in question. OAG 42-81

September 21, 1981.

CHARLOTTE M. HIGBEE, *Chairperson*
Personnel Commission

The Wisconsin Personnel Commission has requested my opinion as to whether a state agency may insist on the presence of legal counsel when making agency personnel available for interviews conducted by Commission equal rights officers in the course of investigating complaints of employment discrimination against such state agency, where the equal rights officer wishes to interview 1) nonmanagerial

personnel, or 2) agency supervisors who are not named or immediately involved in the discriminatory actions in question.

The Personnel Commission possesses the same powers and duties in processing discrimination complaints involving a state agency as employer as those exercised by the Department of Industry, Labor and Human Relations with respect to discrimination complaints involving an employer other than a state agency, including the power to investigate complaints and to issue subpoenas. Secs. 111.33(2), 230.45(1)(b), Stats.; 68 Op. Att'y Gen. 403 (1979).

Under section PC 4.03(1) Wis. Adm. Code, upon the filing of a complaint alleging an unlawful discriminatory practice or act by a named respondent, the complaint is promptly investigated and the Commission issues an *initial determination* "as to whether there is probable cause to believe that discrimination has been or is being committed." If probable cause is found either by the initial determination or after a hearing requested by the complainant, an attempt is made to eliminate the offending practice by conciliation or persuasion. Section PC 4.04 Wis. Adm. Code. It is only when the alleged discriminatory practice or act cannot be eliminated through these efforts that notice of hearing on the merits is served requiring the respondent to answer at a hearing before the Commission. Section PC 4.07 Wis. Adm. Code.

The difficulty in responding to your questions rests in part on the fact that they relate to informal efforts of the Commission to investigate complaints of discrimination.

A state agency is *per se* an inanimate entity. The state agency-employer acts through policy-making management personnel which effectively guide and integrate the agency operations. The acts of such supervisory employees are the acts of the agency, as the acts of agents acting within the scope of their authority are always acts of the principal. Therefore, a specific complaint of employment discrimination against the agency directly implicates the supervisory employees of the agency whose offending actions are imputed to be those of the agency and may indirectly implicate other management employees as well. Under normal circumstances, a responding state agency may condition its cooperation by insisting on having its attor-

ney present during the informal interview of its supervisory personnel, despite the fact that the complaining party has not specifically identified such personnel as being "immediately" involved in the specific discriminatory actions in question and may view such supervisors as disinterested members of the management team.

Likewise, when the equal rights officer involved in the investigation of charges desires that the responding agency make its employees available to him or her for interviews while they are normally on the job, the respondent agency, through its supervisory personnel, may condition its cooperation in this regard, which may include insistence on the presence of legal counsel at such interviews. An employer has the right to require an employe to do employer assigned work during work time and not do anything else; "working time is for work," *National Labor Relations Bd. v. Essex Wire Corp.*, 245 F.2d 589, 593 (9th Cir. 1957); *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 510 (1978) (Powell concurring). If the equal rights officer concludes that the presence of legal counsel under those circumstances presents an obstacle to and an intimidating factor in the investigation, he or she is free to interview such employes at a time and place which does not depend on the acquiescence of the state agency involved or may pursue more formal avenues of obtaining the information necessary to the investigation.

The foregoing response to your questions appears to be consistent with the policy and practices of the Federal Equal Employment Opportunity Commission. See EEOC Compliance Manual, sec. 23.2(c)(3).

BCL:JCM

Prisons And Prisoners; Persons committed pursuant to a verdict of not guilty by reason of mental disease or defect should be credited with statutory good time pursuant to sec. 971.17(4), Stats., only after the effective date of that statute. OAG 43-81

September 28, 1981.

DONALD E. PERCY, *Secretary*
Department of Health & Social Services

You have requested my opinion as to whether sec. 971.17(4), Stats., which provides automatic credit for good behavior for persons who have been committed to the care of the Department of Health and Social Services pursuant to sec. 971.17, Stats., as a result of having been found not guilty by reason of mental disease or defect, should be applied retroactively.

Section 971.17(4), Stats., provides:

When the maximum period for which a defendant could have been imprisoned if convicted of the offense charged has elapsed, subject to s. 53.11 and the credit provisions of s. 973.155, the court shall order the defendant discharged subject to the right of the department to proceed against the defendant under ch. 51. If the department does not so proceed, the court may order such proceeding.

Section 53.11, Stats., referred to in the foregoing statute, establishes the grant of statutory good time during the period of commitment; sec. 973.155, Stats., also referred to therein, grants good time credit to persons committed under sec. 971.17, Stats., for all periods of precommitment confinement.

Section 971.17(4), Stats., the subsection in question, was enacted effective May 17, 1978. However, no expression of legislative intent as to the applicability of the subsection to persons committed prior to the effective date of the statute is apparent on the face of the statute. The question thus arises as to whether good time credit should be granted to those persons who were committed prior to the effective date of the statute. In my opinion, persons committed prior to the effective date of the statute should receive good time credit calculated from the effective date of the statute, but not for the period spent in commitment prior to the effective date of the statute.

Failure to grant good time credit earned after the effective date of the statute to those committed prior to the effective date of the stat-

ute, while granting it to those committed after the effective date of the statute might well amount to a denial of constitutional equal protection. On the other hand, it would not appear to be required that persons committed prior to the effective date of the statute be granted good time credit for the period spent in commitment before the statute became effective. Rather, the more logical and legally well-supported course of action is to give good time credit to persons committed prior to the effective date of the statute only for the period of time spent in commitment after the effective date of the statute, *In Matter of Guardianship of Nelson*, 98 Wis. 2d 261, 264, 296 N.W.2d 736 (1980).

This conclusion is prompted, first, by comparison with relevant statutes. Section 53.11, Stats., which is the statute initially providing for good time credit, and sec. 975.12, Stats., the statute which grants good time to sex offenders, specifically incorporate starting dates for the initial grants of good time provided for by those statutes. Section 971.17(4), Stats., the section here in question, does not. Similarly, sec. 973.155(5), Stats., the statute granting presentence credit for all periods of confinement, and sec. 53.11(3)(b), Stats., are expressly made retroactive by the terms of the statute. Section 971.17(4), Stats., as noted previously, is silent on its face as to retroactive application.

Maxims of statutory interpretation lend further support to the opinion advanced herein. For example, 82 C.J.S. *Statutes* 414, at 981, notes: "As a general rule, statutes are construed to operate prospectively unless the legislative intent that they be given retrospective or retroactive operation clearly appears from the express language of the acts, or by necessary or unavoidable implication." At 82 C.J.S. *Statutes* 415, at 990, the same compendium states: "In the absence of anything in the statute to overcome it, the presumption is that a statute operates prospectively only." See, also, *Wipperfurth v. U-Haul Co. of Western Wis., Inc.*, 98 Wis. 2d 516, 522, 297 N.W.2d 65 (1980).

A final consideration in support of the conclusion described in this response relates to the practical application of the statute. The purpose of the statute is to provide an incentive for appropriate behavior. Statutory good time can be lost by disciplinary proceedings. There-

fore, to grant it retroactively would defeat its purpose, since no adjustment could be made for disciplinary infractions which, had the statute been in effect at the time, might have resulted in a loss of a certain amount of good time.

In view of the foregoing legal and practical considerations, it is my opinion that persons committed pursuant to sec. 971.17, Stats., prior to the effective date of sec. 971.17(4), Stats., should be credited with good time earned pursuant to that statute only after its effective date.

BCL:PM-H

Cosmetology Examining Board; Regulation And Licensing, Department Of; Relationship between the Department of Regulation and Licensing, its secretary, the Cosmetology Examining Board and the Governor discussed in the areas of personnel, examinations and educational activities. OAG 44-81

September 28, 1981.

LUVENIA V. CHILDS, *Chairperson*
Cosmetology Examining Board

You indicate that the Cosmetology Examining Board has been having an ongoing difference of opinion with the secretary of the Department of Regulation and Licensing as to the respective powers of each agency.

The Examining Board has utilized two departmental employees whose positions were classified as barber and cosmetology inspectors. The Department and its secretary propose to have such positions reallocated to attorney and investigator positions, apparently so that their skills could also be utilized by other examining boards. The Examining Board has prepared and issued its own cosmetologist newsletter on a quarterly basis. The Department and its secretary deem that its own publication "Digest of Rules and Discipline" better serves the needs of all examining boards and will not authorize funding for other newsletters. The Examining Board has sponsored cosmetology institutes as a means of educating its licensees and informing the pub-

lic. The Department and its secretary deem that such institutes are unnecessary because the same material is covered in institutes sponsored by the private sector. The Examining Board has utilized practical examinations in determining whether applicants have the skills required for licensure. The Department and its secretary have advised that they have requested no funds in the 1981-83 biennial budget for practical exams for any period after July 1, 1982.

Although examining boards, including the Cosmetology Examining Board, are created "in the department of regulation and licensing," they are really attached for limited purposes. In my opinion their independence in certain areas is controlled by sec. 15.03, Stats., and certain sections of ch. 440, Stats., hereinafter referred to.

Section 15.01(5)(b), Stats., provides:

"Examining board" means a part-time body which sets standards of professional competence and conduct for the profession under its supervision, prepares, conducts and grades the examinations of prospective new practitioners, grants licenses, investigates complaints of alleged unprofessional conduct and performs other functions assigned to it by law.

Section 15.03, Stats., provides, in part:

Any ... board attached ... to a department ... shall be a distinct unit of that department. ... Any ... board so attached shall exercise its powers, duties and functions prescribed by law, including rule-making, licensing and regulation, and operational planning within the area of program responsibility of the ... board, independently of the head of the department ... but budgeting, program co-ordination and related management functions shall be performed under the direction and supervision of the head of the department or independent agency.

Section 15.04(1)(a), (b), as amended by ch. 221, Laws of 1979, provides:

(1) Duties. Each head of department or independent agency shall:

(a) *Supervision.* Except as provided in s. 15.03, plan, direct, coordinate and execute the functions vested in the department or independent agency.

(b) *Budget.* Biennially compile a comprehensive program budget which reflects all fiscal matters related to the operation of the department or independent agency and each program, subprogram and activity therein.

Sections 15.40, and 15.401 (Intro.), (16), Stats., provide:

There is created a department of regulation and licensing under the direction and supervision of the secretary of regulation and licensing.

[Intro.] The department of regulation and licensing shall have the program responsibilities *specified for the department* under chs. 440 to 459. In addition:

[Note words of limitation “for the department”]

....

(16) Cosmetology examining board. The cosmetology examining board shall have the program responsibilities *specified for the examining board* under ch. 458.

Section 15.405(15), Stats., provides in part: “There is created a cosmetology examining board *in the department of regulation and licensing.*”

Section 440.03(1), (3), Stats., sets forth the duties of the Department:

(1) The department may adopt rules defining uniform procedures to be used by the department and all examining boards attached to the department for receiving, filing and investigating complaints, for commencing disciplinary proceedings and for conducting hearings.

....

(3) If the secretary reorganizes the department, no modification may be made in the powers and responsibilities of the examining boards attached to the department under s. 15.405.

Section 440.035, Stats., sets forth the duties of each examining board:

Each examining board attached to the department shall:

(1) Independently exercise its powers, duties and functions prescribed by law with regard to rule-making, licensing, certifying and regulation.

(2) Be the supervising authority of all personnel, other than shared personnel, engaged in the review, investigation or handling of information regarding qualification of applicants for license, examination questions and answers, accreditation, investigation incident thereto, and disciplinary matters affecting licensees, or in the establishing of regulatory policy or the exercise of administrative discretion with regard to qualification or discipline of applicants or licensees or accreditation.

(3) Maintain, in conjunction with their operations, in central locations designated by the department, all records of the examining boards pertaining to the functions independently retained by them.

(4) Compile and keep current a register of the names and addresses of all licensees to be retained by the department and which shall be available for public inspection during the times specified in s. 230.35(6)(a).

Section 440.04, Stats., sets forth the duties of the secretary of the Department of Regulation and Licensing:

The secretary shall:

(1) Centralize, at the capital and in such district offices as the operations of the department and the attached examining boards require, the routine housekeeping functions required by the department and the examining boards.

(2) Provide the bookkeeping, payroll and accounting services, and the personnel advisory services required by the department.

(3) Control the allocation, disbursement and budgeting of the funds received by the examining boards in connection with their licensing, certifying and related activities.

(4) Employ, assign and reassign such staff as are required by the department and the attached examining boards in the performance of their functions.

(5) With the advice of the examining boards:

(a) Provide the department with such supplies, equipment, office space and meeting facilities as are required for the efficient operation of the department.

(b) Make all arrangements for meetings, hearings and examinations.

(c) Provide such other services as the examining boards request.

(6) Appoint outside the classified service an administrator for any division established in the department and a director for any bureau, including a bureau of nursing or a bureau of design professions, established in the department. Directors of bureaus shall be appointed from a list of candidates recommended to the secretary by a committee composed of the persons designated by the chairperson of each examining board for the occupations or professions which are regulated by that bureau.

Other powers and duties of the Department and of the Examining Board appear in ch. 458, Stats., renumbered from ch. 159 by ch. 221, Laws of 1979. The chapter is too lengthy to set forth in full here, however, in view of the statutes quoted above, special consideration must be given to the use of the words "department" and "examining board" in each section in ch. 458.

The Legislature apparently was aware that there was potential for conflict with respect to the powers of the Department and its secretary as opposed to those reserved to examining boards and provided for a method of resolution. Section 440.045, Stats., provides: "Any dispute between an examining board and the secretary shall be arbitrated by the governor or the governor's designee after consultation with the disputants." The differences you have may well be ripe for submission to the Governor. Nevertheless, I will attempt to offer limited advice.

Your questions, as restated, and my answers follow *seriatim*.

1. Do the secretary and Department of Regulation and Licensing have power, without approval of the Examining Board, to seek reallocation of two barber and cosmetology inspector positions to attorney and investigator positions?

The answer is yes. However, the secretary should consider the needs of the Examining Board for personnel skilled in their special area of regulation. The secretary is the appointing authority by reason of secs. 15.02(4), 15.04, 230.03, 230.06, 440.04(4), 458.05, Stats., and any reallocation would have to be approved by the Administrator of the Division of Personnel in the Department of Employment Relations pursuant to sec. 230.09(2), Stats. Creation of attorney positions outside the Department of Justice requires approval of the Governor. Sec. 20.918, Stats.

Section 159.05, Stats. (1977), provided:

Employees. The department shall appoint, under the classified service, field inspectors who shall have been engaged in the practice of cosmetology in this state as licensed cosmetologists for the last 3 years immediately preceding their appointment. Such field inspectors shall devote their time to inspecting beauty and electrolysis salons and schools of cosmetology and in the performance of such other duties as are assigned by the department in connection with this chapter, and may enter any beauty and electrolysis salon or school of cosmetology during reasonable business hours for the purpose of inspection. In addition, the department shall appoint, under the classified service, such investigators as are required, whose qualifications shall be established jointly by the examining board and the director of personnel, to carry out investigations as assigned.

That section was amended and renumbered sec. 458.05, Stats., by ch. 221, Laws of 1979, to provide:

Inspectors

The department shall appoint *inspectors* under the classified service ... *to inspect barber shops, beauty and electrolysis salons and schools of barbering and cosmetology ..., who may be the same persons appointed under s. 457.05.*

Section 440.04(4), Stats., empowers the secretary to “[e]mploy, assign and reassign such staff as are required by the department and the attached examining boards in the performance of their functions.” In my opinion, the Examining Board has a duty to document need for personnel to be utilized on a full or part-time basis and the qualifications it deems necessary to fulfill the tasks to be assigned. The secretary and Department have a duty to reasonably and objectively consider requests of the Examining Board and to furnish personnel reasonably qualified to perform the tasks requested if available within budgeted limits.

2. Do the secretary and Department have power to force the Examining Board to eliminate cosmetology institutes, the Examining Board Newsletter, and the use of practical examinations to evaluate whether applicants have the skills required for licensure by unilateral refusal to seek budget authorization for such functions, or the refusal to allocate funds, which were more generally designated and budgeted, for such purposes.

These are closer questions. Section 440.04(3), Stats., provides that the secretary shall “[c]ontrol the allocation, disbursement and budgeting of the funds received by the examining boards in connection with their licensing, certifying and related activities.” This section must be construed in light of authority of the Examining Board to “[i]ndependently exercise its powers, duties and functions prescribed by law with regard to rule-making, licensing, certifying and regulation.” Sec. 440.035(1), Stats. *Also see* secs. 15.01(5)(b), 15.03, 15.401(16), Stats. Although the secretary does have a duty under sec. 440.04(1), (2), (3), (4), Stats., with respect to budgeting, allocation and disbursement of funds, and to centralize “the routine housekeeping functions,” “provide the bookkeeping,” etc., services and “employ, assign, and reassign such staff as required by the department and the attached examining boards,” such powers must be exercised giving due deference to the Examining Board’s exercise of its powers with regard to “rule-making, licensing, certifying and regulation.”

Section 15.03, Stats., provides in part: “[B]udgeting, program co-ordination and related management functions shall be performed under the direction and supervision of the head of the department.” Both that section and sec. 15.04(1)(b), Stats., which require the sec-

retary to "compile a comprehensive program budget which reflects all fiscal matters related to the operation of the department or independent agency and each program, subprogram and activity therein" contemplate that an Examining Board have authority to request that the budget include funds for "rule-making, licensing, certifying and regulation" activities. The secretary has the duty of seeking a reasonable amount of funds for activities related to the "core" regulatory function of the Examining Board. The Examining Board, rather than the secretary, has the responsibility and the power to determine the manner in which the essential aspects of regulation, continuing education, and examinations are to be conducted within budget constraints.

Section 15.08(5), (6), Stats., provides, in part:

(5) General powers. Each examining board:

....

(b) Shall formulate rules for its own guidance and for the guidance of the trade or profession to which it pertains, and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular trade or profession.

(c) May limit, suspend or revoke, or reprimand the holder of, any license, permit or certificate granted by the examining board.

(6) Improvement of the profession. In addition to any other duties vested in it by law, each examining board shall foster the standards of education or training pertaining to its own trade or profession, not only in relation of the trade or profession to the interest of the individual or to organized business enterprise, but also in relation to government and to the general welfare. Each examining board shall endeavor, both within and outside its own trade or profession, to bring about a better understanding of the relationship of the particular trade or profession to the general welfare of this state.

Determination of what constitutes the essential functions of the Examining Board on the one hand and what are merely Examining Board preferences (no matter how strongly felt by the Board) is nec-

essary therefore to resolve your second question. Rather than providing definitive answers, I can only provide guidance based on general considerations, and indicate the method provided by statute for resolving close questions.

The matter of the use of a type of examination, *e.g.*, practical, to evaluate the skill level of applicants appears to be close to the core competence determining functions of the Examining Board. Secs. 458.02, 458.03, 458.06, 458.08, Stats. The use of a newsletter rather than a digest may be more a question of form rather than substance. Perhaps falling between these activities in terms of board prerogative is the matter of whether it is necessary to supplement private sector institutes with board run institutes adequately to prepare candidates for licensure. The nature, content, alternative availability and the role of the function in discharging the essential legislatively defined role of the Examining Board must be weighed on a case-by-case basis.

The allocation of responsibilities among the various boards and the Department has been the subject of legislative attention during recent years. Numerous changes have been made. Implementation of these changes has required accommodation and cooperation. Statutory language and its careful interpretation does not, however, as has been noted, provide definitive answers to the types of questions you have raised. To facilitate resolution of those matters that are not able to be worked out between the Examining Board and the Department, the Legislature has specifically provided: "Any dispute between an examining board and the secretary shall be arbitrated by the governor or the governor's designee after consultation with the disputants." Sec. 440.045, Stats. This mandatory language requiring arbitration by the appointing authority for both disputants establishes a statutory process of dispute resolution that ought to precede resort to an outside agency's application of a legal analysis to a specific factual context.

County Board; County Executives; A county board in a county having a county executive could, by ordinance, require that four of seven sec. 46.18(1), Stats., trustees be county supervisors. The county board could also abolish the board of trustees and transfer all of its powers to a board, commission or committee created pursuant to sec. 59.025(3), Stats. Trustees, board members and commissioners are appointed by the county executive, subject to confirmation by the county board. The county board chairperson appoints members of committees established pursuant to sec. 59.06, Stats. OAG 45-81

September 28, 1981.

WILLIAM F. BOCK, *Corporation Counsel*
Racine County

You advise that Racine County has an elected county executive and a county institution which is governed by a seven member board of trustees pursuant to sec. 46.18(1), Stats., which provides:

TRUSTEES. Every county home, infirmary, hospital, tuberculosis hospital or sanitorium, or similar institution, or house of correction established by any county whose population is less than 500,000 shall (subject to regulations approved by the county board) be managed by a board of trustees, electors of the county, chosen by ballot by the county board. At its annual meeting, the county board shall appoint an uneven number of trustees, from 3 to 9 at the option of the board, for staggered 3-year terms ending the first Monday in January. Any vacancy shall be filled for the unexpired term by the county board; but the county chairman may appoint a trustee to fill the vacancy until the county board acts.

The board of supervisors has proposed that the board of trustees be organized and appointed as follows:

High Ridge Board of Trustees. Pursuant to 46.18, Wis. Stats., the trustees shall consist of seven (7) members. These members shall be appointed at the annual meeting of the County Board for staggered three (3) year terms ending the first Monday in

January. Four (4) members of the board shall be County Board supervisors appointed by the County Board Chairman. The terms of the supervisors shall expire in the event that a supervisor fails to be re-elected to the County Board and a successor shall be appointed to fill the unexpired term. Three (3) members shall be citizens appointed by the County Executive and confirmed by the County Board. County Board supervisors serving on the board of trustees shall not receive any additional salary or per diem other than normally received as a County Board supervisor.

1. Can the County Board, pursuant to 46.18(1), *Wis. Stats.*, specify that four of the members of the board of trustees shall be county board supervisors?

In my opinion, the county board could, by ordinance, require that four of the trustees be county board supervisors. Section 46.18(2), *Stats.* (1977), provided that "no member of the county board shall serve as a trustee during the term for which he was elected." That portion of sec. 46.18(2), *Stats.*, was repealed by ch. 34, sec. 825d, *Laws of 1979*. Section 856m of the same session law amended sec. 59.03(4), *Stats.*, to provide in part:

COMPATIBILITY. No county officer or employe is eligible to the office of supervisor, but a supervisor may also be a member of a committee, board or commission appointed or created under s. 59.025(3), a town board, a mosquito control district, the common council of his or her city, the board of trustees of his or her village or the board of trustees of a county institution appointed under s. 46.18.

Section 46.18(1), *Stats.*, specifies the number of trustees to be appointed as well as the length of their terms. The statute is silent as to whether trustees must or can be county board supervisors. I am of the opinion that the county board could specify qualifications for the board of trustees.

In *The Supervisors of La Pointe v. O'Malley and another*, 47 *Wis.* 332, 336, 2 *N.W.* 632 (1879), the supreme court held:

[W]hen any subject of legislation is entrusted to said county boards, by general words, such boards acquire the right to pass any ordinance necessary or convenient for the purpose of disposing of the whole subject so committed to them; and that, for the purpose of disposing of such subject, they have all the powers the legislature itself would have over the same subject, unless the legislature, in conferring such power, has restricted the power of the boards, or directed that it should be done in a certain way.

2. If they are permitted to so specify, who has the authority to appoint those supervisors, the County Board Chairman or the County Executive?

The power to appoint *all trustees* would reside in the county executive subject to confirmation by the county board.

Section 46.18(1), Stats., provides that the trustees be electors of the county chosen by ballot by the county board. Section 46.18(1), Stats., uses the words the "county board shall *appoint* ... trustees ... for staggered 3-year terms." Where there is not a county executive, ballots are utilized by the county board to "appoint." See 61 Op. Att'y Gen. 116 (1972). Where there is a county executive, sec. 59.032(2)(c), Stats., transfers the power of appointment of members of the board of trustees to such officer and provides:

The duties and powers of the county executive shall be:

....

(c) Appoint the members of all boards and commissions where the law provides that such appointment shall be made by the county board or the chairman of the county board. All appointments to boards and commissions by the county executive shall be subject to the confirmation of the county board.

In my opinion the board of supervisors could not provide that the term of a sec. 46.18, Stats., trustee who was a supervisor would end on his or her failure to be reelected as supervisor. Wisconsin Constitution art. XIII, sec. 1 provides: "The legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in

this constitution.” The Legislature has provided in sec. 17.03, Stats., how vacancies in certain county offices are caused. In my opinion, they are applicable to the office of trustee of a county institution appointed under sec. 46.18(1), Stats., and such provisions do not include causal of a vacancy in the separate office of trustee by failure to be reelected as supervisor. In sec. 46.18(3), Stats., the Legislature provided that “[a]ny trustee may be removed from office for misconduct or neglect, by a two-thirds vote of the county board, on due notice in writing and hearing of the charges against him.”

3. In the event that the answer to #1 is yes and the answer to #2 is the County Executive, can the County Board change the proposed rule to in effect create a High Ridge committee which would be a standing committee of the County Board and which committee would also be four out of the seven members on the board of trustees? In this situation, it is presumed that the County Board Chairman could appoint the members of the High Ridge Committee as he appoints members of all other County Board committees.

The answer to the question as stated is no. But the county board does have power, under sec. 59.025(3), Stats., to abolish the board of trustees appointed under sec. 46.18(1), Stats., and to create another board, commission or committee and transfer all of the powers of the present board of trustees to such other agency including a committee of the county board appointed pursuant to sec. 59.06, Stats. Members of a board or commission created under sec. 59.025(3), Stats., if not elected, would be appointed by the county executive subject to confirmation by the county board by reason of the express limitation in secs. 59.025(4), 59.032(2)(c), Stats. The latter section is quoted above. Section 59.025(4), Stats., provides in part: “The county board may determine the method of selection of any county offices except for The method may be by election or by appointment and, *if by appointment, the county board shall determine the appointing authority, subject to ss. 59.031 and 59.032.*” The county board could provide that a portion or all of the members of a board, commission or committee created under sec. 59.025(3), Stats., to manage a county institution, be supervisors. Where the county board abolished the sec. 46.18(1), Stats., board of trustees and appointed a committee of the county board pursuant to sec. 59.06, Stats., membership on such committee would be limited to board members and appointment

would be by the county board chairman. *Forest County v. Shaw*, 150 Wis. 294, 136 N.W. 642 (1912). This opinion is not to be construed as a recommendation to deviate from the statutory plan of operation of county institutions provided for in sec. 46.18, Stats., which provides for a certain degree of independence in the board of trustees operating a county institution.

BCL:RJV

Elections; Legislation; 1981 Assembly Bill 176, which would create a congressional campaign fund to provide public funding for qualified candidates from Wisconsin for the United States House of Representatives, is preempted by the Federal Election Campaign Act. OAG 46-81

September 28, 1981.

ED JACKAMONIS, *Speaker*
State Assembly

The Committee on Assembly Organization has requested my opinion on the validity of a law which would result from the enactment of 1981 Assembly Bill 176. In general, the proposal would create a congressional campaign fund to provide public funding for qualified candidates from this state for the United States House of Representatives. It sets campaign spending and contribution limits on candidates receiving money from the fund, and it places limitations on what campaign expenses can be paid for by the money. Penalties are created for violations of these provisions, and a \$2 checkoff replaces the \$1 checkoff on state tax returns. Funding under this proposal begins with the 1982 general election.

It is my opinion that the law which would result from the enactment of 1981 AB 176 would be preempted by the Federal Election Campaign Act, 2 U.S.C. secs. 431-55.

The preemption doctrine is grounded in the Supremacy Clause, U. S. Const. art. VI:

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Under this clause, the historic police powers of the state are not to be superseded unless that is the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230 (1947); *State v. Amoco Oil Co.*, 97 Wis. 2d 226, 239, 293 N.W.2d 487 (1980); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). However, an express congressional command that a given federal law shall exclusively regulate a certain activity will have the effect of preempting state laws regulating the same activity. *Alessi v. Raybestos-Manhattan, Inc.*, 101 S. Ct. 1895 (1981); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

The Federal Election Campaign Act, 2 U.S.C. 431-55, already provides federal regulation of campaigns for the United States House of Representatives by limiting campaign expenditures, regulating sources of campaign funds and providing campaign funding, much as the state would attempt to do by passage of 1981 AB 176. Moreover, Congress provided in 2 U.S.C. sec. 453: "The provisions of this Act, and of the rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office [such as the United States House of Representatives]."

The provisions of 2 U.S.C. sec. 453 make it clear that the federal law is to occupy the field in the area of regulating campaign expenditures, sources of campaign funds and the conduct of campaigns for such federal offices as the House of Representatives. No state law regulating any part of this field is to have any force or effect. The authority of the state to regulate federal campaigns extends only to the power to prohibit false voter registration, vote fraud, theft of ballots and similar offenses. S. Rep. No.93-689, *reprinted in* [1974] U.S. Code Cong. & Adm. News 5587, 5638.

The express statutory wording and the legislative history of 2 U.S.C. sec. 453 plainly indicate that Congress has expressly preempted all state legislation such as 1981 AB 176. Cases such as *Alessi* and *Jones* further indicate that such express commands of federal supremacy as in 2 U.S.C. sec. 453 are effective to preempt state regulation of the identical subject matter.

Since Congress has expressly preempted state law dealing with the subject matter of 2 U.S.C. 431-55, and since 1981 AB 176 would also attempt to regulate that same subject matter, I conclude that the law which would result from the enactment of 1981 AB 176 would be invalid under the Supremacy Clause, U.S. Const. art VI.

BCL:JDJ:EWJF

Boundaries; Towns; The responsibility of town supervisors under ch. 90, Stats., is limited to assigning to the occupants of adjoining lands the respective share of a division fence which each occupant shall erect and repair, and does not authorize town supervisors to settle boundary disputes. OAG 47-81

September 28, 1981.

DARWIN L. ZWIEG, *District Attorney*
Clark County

You ask my opinion regarding the following question:

What are the "responsibilities of town supervisors under Chapter 90 of the Wisconsin Statutes where the boundary line between two farms has not been established by survey and the two parties involved can not agree on where a partition fence should be placed."

My answer is that the responsibility of town supervisors in their capacity as fence viewers is limited to assigning to the occupants of adjoining lands the respective share of a division fence which each occupant shall erect and repair. Town supervisors are not authorized to settle boundary disputes.

Section 90.03, Stats., provides:

The respective occupants of adjoining lands, used and occupied for farming or grazing purposes, and the respective owners of adjoining lands when the lands of one of such owners is used and occupied for farming or grazing purposes, shall keep and maintain partition fences between their own and next adjoining premises in equal shares so long as either party continues to so occupy the same, and such fences shall be kept in good repair throughout the year unless the occupants of the lands on both sides otherwise mutually agree.

Section 90.05, Stats., provides that the partition of the fence or of the line upon which partition fences are to be built, may be made by the owners in a witnessed writing or by the fence viewers. In deciding a case involving ch. 14, 1849 Rev. Stats., the predecessor of ch. 90, the Wisconsin Supreme Court held:

The power conferred upon the fence-viewers by this section is merely to assign in writing to each of the adjoining occupants of enclosures his share of the partition fence or fences, and also to direct the time within which they shall respectively erect or repair the portion of such fence so assigned ... Beyond this the fence viewers can determine nothing.

Butler v. Barlow, 2 Wis. 8, 11 (1853). Because the statute is in derogation of the common law, it must be strictly construed so as not to unconstitutionally expand the jurisdiction of the fence viewers. 2 Wis. at 12.

The words "or of the line upon which partition fences are to be built" which were added subsequent to the court's decision in *Butler* were not intended to authorize fence viewers to partition disputed properties, but merely indicate authorization to partition the responsibility for erection and maintenance of a fence along a common property line in advance of the actual erection of the fence. Fence viewers have the authority to draw a line perpendicular to a property line, even one whose location is disputed, partitioning responsibility for a required fence, but are not authorized to settle boundary disputes. Controversies arising between occupants of adjoining parcels concerning boundaries, location of division fences, or maintenance of

respective shares of a division fence are not within the fence viewer's jurisdiction and, if need be, should be determined in court.

You also ask how the situation would differ if a partition fence had been placed between two respective farms for a period of twenty years, and farmer A, believing the fence was incorrectly placed, removes the fence to a different position.

As previously stated, the responsibility of town supervisors under ch. 90, Stats., is limited to assigning to the occupants of adjoining lands the respective share of a division fence which each occupant shall erect and repair, and does not authorize town supervisors to settle boundary disputes.

Finally, you ask what responsibility the district attorney has in settling fence line disputes?

Chapter 90, Stats., places no responsibility on the district attorney to settle fence line disputes between adjacent landowners concerning the necessity for a line fence, the partition of such fence or boundary disputes. By reason of other statutes, the district attorney may have a duty to advise county officials or prosecute or defend actions where state or county land is involved.

BCL:WHW

Governor; Legislation; Failure of the Governor to express his objections to several possible partial vetoes of the 1981-82 Budget Bill make any such possible vetoes ineffective. OAG 48-81

September 30, 1981.

ED JACKAMONIS, *Speaker*
State Assembly

You request my opinion on the effect of discrepancies between the Governor's veto message to the Legislature and the copy of 1981 Assembly Bill 66 deposited with the Secretary of State.

You ask three questions:

First, you ask whether sec. 1274gm of Assembly Bill 66 was vetoed by the Governor.

My answer is "no."

Second, you ask whether secs. 733s, 1089r, 1089t, 1089wm, 1089z, 1090f, 1090fb, 1090fc, 1090fe, 1090km, 1154p, 1154r, 1154sg, 1154sh, 1154t, 1180 and 1392jm of Assembly Bill 66 were vetoed by the Governor.

My answer is "no."

Third, you ask whether the sec. 20.370(1)(kr) appropriation line of sec. 120sm of Assembly Bill 66 was vetoed by the Governor.

My answer is "no."

The essential facts are as follows:

On July 27, 1981, engrossed Assembly Bill 66, the 1981 Budget Bill, was presented to the Governor for his action, *i.e.*, approval, partial approval and partial veto or veto. Governor Dreyfus partially approved and partially vetoed Assembly Bill 66 and on July 29 delivered the entire bill, technically an Act at that time, with his vetoes thereon to the Secretary of State pursuant to law. On the same day, July 29, Governor Dreyfus sent his veto message to the Assembly. On July 30, ch. 20, Stats., was published in the Wisconsin State Journal. The publication showed the Governor's vetoes as submitted to the Secretary of State. Upon checking the published version against the Governor's veto message, a large discrepancy in the number of sections vetoed was observed. In some cases sections were listed as vetoed in the Governor's message which were not marked as vetoed on the Act deposited with the Secretary of State. In other cases sections were marked on the Act as having been vetoed which were not mentioned in the Governor's message to the Legislature. On or about August 4, 1981, the Governor submitted an amended message to the Legislature seeking to correct or clarify many of the errors or omissions of the original message.

The Governor's attempt to correct or clarify with an amended message in my opinion is completely ineffective. Not only had the Governor put the bill beyond his reach with the first message and deposit with the Secretary of State, but the six-day limitation for veto action imposed by the constitution had also run.

The Governor's veto power is derived from Wis. Const. art. V, sec. 10, which provides:

Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it, *but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large upon the journal and proceed to reconsider it.* 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. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, or the part of the bill objected to, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for or against the bill or the part of the bill objected to, shall be entered on the journal of each house respectively. *If any bill shall not be returned by the governor within six days (Sundays excepted) after it shall have been presented to him, the same shall be a law unless the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law.*

(Emphasis supplied.)

The veto power granted the Governor is negative in the sense that if the Governor fails to act, or fails to act in a manner consistent with the procedures mandated by the constitution, the bill as enacted by the Legislature becomes law. Wis. Const. art. V, sec. 10. Publication serves to make the law enforceable. Wis. Const. art. IV, sec. 17; sec. 985.04, Stats.

The Wisconsin Supreme Court has discussed at length the procedures mandated by the constitution in *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978). Although the issue presented by the facts in *Kleczka* differ from those involved here, the language in *Kleczka* provides guidance as to how the court would react if presented with the facts under consideration here. As stated in *Kleczka*, 82 Wis. 2d at 700:

[W]hat is necessary for the Legislature to proceed with a vote to override a veto is a written objection by the Governor addressed to the Legislature which may be entered in the legislative journal with sufficient completeness that the Legislature knows the nature and scope of the Governor's objections. ... The constitutionally required return was made when the Governor submitted his objections to the bill and his veto message in a timely fashion to the originating house of the Legislature. The Constitution requires no more.

The court in *Kleczka* goes on to acknowledge that requiring the physical return of the bill would be a mere formality which the constitution does not require. The Supreme Court of Wisconsin acknowledges in this case that the reality of the process is that the Legislature must consider both the message and the bill itself. See discussion in *Kleczka*, 82 Wis. 2d at 698-700, as to how the Governor in practice returns the vetoed portion of an appropriation bill to the Legislature to be in compliance with the constitution. It is the usual practice of the Legislative Reference Bureau to provide each legislator with a copy of the Budget Bill showing the Governor's vetoes. Using the two documents together, each legislator can consider the Governor's partial veto. The Legislature as a body can then determine whether or not to override the veto.

The problem with the Governor's partial veto of Assembly Bill 66 is that when the Governor's message and the Budget Bill are viewed together there are a number of instances in which it is unclear exactly what the Governor had chosen to veto. This ambiguity, in my opinion, is fatal to his vetoes in a number of instances in which it appears the Governor may have been attempting to exercise his power of partial veto.

Your first question involves sec. 1274gm of Assembly Bill 66. In the Act deposited with the Secretary of State this section is shown as "vetoed" along with adjoining secs. 1274g and 1274gr. Section 1274gm of Assembly Bill 66 reads as follows:

100.215 of the statutes is created to read:

100.215 *Unfair trade practices in the insulation industry.* The department shall establish rules regulating home insulation trade practices. The rules shall include, without limitation because of enumeration:

(1) Standards for the type and amount of insulation to be installed.

(2) Standards for measuring compliance with the contract and warranty provisions protecting a consumer.

(3) Standards for safe installation of insulation and provision for the correction of unsafe installations.

Section VI-C of the Governor's message reads:

INSULATION TESTING LABORATORY

(Sections 120sm, 120sp, 1274g and 1274gr)

This provision would have allocated one position and about \$100,000 in order to establish an insulation testing laboratory in the Department of Agriculture, Trade and Consumer Protection. I have vetoed this proposal because the Department already has authority through s. 100.21 to protect the public from false energy savings and safety claims. The Department might review laboratory facilities in the University System to determine if needs could be met in a cooperative way.

The Governor's message, when read in conjunction with the Budget Bill itself, is sufficient to comply with the constitutionally mandated procedure for vetoing those sections of the Bill which relate to the creation of an insulation testing laboratory. The Governor's message, however, is insufficient to veto sec. 1274gm because the objection listed does not relate with sufficient clarity to the content of the portion of the Budget Bill marked as vetoed.

In my opinion, sec. 1274gm is law and should be published as such by the Secretary of State. In order for the Governor's veto to be effective he must list his objections. 28 Op. Att'y Gen. 423 (1939); *State ex rel. Link v. Olson*, 286 N.W.2d 262 (N.D. 1979); *Welden v. Ray*, 229 N.W.2d 706 (Iowa 1975); *State ex rel. Browning v. Blankenship*, 154 W. Va. 253, 175 S.E.2d 172 (1970); *Arnett v. Meredith*, 275 Ky. 223, 121 S.W.2d 36 (1938). In this instance he simply failed to do so. As a result, sec. 1274gm of Assembly Bill 66 has not been vetoed in accordance with the procedures mandated by the Wisconsin Constitution and is law. The Secretary of State should publish sec. 1274gm since it has not been vetoed.

Your second question involves a number of sections which were listed in the Governor's veto message which were not shown as vetoed in the Act deposited with the Secretary of State. In my opinion, since the Governor did not specify his objections to these sections, they have not been effectively vetoed and they are law despite having been listed in the Governor's veto message. Again, when viewing the Governor's message and the Budget Bill together, it is unclear what, if anything, the Governor intended to veto. It is impossible to tell from the text appearing along with the listing of section numbers what it was that the Governor is objecting to in the Budget Bill. There are no markings or other indications on the Bill itself which might indicate what the Governor desired to veto; whether it be a word, a paragraph or the entire section.

As the court stated in *Kleczka*, 82 Wis. 2d at 700, the objection must be made "*with sufficient completeness that the Legislature knows the nature and scope of the Governor's objections.*" (Emphasis added.) The Governor failed to provide the Legislature with sufficient information so that it could intelligently consider the Governor's vetoes. As a result, in each of the instances you have cited, the Governor has failed to comply with the constitutionally mandated procedure for vetoing legislation. The sections you inquire about in your second question are therefore law. Since they have already been published as such by the Secretary of State there is no need for further action in order that they may be enforced.

Your third question involves the sec. 20.370(1)(kr) appropriation line of sec. 120sm of Assembly Bill 66. In this instance the appropria-

tion line is shown as vetoed in the Bill deposited with the Secretary of State, but it is not, to my knowledge, referred to in the veto message. Therefore, for the reasons stated above, it has not been effectively vetoed. Furthermore, the question of whether the veto is effective seems irrelevant since sec. 202p of Assembly Bill 66 creates the appropriation in sec. 20.370(1)(kr) as a sum sufficient to reimburse sec. 20.866(1)(u). Section 202p was not shown as vetoed in the Bill deposited with the Secretary of State nor was it referenced in the Governor's veto message. As a result, sec. 202p is law and establishes sec. 20.370(1)(kr) as a sum sufficient appropriation. Any remaining ambiguity as to the effect of this apparent conflict is resolved by sec. 20.004, Stats., which provides: "If any conflict exists between ss. 20.100 to 20.899 and s. 20.005, ss. 20.100 to 20.899 shall control and s. 20.005 shall be changed to correspond with ss. 20.100 to 20.899."

As the United States Supreme Court stated in *Wright v. United States*, 302 U.S. 583, 596 (1938):

The constitutional provisions have two fundamental purposes; (1) That the President shall have suitable opportunity to consider the bills presented to him; and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes.

The procedures followed by the Governor in the instances you have pointed out are insufficient to inform the Legislature of the nature and scope of the Governor's objections. Since the Governor has failed to comply with the constitutionally mandated procedures in these instances his vetoes are ineffective. The Bill as passed by the Legislature and not as purportedly vetoed by the Governor in these instances has become law. Only in the case of sec. 1274gm of Assembly Bill 66 need the Secretary of State publish the law in order to make it enforceable. In each of the other situations you cite the Secretary of State has already complied with the constitutional and statutory requirement of publication.

BCL:WHW

Counties; Public Records; A county with a population under 500,000 may, by ordinance enacted pursuant to sec. 19.21(6), Stats., provide for the destruction of obsolete case records maintained by the county social services agency pursuant to sec. 48.59(1), Stats. OAG 50-81

October 2, 1981.

KENNETH J. BUKOWSKI, *Corporation Counsel*
Brown County

You ask when a county with a population under 500,000 may destroy case records maintained by the county social services agency pursuant to sec. 48.59(1), Stats.

It is my opinion that a county with a population of under 500,000 may provide for the destruction of such records by enacting an ordinance pursuant to sec. 19.21(6), Stats.

Section 48.59(1), Stats., provides, in part:

The county agency shall keep a complete record of the information received from the court, the date of reception, all available data on the personal and family history of the child, the results of all tests and examinations given the child and a complete history of all placements of the child while in the legal custody of the county agency.

The general rule is that public records may not be destroyed without express legislative authority. 46 Op. Att'y Gen. 8 (1957); 38 Op. Att'y Gen. 22 (1949); 37 Op. Att'y Gen. 330 (1948). Sections 19.21(6), 59.715 and 889.30, Stats., all contain express legislative authority for counties to destroy certain kinds of documents. Section 59.715, Stats., lists approximately twenty-two categories of records which may be destroyed upon compliance with certain conditions. Since records maintained under the provisions of sec. 48.59(1), Stats., do not fit within any of these categories, neither sec. 59.715, Stats., nor sec. 889.30, Stats., permit the destruction of original case records concerning children. Specific legislative authority to destroy

these records is, however, contained in sec. 19.21(6), Stats., which provides:

Any county having a population of 500,000 or more may provide by ordinance for the destruction of obsolete public records without regard to ss. 59.715 to 59.717 and may undertake a management of records service *and any other county may so provide subject to ss. 59.715 to 59.717*. The period of time any public record shall be kept before destruction shall be determined by ordinance except that in all counties the specific period of time expressed within s. 59.715 shall apply. Prior to any destruction of records under this subsection, except those specified within s. 59.715, at least 60 days' notice of such destruction shall be given in writing, to the historical society, which may preserve any records it determines to be of historical interest. Notice is not required for any records for which destruction has previously been approved by the historical society or in which the society has indicated that it has no interest for historical purposes.

The emphasized language was derived from 1979 Assembly Bill 114. The following language from the Legislative Reference Bureau's analysis of that bill clearly indicates that the additional statutory language authorizes counties with a population under 500,000 to provide for the destruction of categories of documents not listed in sec. 59.715, Stats., as long as the criteria and procedures contained in secs. 59.715 - 59.717, Stats., are followed:

Under current law, the power of towns and counties with a population of less than 500,000 to destroy obsolete public records is limited to certain types of records. This bill gives all counties and towns the power to provide by ordinance for the destruction of obsolete public records. The period of time for retention of the records set forth by the ordinance must comply with the requirements of specific laws and with minimum periods fixed by the public records board.

1979 Assembly Bill 114, as amended, was enacted by the Legislature as ch. 35, Laws of 1979. The Legislative Reference Bureau's statements concerning minimum requirements set by the Public Records Board probably refer to amendments made to sec.

19.21(5)(b), Stats., which does not apply to counties. Shortly after the passage of ch. 35, Laws of 1979, the Legislature did, however, amend sec. 16.61(3)(e), Stats., to authorize the Public Records Board to set minimum periods of time for the retention of county records. See ch. 79, Laws of 1979. The Public Records Board currently has no requirements for the retention of case records maintained pursuant to sec. 48.59(1), Stats.

The destruction of such records does not appear to conflict with any provision of secs. 59.715, 59.716 or 59.717, Stats. Consequently, an ordinance enacted pursuant to sec. 19.21(6), Stats., could provide for the destruction of obsolete case records maintained by the county social services agency, if the original records are first offered to the state historical society within the statutory sixty-day time frame.

In reaching the conclusion that these records may be destroyed, I have considered the possibility that sec. 19.21(6), Stats., might appear to conflict with sec. 48.59(1), Stats. But "it is a cardinal rule of statutory construction that conflicts between different statutes, arising by implication or otherwise, are not favored and will not be held to exist if the statutes may otherwise be reasonably construed. *Strong v. Milwaukee*, 38 Wis.2d 564, 570, 157 N.W.2d 619 (1968)." 66 Op. Att'y Gen. 158, 159 (1977). Section 48.59(1), Stats., merely requires that case records be kept while they are needed, rather than in perpetuity. Once those records become obsolete, sec. 19.21(6), Stats., permits their destruction under an ordinance meeting the criteria of that statute.

BCL:FTC

Farmland Preservation Project; Funds provided in the account under sec. 20.143(3)(ea), Stats., may be used for a proposed State-wide Mapping for Farmland Preservation Project if those funds are either utilized to carry out preliminary mapping functions or provided to counties to develop or revise agricultural preservation plans. OAG 51-81

October 2, 1981.

CHANDLER MCKELVEY, *Secretary*
Department of Development

You ask whether funds contained in the account mentioned in sec. 20.143(3)(ea), Stats., as renumbered by ch. 20, sec. 138, Laws of 1981, may be used for a proposed State-wide Mapping for Farmland Preservation Project.

In my opinion the answer is yes, provided that such funds are either utilized to carry out preliminary mapping functions, or provided to counties to develop or revise agriculture preservation plans.

You indicate that this proposed project is designed to provide a standardized set of farmland preservation maps for each county in the state. Standard land use classifications would be used. All maps would be placed on a standard scale, using existing state computer programs. Existing county farmland preservation maps would be utilized when possible. Where no such maps are available, the Department of Development (Department) would cause preliminary maps to be prepared under sec. 91.05, Stats. The entire proposed project is projected to be a cooperative effort between the Department, the Office of the State Cartographer, various regional planning commissions and certain counties.

This project is proposed because farmland preservation maps are not consistent in scale or categorization of information. Because of the inconsistencies, it is difficult for the Department to ascertain how much farmland is in preservation or transition areas at any given time. Once the project is completed, the standardized maps would be made available to all local, regional, state and federal agencies that provide assistance in preserving farmlands.

Section 20.143(3)(ea), Stats., authorizes the Department of Development to expend "the amounts in the schedule to carry out the preliminary mapping function under s. 91.05 and to provide funds to counties for the development of agricultural preservation plans under s. 91.65(1)."

The schedule now contains only one account to carry out both the preliminary mapping function described in sec. 91.05, Stats., and the agricultural preservation planning function described in subch. IV of ch. 91, Stats. Ch. 361, Laws of 1979. Those segments of the proposed project which are to be funded from this account must carry out one or both of these functions.

The Department, subject to standards prepared by the Agricultural Lands Preservation Board, is free to allocate the money contained in the account provided for in sec. 20.143(3)(ea), Stats., between the two functions. The only restrictions are that monies which are used solely to develop agricultural preservation plans must be distributed "to counties," while monies which are used solely to carry out the preliminary mapping function may, but need not, be distributed to counties. *See* secs. 20.143(3)(ea), 91.05(1), 560.02(4), Stats.

In counties where no preliminary maps have been prepared, the activities you describe fall well within the Department's preliminary mapping functions under sec. 91.05, Stats. Under that statute, the Department is free to prepare preliminary maps of any size, using whatever methods it chooses to employ. In those counties, the Department may perform the proposed project itself or contract with the State Cartographer. Funds need not be distributed to counties in which the entire project is performed at the state level.

The question of how the project should be funded in counties where preliminary maps already exist is more difficult. Section 91.05(1), Stats., is broad enough to permit remapping if the remapping is done pursuant to standards prepared by the Farmland Preservation Board. This is particularly true where the remapping would provide increased assistance in locating lands which should be preserved. Since agricultural preservation plans are subject to continual revision under sec. 91.63, Stats., any remapping which could be used under sec. 91.55, Stats., to develop a revised plan is permissible. Legal uncertainty does exist concerning the manner in which the proposed project should be funded in these counties because sec. 91.05, Stats., does not explicitly mention remapping and because that statute requires the Department to set priorities for preliminary mapping on a county-by-county basis. The implication is that remapping

should not occur until there is a preliminary map for each county. Where preliminary maps have already been developed, it would be preferable to provide grants to counties for the purpose of revising their plans to meet standards specified by the Department. The fact that the revisions would provide incidental benefits to the Department would not invalidate the grants.

Those portions of the proposed project which would not assist in developing revised plans under sec. 91.55, Stats., may not be funded from the account provided under sec. 20.143(3)(ea), Stats.

BCL:FTC

County Treasurer; Public Assistance; Welfare; The conclusion of 52 Op. Att’y Gen. 439 (1963), that welfare payment checks must not only be prepared but actually mailed by the county treasurer, is still valid. OAG 52-81

October 2, 1981.

MARK E. MUSOLF, *Secretary*
Department of Revenue

You ask whether 52 Op. Att’y Gen. 439, 446 (1963), concluding that welfare payment checks must be prepared and mailed out by the county treasurer, is still valid in light of the repeal of three of the four statutes cited there. The previous opinion stated that “payment ... is manifestly [sic] not made until the checks to the recipients are prepared *and mailed*.” That interpretation is still valid. Although three of the four statutes cited in the opinion have been repealed, sec. 59.20(2), Stats., still provides that the county treasurer is required to pay out all monies belonging to the county.

Green v. Jones, 23 Wis. 2d 551, 128 N.W.2d 1 (1964), held that portions of an opinion of the Attorney General relating to the construction of a statute are persuasive guides to the meaning of the statute where none of the legislative changes after the opinion was rendered affected the statutory provision construed in the opinion. The Legislature has had eighteen years to change the applicable statute if

it felt 52 Op. Att'y Gen. 439 (1963) was an improper statutory interpretation, but has not done so. Although sec. 59.20, Stats., was not specifically cited in the opinion, it was the applicable statute being interpreted since the issue discussed was the duty imposed by that statutory provision upon the county treasurer to "pay out all moneys belonging to the county." Therefore, that opinion is still a correct interpretation of the law and it is my opinion that county checks must not only be prepared but also actually mailed out by the county treasurer.

This conclusion is not applicable to a county having a population of 500,000 or more if it, pursuant to sec. 66.042(1), Stats., has adopted an ordinance providing for a different method of disbursing county funds.

BCL:WHW

Civil Rights; Discrimination; Prisons And Prisoners; The provisions of sec. 53.41, Stats., which require that at least one jailer on duty be of the same sex as those persons in custody does not conflict with the anti-sex discrimination provisions of the Wisconsin Fair Employment Act. Concept of "bona fide occupational qualification" under federal Title VII of the 1964 Civil Rights Act discussed. Counties must comply with sec. 53.41, Stats., when they can do so without conflict with Title VII. OAG 53-81

October 2, 1981.

DENNIS LIEDER, *District Attorney*
Burnett County

You ask whether sec. 53.41, Stats., which requires that at least one jailer on duty be of the same sex as the prisoners in any jail, is in conflict with state and federal laws prohibiting sex discrimination in employment.

It is my opinion that sec. 53.41, Stats., does not conflict with the prohibition against sex discrimination contained in the Wisconsin Fair Employment Act, secs. 111.31-111.37, Stats., because the stat-

utes were amended simultaneously and the specific requirement of sec. 53.41, Stats., must be given effect over the Act's general prohibition against sex discrimination. To the extent that compliance with sec. 53.41, Stats., as applied to your particular fact situation, may conflict with Title VII of the 1964 Civil Rights Act, 42 U.S.C. sec. 2000e-2, the Supremacy Clause of the United States Constitution requires that federal law prevail over enforcement of the state statute.

Your particular inquiry concerns the positions of dispatcher/jailer at the Burnett County jail, which currently are filled by two females. During the hours of 5:00 p.m. to 8:00 a.m., a single dispatcher/jailer is the only employe on duty at the jail on most work days. The prisoner population in your jail, which has a maximum capacity of nine persons, is entirely male. Female prisoners are incarcerated in facilities located in other counties.

The dispatcher/jailer spends the majority of work time handling radio dispatching duties, including incoming and outgoing transmittals and phone calls, and maintaining a log of such activities. This employe is also responsible for regular (hourly or more often) visual cell checks. Cell checks are necessary to make sure that those incarcerated are present and are receiving medical or other forms of assistance. All booking procedures and the checking of prisoners into the cells are performed by the arresting officer. The dispatcher/jailers are not required to perform strip or pat-down searches of male prisoners, nor to accompany or observe prisoners during toileting or bathing.

Section 53.41, Stats., provides: "Whenever there is a prisoner in any jail there shall be at least one person of the same sex on duty who is wholly responsible to the sheriff or keeper for the custody, cleanliness, food, and care of such prisoner."

In a situation where the jail population is entirely of one sex, or the situation where portions of a jail are segregated by sex, sec. 53.41, Stats., would clearly require that at least one employe on duty be of the same sex as those incarcerated. Applied to the facts outlined above, sec. 53.41, Stats., would require that if only one person is on duty as a dispatcher/jailer, that employe must be a male.

Your question requires an analysis of whether the sex-based employment requirement of sec. 53.41, Stats., is inconsistent with the provisions of state and federal statutes forbidding employment discrimination on the basis of sex. The state and federal statutes forbid discrimination except where sex is a bona fide occupational qualification ("bfoq") for the particular position. Secs. 111.32(5)(a), (g) and 111.325, Stats.; sec. 703(a) and (e) of Title VII as amended, 42 U.S.C. sec. 2000e-2(a) and (e). Under the Wisconsin Fair Employment Act, the "bfoq" exception requires that all of the members of one sex be "physically incapable of performing the essential duties" or that "the essence of the employer's business operation" be undermined if employes are not hired exclusively from one sex. Sec. 111.32(5)(g)5., Stats. Under Title VII, the exception is limited to those instances "where ... sex ... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," 42 U.S.C. sec. 2000e-2(c).

In considering whether sec. 53.41, Stats., conflicts with the requirements of the Wisconsin Fair Employment Act, particularly sec. 111.32(5)(g), Stats., one must apply the principle that statutes relating to the same subject matter must be construed, if at all possible, in harmony with one another. *Hansen Storage Co. v. Wis. Transportation Comm.*, 96 Wis. 2d 249, 255-56, 275 N.W.2d 360 (1980). A statutory subsection may not be considered in a vacuum but must be considered in reference to statutes dealing with the same subject matter. *Aero Auto Parts, Inc. v. Dept. of Transportation*, 78 Wis. 2d 235, 239, 253 N.W.2d 896 (1977). When a general and a specific statute relate to the same subject matter, the specific statute controls, *Sigma Tau Gamma Fraternity House v. Menomonie*, 93 Wis. 2d 392, 402, 288 N.W.2d 85 (1980).

Both secs. 53.41 and 111.32(5)(g), Stats., relate to the employer's ability to hire and otherwise deal with applicants and employes on the basis of their sex. Section 53.41, Stats., is the more specific of the two statutes, dealing with the limited context of custody of prisoners in county jails. Both secs. 53.41 and 111.32 were revised and amended essentially in their present form by the same session law, ch. 94, Laws of 1975. Prior to the amendment, sec. 53.41, Stats., had required only that there be a "matron" on duty whenever a female prisoner was incarcerated. Chapter 94, Laws of

1975, was intended to eliminate from many portions of the statutes distinctions between persons on the basis of their sex. "Summary and analysis of ch. 94, Laws of 1975," Wis. Leg. Council Memo 75-7, Legislative Reference Bill Folder for ch. 94, Laws of 1975.

Accordingly, it is my opinion with respect to Wisconsin law, that sec. 53.41, Stats., does not conflict with sec. 111.32(5)(g), Stats. I note, for example, that sec. 53.41, Stats., does not require that all jailers assigned be the same sex as those under their custody. Particularly in a larger jail or one having some degree of staffing flexibility, it may be possible to comply with the express requirements of both secs. 53.41 and 111.32(5)(g), Stats. To the extent there may be an apparent conflict under the facts of a particular case, however, the specific requirement of sec. 53.41, Stats., would control. *Sigma Tau Gamma Fraternity House*, 93 Wis. 2d at 402.

A more serious, and less easily resolved, problem arises in implementing sec. 53.41, Stats., in light of the prohibition against sex discrimination under Title VII. Under the Supremacy Clause of the United States Constitution, state laws that conflict with Title VII are preempted. *Warshafsky v. Journal Co.*, 63 Wis. 2d 130, 142, 216 N.W.2d 197 (1974); *Kober v. Westinghouse Electric Co.*, 325 F. Supp. 467, 474 (W.D. Pa. 1971); see also *Dothard v. Rawlinson*, 433 U.S. 321, 331 n. 14 (1977).

Thus, the question which must be answered in each case in which sec. 53.41, Stats., applies, is whether the hiring and assignment of jailers on the basis of sex would come within the "bfoq" exception under Title VII, 42 U.S.C. sec. 2000e-(2)(e). Because problems in the application of sec. 53.41, Stats., will differ depending on the organization of the individual jail and the duties of the particular job, I will discuss the development of the case law in this area generally before addressing the facts you have outlined as existing in the Burnett County Jail in particular.

Federal courts interpreting Title VII have uniformly regarded the "bfoq" provision as an extremely narrow exception to the prohibition against sex discrimination. *Dothard*, 433 U.S. at 333-34. As a statutory defense, the burden of proof is on the employer to establish that the "bfoq" is "reasonably necessary to the normal operation" of the

institution, 42 U.S.C. sec. 2000e-2(c)(1). *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir.); *cert. denied*, 100 S. Ct. 2942 (1980).

Formulations of the employer's evidentiary burden vary. Generally, however, in order to establish a "bfoq" defense, an employer must have a reasonable factual basis to believe and must demonstrate that all or substantially all the members of one sex would be unable to perform safely and efficiently the duties of the particular job, *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir., 1969); or that the *essence* of the business operation would be undermined by not hiring members of one sex exclusively. *Diaz v. Pan American World Airways*, 442 F.2d 385, 388 (5th Cir., 1971), cited in *Dothard*, 433 U.S. at 333 and *Gunther*, 612 F.2d at 1085. The employer must establish administrative necessity and not merely administrative inconvenience to support a sex-based "bfoq." *Diaz*, 442 F.2d at 388. The Seventh Circuit has held, furthermore, that physical or sexual characteristics alone, rather than attributes which are culturally more common to one sex than the other, must form the basis for the "bfoq." *In re Consolidated Pretrial Proceedings*, 582 F.2d 1142, 1146 (7th Cir., 1978).

In the prison or jail setting in recent years, inmates' rights to bodily privacy, particularly in regard to body searches or surveillance by members of the opposite sex, have been asserted to be in conflict with the equal employment opportunities of jailers and correctional officers. It is, in fact, unclear to what degree incarcerated persons, whether pretrial detainees or convicted persons, retain a constitutional right to bodily privacy, as protection against opposite sex searches or surveillance. *See generally: Bell v. Wolfish*, 441 U.S. 520 (1979); *Forts v. Ward*, 621 F.2d 1210 (2d Cir., 1980); *Sterling v. Cupp*, 44 Ore. App. 755, 607 P.2d 206 (1980), (dissenting opinions); *cf. Fesel v. Masonic Home of Delaware, Inc.*, 447 F. Supp. 1346 (D. Del., 1978).

Nevertheless, the reported decisions addressing both asserted inmates' privacy rights and statutorily guaranteed employment rights of correctional officers and jailers have almost without exception recognized a need to accommodate the two interests. *Gunther; Forts; Manley v. Mobile County*, 441 F. Supp. 1351 (S.D. Ala.,

1977); *Reynolds v. Wise*, 375 F. Supp. 145 (N.D. Tex., 1974); *Sterling*; *Carey v. N.Y. State Human Rights Appeal Bd.*, 61 App. Div. 2d 804, 402 N.Y.S.2d 207 (N.Y. App. Div., 1978); see also, Note, "Balancing Inmates' Rights to Privacy With Equal Employment for Prison Guards," 4 *Women's Rts. L. Rep.* 243 (1978). The foregoing cases, which either recognize a limited right of inmates to bodily privacy or assume one for purposes of resolving the case at hand, also recognize that inmates cannot expect total insulation from surveillance by the opposite sex. Certain activities, however, have been proscribed as an invasion of privacy when performed by members of the opposite sex. Such activities include direct observation during toilet and bathing activities and visual inspection or physical search of or contact with the anal-genital areas, (including both searches and pat-down frisks through clothing). *Forts v. Ward*, 471 F. Supp. 1095 (S.D. N.Y., 1979), *rev'd in part on other grounds*, 621 F.2d 1210 (2d Cir., 1980); *Reynolds v. Wise*, 375 F. Supp. at 151; *Sterling*.

Despite uncertainty regarding the scope of inmates' privacy rights, most courts analyzing the question have been notably reluctant to hold that sex is a "bfoq" for corrections' personnel. *Gunther*, 612 F.2d at 1079; *Forts*, 621 F.2d at 1213; *Reynolds*, 375 F. Supp. at 145; *Manley*, 441 F. Supp. at 1351; *Carey*; but see *Dothard*, 433 U.S. at 321. The difficulty of recognizing a "bfoq" for correctional officers or jailers is illustrated by the *Dothard* opinion itself. The Supreme Court recognized a sex-based "bfoq" in *Dothard* for "contact" positions in the Alabama male maximum security prison. The Court's decision emphasized the uniquely degrading conditions in the Alabama prisons, and subsequent cases have limited that decision to its facts. Instead, in cases like *Manley* and *Gunther*, the courts dealing with "bfoq" questions in the prison or jail setting have developed a variant of the evidentiary burden for establishing a "bfoq" by requiring an examination of alternative job assignments. In order to establish sex as a "bfoq" under these cases, the employer must show that the hiring of one sex would undermine the essence of prison administration, and that job responsibilities cannot reasonably be arranged in such a way as to minimize or eliminate any possible conflict between the privacy interests of inmates and the nondiscrimination principles of Title VII. *Gunther*, 612 F.2d at 1086; *Forts*, 621 F.2d at 1216; *Reynolds*, 375 F. Supp. at 145.

Questions regarding “bfoq’s” in the jail or prison setting and issues of inmates’ rights of bodily privacy are sensitive and difficult ones. *Forts*, 621 F.2d at 1211-12; *cf. Doe v. Duter*, 407 F. Supp. 922 (W.D. Wis., 1976). Authoritative judicial or legislative guidance on the balance which must be struck is not yet available, and each case must be analyzed in light of its individual facts. Nonetheless, I hope that the foregoing discussion will assist county sheriffs and corporation counsel in determining whether compliance with sec. 53.41, Stats., is likely to expose the county to a claim of sex discrimination under Title VII, if not under the Wisconsin Fair Employment Act as well.

In many counties, conflict between sec. 53.41, Stats., and the Title VII rights of employes may be avoidable because of staffing flexibility and by the use of alternative work assignments. In such cases, compliance with both state and federal statutes is required. In those instances in which the individual facts establish that sex is not a “bfoq” under Title VII, the requirements of sec. 53.41, Stats., are superseded, based on the Supremacy Clause. Where being male or female does constitute a “bfoq” for a particular jailer position, compliance with sec. 53.41, Stats., would follow.

Based on the facts outlined above regarding the dispatcher/jailers in Burnett County, I believe a court would conclude that being male or female is not a bona fide occupational qualification for those positions. In the circumstances you have outlined, it is my opinion that the county’s obligation to comply with sec. 53.41, Stats., could not justify avoidance of the requirements of Title VII, and the federal statute would supersede the state statute. Accordingly, it would be impermissible to terminate the incumbent female dispatcher/jailers or to hire an additional male dispatcher/jailer solely upon the basis of sex.

BCL:MAM

Appropriations And Expenditures; County Board; Section 70.62(4)(em)1., Stats., only permits county board to increase tax levy over maximum to pay increased costs which relate to payment of a court judgment or court confirmed award, or out-of-court settlement after a civil action or special proceeding has been commenced in a court. OAG 54-81

October 12, 1981.

FRANK VOLPINTESTA, *Corporation Counsel*
Kenosha County

You inquire whether sec. 70.62(4)(em)1., Stats., empowers a county board of supervisors to increase the levy limit allowed under sec. 70.62, Stats., to include the costs of workers' compensation claims, unemployment compensation claims and other claims filed against a county where such claims were settled either before being litigated or after litigation.

Section 70.62(4)(em)1., Stats., provides:

The amount of the levy allowed under this subsection may be increased by the following amounts:

1. The amount needed for increased costs of court judgments and out-of-court settlements.

In my opinion, the levy limit can only be increased pursuant to sec. 70.62(4)(em)1., Stats., to cover increased costs which relate to payment of a judgment awarded by a court, an award of an administrative agency which has been affirmed by a court or the amount of a settlement which has been made out-of-court after a civil action or special review proceeding has been commenced or instituted in a court. Pleadings must have been filed with the clerk of the proper court. See secs. 59.76, 102.23, 108.09(7), 227.16, 801.02, 893.80, Stats.

Many counties budget some amount yearly to pay anticipated claims. The reference in sec. 70.62(4)(em)1., Stats., to "increased costs" only includes those amounts not previously budgeted. Since

the phrase out-of-court settlements is not defined in the statute, the words therein are to be construed according to sec. 990.01(1), Stats. In my opinion, it has a "peculiar meaning in the law" and is required to be construed according to such meaning. *Black's Law Dictionary* 993 (5th ed. 1979), defines "out-of-court settlement":

The phrase is used with reference to agreements and transactions in regard to a pending suit which are arranged or take place between parties or their counsel privately and without being referred to the judge or court for authorization or approval. Thus, a case which is compromised, settled, and withdrawn by private agreement of the parties, after its institution, is said to be settled "out of court."

In *People v. McWilliams*, 117 Cal. App. 732, 4 P.2d 601, 603 (1931), which is cited in 30A Words and Phrases at 296, it is stated that "[t]he plain meaning of the expression out of court ... is outside of the proceedings then being taken in court."

You also inquire whether the phrase "costs of court judgments and out-of-court settlements" would include attorneys' fees, filing fees, cost of depositions and other costs directly related to the litigation.

I am of the opinion that it would. Such costs would not be limited to those allowed or allowable by a court pursuant to statute. Costs related to defending the claims at the administrative level could be included where there was a court judgment, court confirmation of award or out-of-court settlement after civil action had been commenced or special proceeding instituted.

BCL:RJV

Nursing Homes; Religion; Words And Phrases; Neither Wisconsin nor federal law prohibits a nursing home operated by a bona fide, nonprofit religious organization from giving preference in admission to members of that religion. OAG 55-81

October 12, 1981.

ED JACKAMONIS, *Speaker*
State Assembly

The Committee on Assembly Organization has requested my opinion "as to whether or not a nursing home, which is operated by a religious organization, may give preference in admission to members of that religion." This question necessitates an analysis of the relevant state and federal law governing nursing home accommodations.

Section 942.04(1), Stats., provides as follows:

Whoever does any of the following is guilty of a Class A misdemeanor:

(a) Denies to another or charges another a higher price than the regular rate for the full and equal enjoyment of any public place of accommodation or amusement because of sex, race, color, creed, physical condition, developmental disability as defined in s. 51.01(5), national origin or ancestry; or

(b) Gives preferential treatment to some classes of persons in providing services or facilities in any public place of accommodation or amusement because of sex, race, color, creed, national origin or ancestry; or

(c) Directly or indirectly publishes, circulates, displays or mails any written communication which the communicator knows is to the effect that any of the facilities of any public place of accommodation or amusement will be denied to any person by reason of sex, race, color, creed, physical condition, developmental disability as defined in s. 51.01(5), national origin or ancestry or that the patronage of a person is unwelcome, objectionable or unacceptable for any of those reasons

Under this subsection, giving a preference to members of one religion over persons not members of that religion is prohibited. Unless nursing homes operated by religious organizations are exempt from this prohibition, your question would have to be answered that such nursing homes may not give such preference.

The exemptions from this prohibition are listed in sec. 942.04(2), Stats., which provides:

“Public place of accommodation or amusement” shall be interpreted broadly to include, but not be limited to, places of business or recreation, hotels, motels, resorts, restaurants, taverns, barbershops, nursing homes, clinics, hospitals, cemeteries, and any place where accommodations, amusement, goods or services are available either free or for a consideration except where provided by bona fide private, nonprofit organizations or institutions.

Your question poses a problem of statutory construction: whether the exception of “bona fide private, nonprofit organizations or institutions” in sec. 942.04(2), Stats., applies only to the last clause in the section, “any place where accommodations, amusement, goods or services are available either free or for a consideration,” or whether the exception applies to the entire subsection.

Some aid in determining legislative intent in this case is provided by *Service Investment Co. v. Dorst*, 232 Wis. 574, 288 N.W. 169 (1939), wherein the court held that the presence of a comma preceding the modifying phrase is necessary if the modifying phrase is to be interpreted as modifying all preceding clauses and not just the last antecedent clause. 232 Wis. at 577. This principle of statutory construction has been applied by this office. 63 Op. Att’y Gen. 519, 522 (1974). Based on these authorities, it would appear that the exemption in sec. 942.04(2), Stats., applies only to the last antecedent clause. A further examination of the court’s holding in *Dorst*, however, leads me to the opinion that the exemption does apply to the entire section.

In *Dorst* the court said: “Although as a general rule of construction a modifying clause is considered ordinarily to be confined to the last antecedent, that rule is not always applicable and may be easily rebutted where other circumstances so indicate.” 232 Wis. at 577.

The Wisconsin court quoted with approval the United States Supreme Court’s reasoning in *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345 (1920). The Supreme Court said: “When several words are followed by a clause which is applicable as much to the

first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." 253 U.S. at 348. *See also, In re Bowler Trust*, 56 Wis. 2d 171, 178-79, 201 N.W.2d 573 (1972).

In my opinion the qualifying clause in sec. 942.04(2), Stats., applies to all the previous clauses as well as the last antecedent clause. The enumerated examples of "[p]ublic place of accommodation or amusement" are parts of the more general category of "any place where accommodations, amusement, goods or services are available either free or for a consideration." It does not make sense to say that the exemption applies to a general category, which, by the terms of the statute, is to be broadly defined, but not to enumerated examples of "[p]ublic place of accommodation or amusement" that clearly can be included within the purview of the last antecedent clause.

Thus, in my opinion, nursing homes operated by bona fide private, nonprofit organizations or institutions, including religious associations, come within the exemption provided in sec. 942.04(2), Stats. This interpretation comports with other statutes prohibiting discrimination. In sec. 111.325, Stats., for example, the Legislature made it unlawful for any employer, labor organization, licensing agency or person to discriminate against any employe or any applicant for employment or licensing. In sec. 111.32(3), however, the Legislature specifically exempts "a social club, fraternal or religious association not organized for private profit" from the definition of employer. Further, sec. 50.03(9), Stats., includes a recognition that some nursing homes may admit only adherents of a certain church or denomination and may be so designated.

As regards the prohibition against discrimination based on creed in the use of private facilities, found in sec. 942.04(3), Stats., I do not believe that prohibition applies in the present instance. The Legislature has already declared nursing homes to be places of public accommodation in sec. 942.04(2), Stats., while sec. 942.04(3), Stats., relates to places other than those of public accommodation, namely "private facilities commonly rented to the public." Therefore, religious nursing homes are not subject to sec. 942.04(3), Stats.

Similarly, the prohibition against discrimination based on creed in selling or renting housing, found in sec. 101.22, Stats., does not apply to this situation. Nursing homes are places of public accommodation, not "housing," according to the Legislature. The Legislature intended by sec. 942.04(2), Stats., to exempt religious nursing homes from discrimination laws, and to read sec. 101.22, Stats., as subjecting religious nursing homes to discrimination laws would be inconsistent with that intent. Therefore, religious nursing homes are not subject to sec. 101.22, Stats.

I therefore conclude that nothing in the Wisconsin statutes prohibits a nursing home operated by a religious organization from giving preference in admission to members of that religion. The question remains whether any federal statute or regulation prohibits such a preference policy.

While your question does not indicate so, it will be assumed that the religious nursing home involved is a certified Medicaid provider so as to render it subject to federal statute and regulation. Religious nursing homes may constitutionally be certified as Medicaid providers since the state may, in certain instances, contract with and even aid a religious organization in order to obtain goods and services for a public, secular purpose, *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 321, 198 N.W.2d 650 (1972). Here, the state may contract for nursing home services so as to provide quality nursing care for its needy residents. This is certainly a permissible public, secular purpose.

It will first be considered whether the religious nursing home's preferential admissions policy is actionable under 42 U.S.C. sec. 1983. This statute provides a right of action to a person when:

- a. The defendant has deprived that person of a right secured by the Constitution or laws of the United States; and
- b. The defendant has acted "under color" of any state law, ordinance, etc. (hereinafter, the "state action" requirement), *Adickes v. S. H. Kress and Company*, 398 U.S. 144, 150 (1970).

Neither requirement is fulfilled in this case. While a state may not discriminate on the basis of religion (absent a compelling state interest served by the discrimination), *Remmers v. Brewer*, 361 F. Supp. 537, 542 (S.D. Iowa 1973), *Sherbert v. Verner*, 374 U.S. 398, 402 (1963), there is no law that a religious organization not acting under color of state law may not so discriminate. Purely private discriminatory conduct is not constitutionally prohibited. *Golden v. Biscayne Bay Yacht Club*, 521 F.2d 344, 349 (5th Cir. 1975); *Adickes; Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

Further, the admissions policy of a nursing home is not state action under the three tests of what constitutes state action, namely the "public function" test, the "nexus" test and the "state instrumentality" test.

"Public function" state action occurs when a private actor does an act "traditionally reserved to the state." *Wagner v. Sheltz*, 471 F. Supp. 903, 907 (D. Conn. 1979). Nursing home admissions are certainly not and never have been "reserved to the state," such are usually private affairs. Therefore, the admissions policy survives the "public function" test. See also *Musso v. Suriano*, 586 F.2d 59 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979).

"Nexus" state action occurs when a private institution does a given act and:

- a. The state is significantly involved with the private institution;
- b. The state is involved in the very act that caused the injury to the plaintiff; and
- c. The state's involvement must encourage, aid, or connote approval of the private act.

Barrett v. United Hospital, 376 F. Supp. 791, 797 (S.D.N.Y. 1974).

By contracting with the nursing home for Medicaid purposes, the state does become significantly involved with the nursing home. However, the state is not involved with the nursing home's admissions policy. Medicaid regulations concern the state only with the health and safety aspects of the home, not with whom it admits. Indeed, a

Medicaid certification does not encourage or connote approval of the policy since the certifying state has no control over a home's admissions policy. Therefore, the nursing home admissions policy is not state action under a "nexus" approach.

"State instrumentality" state action occurs when the state actually administers or controls the private actor, so that the acts are, for all practical purposes, the act of the state and not of a private actor. *Musso*, 586 F.2d at 63. Mere allegations of state funding and general regulation of the institution, without evidence of actual administration or control by the state of the institution, does not fulfill this test. *Id.*

As noted previously, subjects such as a nursing home's admissions policy are not regulated by the state. Medicaid regulation concerns the state only with health and safety aspects of the home, and such regulation does not appear to rise to the level of control which would reduce a nursing home to a "state instrumentality." As such, absent any evidence which would lead one to believe that a particular nursing home was administered or controlled by the state, the nursing home's admissions policy would not be state action under a "state instrumentality" approach.

Thus, 42 U.S.C. sec. 1983 does not provide a cause of action against a nursing home using a preferential admissions policy.

A further question is whether 42 U.S.C. sec. 1985(c) makes the religious nursing home's admission policy actionable.

This statute provides a cause of action when two or more persons "conspire or go in disguise on the highway or on the premises of another" to deprive another of his equal protection, privileges and immunities under the law. While there is some controversy as to whether 42 U.S.C. sec. 1985(c) will make private discriminatory conduct illegal, the rule in this circuit appears to be that 42 U.S.C. sec. 1985(c) does not make a private discrimination illegal where it is otherwise not illegal. *Murphy v. Mount Carmel High School*, 543 F.2d 1189, 1193-94 (7th Cir. 1976); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 828-29 (7th Cir. 1975); *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972); *contra*, *Action v. Gan-*

non, 450 F.2d 1227, 1235 (8th Cir. 1971). The requirement remains that there must be state involvement in the discriminatory act for the discrimination to be actionable, and since there is no state involvement in the religious nursing home's admissions policy, there is no cause of action under 42 U.S.C. sec. 1985(c). Recall that private discriminatory conduct is not constitutionally prohibited.

A final federal question is whether there is an implied right of action against a religious nursing home practicing a preferential admissions policy pursuant to 42 U.S.C. sec. 1396, *et seq.*, the Medicaid statute.

In certain circumstances, a right of action may be inferred from a statute conferring a benefit on a person or group of persons in order to allow such person or group to sue to protect the benefit. *Cort v. Ash*, 422 U.S. 66 (1975). A detailed analysis of the requirements for this implied right of action will not be attempted because I am of the opinion that the preferential admissions policy of a nursing home does not deny a Medicaid recipient any benefit conferred by law or regulation.

Nowhere is discrimination based on religion even inferentially prohibited by federal or state rule, since the relevant rules and statutes limit their prohibitions to discrimination based on race, color or national origin. *See* section HSS 104.01(1) Wis. Adm. Code, 45 C.F.R. sec. 80.3(a), 42 U.S.C. sec. 2000d. Further, even though the Medicaid recipient may freely choose a Medicaid provider from among the certified providers, sec. 49.45(9), Stats., a recipient is not thereby guaranteed treatment at that facility. The free choice cannot be impaired by the *state*; the certified provider may refuse to treat a Medicaid recipient if it wishes. The refusal by a provider is not a denial of benefits, since the Medicaid recipient can go elsewhere to receive his or her care. Therefore, since neither 42 U.S.C. sec. 1396, *et seq.*, nor any other rule or statute confers on a Medicaid recipient the right to enter any nursing home he or she pleases, there is no implied right of action against the nursing home which has a preferential admissions policy such as you describe.

Therefore, I conclude that no federal rule or statute prohibits a nursing home operated by a religious organization from giving pref-

erence in admission to members of that religion. Since no state or federal law, rule or constitutional provision prohibits the religious nursing home from giving preference in admission to members of that religion, a religious nursing home is free to implement such an admissions policy.

BCL:JDJ:EWJF

Savings And Loan Associations; Section 112.05, Stats., does not apply to or restrict the investment of deposited funds by a savings and loan association except when it acts as trustee. OAG 56-81

October 14, 1981.

R. J. McMAHON, *Commissioner*
Savings and Loan

You have requested my opinion concerning the applicability of sec. 112.05, Stats., to the investment of funds on deposit by savings and loan associations in money market futures. As you have described the procedure, such investments serve to control and make more certain the associations' future interest obligations and allow the associations increased ability to predict or control the rate of their future interest obligations. As you have indicated, such investments, controlled by regulations and insured savings, may be financially sound practices.

It is my opinion that sec. 112.05, Stats., does not apply to savings and loans except when they act in a trust capacity. Section 112.05, Stats., is a part of ch. 112 of the Wisconsin Statutes, which chapter concerns "fiduciaries." It is a criminal statute and must be interpreted narrowly. *Shinners v. State ex rel. Laacke*, 219 Wis. 23, 261 N.W. 880 (1935). In *Shinners*, the Wisconsin Supreme Court construed the word "person" as used in the first phrase of sec. 112.05, Stats., to apply only to a situation where an *individual* took money for safekeeping: "With this history in mind, the separate classification of persons engaged in the business of receiving deposits of money for safekeeping can only relate to individuals engaged in that business as

distinguished from corporations organized under the banking act.”
219 Wis. at 30.

Moreover, as none of the other terms in the statute would in any way include a savings and loan association except where it acted as a trustee, a savings and loan association would only be included when it acted in a trust capacity and only with respect to such funds. *See* 68 Op. Att’y Gen. 372 (1979), where this office approved practices similar to those described in your opinion request.

You further ask if sec. 112.05, Stats., would apply to or restrict trust funds deposited with a savings and loan association. As noted above, only where the savings and loan is acting as a trustee would the restriction in sec. 112.05, Stats., apply and then only to such funds.

BCL:RDR

51.42 Board; Menominee Indians; Individual Menominee Tribe members are eligible to participate in voluntary programs mandated by ch. 51, Stats., but the state cannot accept tribe members into involuntary programs on the basis of tribal court orders alone. OAG 57-81

November 3, 1981.

PAUL M. CORNETT, *District Attorney*
Shawano and Menominee Counties

You have requested my opinion on several matters involving the respective authority and jurisdiction of Menominee County and the Menominee Indian Tribe which arise under ch. 51, Stats. Chapter 51 is concerned primarily with the admission, commitment and treatment of all persons in need of services in four major disability areas related to: (1) alcoholism, (2) drug abuse, (3) developmental disabilities, and (4) mental illness. Chapter 51 also places certain funding responsibilities on the state and county governments to provide these services to county residents. Your first two questions are inter-related and, therefore, will be considered together. You ask:

1. Is Menominee County responsible for providing these services to Indians residing on the Menominee Indian Reservation?
2. Are Indians residing on the Menominee Indian Reservation residents of Menominee County for the purposes of obtaining services pursuant to Chapter 51?

Section 51.42(3), Stats., provides in part:

The county board of supervisors of every county, or the county boards of supervisors of any combination of counties, *shall* establish a community mental health, mental retardation, alcoholism and drug abuse program, make appropriations to operate the program and authorize the board of directors of the program to apply for grants-in-aid pursuant to this section.

Section 51.437, Stats., provides in part:

(4) The county boards of supervisors have the primary governmental responsibility for the well-being of those developmentally disabled citizens residing within their respective counties and the families of the mentally retarded insofar as the usual resultant family stresses bear on the well-being of the developmentally disabled citizen. County liability for care and services purchased through or provided by a board established under this section shall be based upon client's county of residence except for emergency services for which liability shall be placed with the county in which the individual is found. ...

(5) The county board of supervisors *shall* establish community developmental disabilities services boards to furnish services within the counties. Such services shall be provided either directly or by contract.

These and related provisions in ch. 51 make clear that counties must provide these services to all persons residing within the respective county and in emergency situations to nonresidents as well. Menominee County is not excepted from having to provide these statutorily-mandated services. Nor does ch. 51 distinguish between Indian and non-Indian county residents.

Unquestionably, Indians residing on the Menominee Indian Reservation also are residents of Menominee County for the purpose of obtaining services pursuant to ch. 51. You will recall that Menominee County and the Town of Menominee were created as a result of termination. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 409-10 (1968), and the Menominee Termination Plan, 26 Fed. Reg. 3726 (April 29, 1961). The Menominee Reservation, which had been created by the Treaty of Wolf River in 1854 (10 Stat. 1064), but later modified by the Treaty of February 11, 1856 (11 Stat. 679), thus became coterminous with Menominee County and the Town of Menominee, ch. 259, sec. 2, 1959 Wis. Session Laws, 300-01, sec. 2.01(39mm), Stats. The Menominee Reservation was reestablished by the Menominee Restoration Act (87 Stat. 770, 25 U.S.C. 903-903f), which repealed the Menominee Termination Act of June 17, 1954 (68 Stat. 250, 25 U.S.C. 891 *et seq.*). In 66 Op. Att'y Gen. 115 (1977), it was concluded that as a result of restoration the county and reservation boundaries once again are coterminous for jurisdictional purposes.

The opinions of this office have uniformly held that tribe members residing on Indian reservations located within a county enjoy the same entitlement to public services (such as those mandated in ch. 51, Stats.) that are available to other residents of the county. *See, e.g.*, 37 Op. Att'y Gen. 213 (1948); 38 Op. Att'y Gen. 531 (1949). *See also* 70 Op. Att'y Gen. 36 (1981).

It is settled that under most circumstances state regulatory authority does not extend to Indians residing on reservations. (*See discussion infra.*) It is my opinion, however, that the state, in making available ch. 51 services to Indian residents is not exercising proscribed regulatory authority. Where tribe members voluntarily apply for public services and meet eligibility requirements, there appears to be no basis for denying such services. *See* 70 Op. Att'y Gen. 36 (1981) and cases cited therein.

Your final three questions also are interrelated and, therefore, will be considered together. You ask:

3. May the Menominee Tribal Court make commitments to the Menominee County 51.42/.437 Unified Board?

4. Must the procedural requirements of Chapter 51 be followed by the Tribal Court in committing members of the tribe?

5. May the Menominee Tribal Court incur expenses for Menominee County by ordering tribal members to participate in Menominee County 51.42/.437 Unified Board programs?

In response to question number three, it is my opinion that the Menominee County 51.42/.437 Unified Board has no authority to accept involuntary commitments ordered by the Menominee Tribal Court. It follows that your fourth question need not be considered. The answer to question five is no, which also follows from the answer to question three with regard to involuntary commitments. Whether Menominee Tribal Court action effects an involuntary or voluntary commitment regarding Menominee County 51.42/.437 Unified Board programs is an important factor which must be considered in each case.

Services that counties are mandated to provide through boards established under secs. 51.42 and 51.437, Stats., are to be distinguished from jurisdictional considerations associated with commitments and detentions. As indicated above there is no legal basis for the Menominee County 51.42/.437 Unified Board to deny services to Menominee Tribe members where such persons voluntarily request the service. There is, however, a jurisdictional impediment in those cases involving an involuntary commitment as under a court order.

The state, of course, has no jurisdiction to compel Menominee Tribe members to involuntarily submit themselves to the control of the 51.42/.437 Unified Board or to any state agency charged with providing services in the ch. 51 disability areas. The Menominee Tribe and the federal government rather than the state have the responsibility to provide services where there is the need for an involuntary commitment. *White v. Califano*, 437 F. Supp. 543, 556 (D. S.D. 1977). The Tribe has the power to regulate its internal relations generally to the extent this power has not been qualified by federal law or affected by the unique relationship between the Tribe and the United States. See generally 64 Op. Att'y Gen. 184 (1975); 66 Op. Att'y Gen. 115 (1977). It is thus settled that the primary governmental authority to exercise general jurisdiction over tribe members

within reservation boundaries rests with the Menominee tribal government and the federal government.

Only infrequently have the courts allowed state jurisdiction such as that associated with involuntary commitments to be exercised against Indians within reservation boundaries absent specific federal legislative authorization. Although Wisconsin has been granted jurisdiction over civil causes of action to which Indians are parties under Pub. L. No. 280 (67 Stat. 558; 28 U.S.C. sec. 1360; 18 U.S.C. sec. 1162), the Menominee Tribe was excepted from its coverage effective March 1, 1976. Since Pub. L. No. 280 does not apply to the Menominee, it is not necessary to decide to what extent it grants the state jurisdiction over Tribe members in matters arising under ch. 51, Stats. I have found no other specific federal legislative authorization. It is therefore necessary to consider whether there is any other basis to support state jurisdiction over involuntary commitment matters involving Menominee Tribe members.

The Supreme Court recently summarized the analytical framework utilized to determine under what circumstances a state's regulatory authority may lawfully be extended to tribal affairs within reservation boundaries. The Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), observed:

Congress has broad power to regulate tribal affairs under the Indian Commerce Clause [U.S.C.A. Const.] Art. I, 8, cl. 3. See *United States v. Wheeler*, *supra*, 435 U.S., at [313.] 322-23, 98 S.Ct., at 1085-1086 [(1978)]. This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. See, e.g., *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *McClanahan v. Arizona State Tax Comm'n*, [411 U.S. 164 (1973)]. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1958). See also *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470, 99 S.Ct. 740, 746, 58 L.Ed.2d 740 (1979); *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943, 47

L.Ed.2d 106 (1976) (*per curiam*); *Kennerly v. District Court of Montana*, 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971). The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," *McClanahan v. Arizona State Tax Comm'n, supra*, 411 U.S. at 172, 93 S.Ct., at 1262, against which vague or ambiguous federal enactments must always be measured.

448 U.S. at 142-43. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Cf. *Moe v. Confederated Salish and Kootenai Tribes, Etc.*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes*, 447 U.S. 135 (1980).

The Court went on to caution, however, that: "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." 448 U.S. at 144.

In *Califano*, the court held that South Dakota state and county officials have no power to initiate or carry out procedures for the involuntary commitment of allegedly mentally ill Indian persons residing in Indian country because such action infringes upon the right of Indian people to govern themselves. Jurisdiction under Pub. L. No. 280 was not at issue. The court noted that:

A person involuntarily committed is torn away from family, friends and community; after commitment the person may be allowed no greater liberty than a person convicted of a criminal offense. One can scarcely conceive how the power of the state could be brought to bear upon a person with any greater severity.

437 F. Supp. at 549. Applying involuntary commitment procedures to an Indian person residing on the reservation would, the court reasoned, require *severe* intrusions into the tribe's sovereignty, which infringement is not constitutionally permitted.

The court went on in an alternative holding to conclude that the involuntary commitment of allegedly mentally ill Indian residents of South Dakota who reside on Indian reservations is a subject area preempted by the federal government. The federal government, not the state government, has responsibility to provide these services under the trust relationship that exists between tribes and the United States. 437 F. Supp. at 556 *et seq.*

Also, the court rejected a suggested procedure which involved agreement between state and tribal officials to vest jurisdictional authority within the state. The court considered a proposal whereby tribal officials would take jurisdiction over the person and subject matter when a case appearing to necessitate involuntary commitment arises and thereafter the person would be transferred to the custody of state officials if commitment were necessary. The court concluded that this suggested procedure could not be utilized in view of *Kennerly v. District Court of Ninth J.D. of Montana*, 400 U.S. 423 (1971).

In *Kennerly*, the Court rejected unilateral efforts by the Black Feet Tribal Council to vest Montana courts with jurisdiction over civil matters which arose on the reservation and which involved Indian persons. The Court noted that Congress by enacting the Indian Civil Rights Act of 1968 (25 U.S.C. 1322) established procedures that must be adhered to before a state can acquire civil and criminal jurisdiction over litigation involving Indians arising in Indian country. 400 U.S. at 428-29.

The situation you describe with Menominee Tribe members appears to be very similar to that considered by the court in *Califano*. The court's reasoning in *Califano* is persuasive, and I have found nothing that would allow a different result with respect to the question of whether the Menominee Tribal Court can order the commitment of tribe members to state jurisdiction for care in state facilities.

This is not to suggest, however, that the State of Wisconsin, the Menominee Tribe and appropriate federal officials cannot cooperate to ensure that these types of services are made available to Menominee Tribe members. This could occur, for example, through the purchase of services from state government by the federal government in coordination with the exercise of tribal authority. Under such a contractual relationship jurisdictional authority over involuntary commitments would remain with the federal government or the tribal government throughout the period that care is provided in state operated facilities. *C.f., Necklace v. Tribal Court of Three Affiliated Tribes, etc.*, 554 F.2d 845 (8th Cir. 1977).

In view of these considerations, the answer to your fifth question must be determined on a case-by-case basis. Although the Unified Board cannot acquire jurisdiction over a tribe member residing on the Menominee Reservation by virtue of a tribal court order, the Board would have to make services available to tribe members where there is a voluntary application. The critical consideration is whether the tribe member meets the eligibility requirements for such services and not his or her motivation for making application.

BCL:JDN

Employer And Employee; Ordinances; Vocational And Adult Education; The employment practices of vocational, technical and adult education districts are subject to city equal employment opportunity ordinances. Such ordinances, however, can be applied only to employment within the geographic boundaries of the city. OAG 58-81

November 12, 1981.

ROBERT P. SORENSEN, PH.D., *State Director*
Board of Vocational, Technical
and Adult Education

You ask whether Vocational, Technical and Adult Education District No. 4 is subject to the jurisdiction of the Madison Equal Opportunities Commission under an ordinance prohibiting employment dis-

crimination. If so, you ask what is the extent of such jurisdiction. District No. 4 encompasses parts of twelve counties and has major facilities in Madison, Fort Atkinson, Watertown, Reedsburg and Portage.

Although not free from doubt, it is my opinion that the Madison Equal Opportunities Commission *does* have jurisdiction over the employment practices of District No. 4. Such jurisdiction, however, is limited to employment within the geographic boundaries of the City of Madison.

Education in Wisconsin constitutes a state function. *West Milwaukee v. Area Bd. Vocational, T. & A. Ed.*, 51 Wis. 2d 356, 376, 187 N.W.2d 387 (1971). Vocational, technical and adult education districts are quasi-municipal corporations which act as agents of the state for the purpose of administering the state's system of vocational, technical and adult education. *Green Bay Met. S. Dist. v. Voc., T. & A. Ed.*, 58 Wis. 2d 628, 638, 207 N.W.2d 623 (1973). A basic issue underlying your questions is whether the employment practices of District No. 4 are immune from regulation by the City of Madison because the District is performing a *state* function.

In *Milwaukee v. McGregor*, 140 Wis. 35, 121 N.W. 642 (1909), the court held that a city could not require the State Board of Normal School Regents to comply with the city's building permit ordinance before erecting a school building. The court concluded that "the state ... is as exempt from mere general or local laws as the king was of old in the exercise of his sovereign prerogatives." 140 Wis. at 37. See also *Kentucky Inst., Education of Blind v. City of Louisville*, 123 Ky. 767, 97 S.W. 402, 404 (1906); *Board of Regents of Universities v. City of Tempe*, 88 Ariz. 299, 356 P.2d 399, 406 (1960).

McGregor involved a *state agency* — the State Board of Normal School Regents. Such state agencies have been found to differ "very widely" from quasi-municipal corporations such as school districts. *Sullivan v. Board of Regents of Normal Schools*, 209 Wis. 242, 244-45, 244 N.W. 563 (1932). It is not clear whether *McGregor* would be extended to immunize vocational school districts from a city's regulatory ordinances simply because the districts perform a state func-

tion. *Cf. Milwaukee v. Firemen Relief Asso.*, 42 Wis. 2d 23, 34, 165 N.W.2d 384 (1969).

In *Green County v. Monroe*, 3 Wis. 2d 196, 87 N.W.2d 827 (1958), the court rejected the attempted application of a city zoning ordinance to the construction of a county jail. The court noted that counties have extensive police powers, that construction of the jail was subject to a comprehensive state building code, and that the county was required by state law to locate the jail in the city. 3 Wis. 2d at 201-02. The court concluded that the city's zoning authority could not be "construed to include the state, or in this instance the county, when *in conflict with* special statutes governing the location and construction of a county jail" (emphasis added). 3 Wis. 2d at 202. The court, however, did not expressly endorse the converse proposition, *i.e.*, that counties *are* subject to city regulation in the absence of any conflict.

The decisions of courts in other jurisdictions have not been uniform in result. Some courts have exempted school districts from city building codes. *Salt Lake City v. Board of Education*, 52 Utah 540, 175 P. 654 (1918); *Hall v. City of Taft*, 47 Cal. 2d 177, 302 P.2d 574 (1956). In *Salt Lake City*, 175 P. at 658-59, the court stated:

[C]ounsel for ... [the city] ... concede that the [city's] ordinances ... would have no application to what they call state buildings, although such buildings are located within the limits of the city. ... Under our Constitution and statutes, however, we can conceive of no distinction between what are denominated by counsel state buildings, such as the buildings of the State University, or the Capitol, and our school buildings. ... [T]he public school buildings and their control are of as much concern to the state as are the other buildings [I]f state buildings must be excluded, then public school buildings must likewise be excluded.

Similarly, in *Hall*, 302 P.2d at 578, the court stated:

While a large degree of autonomy is granted to school districts by the Legislature ... no statute or constitutional provision ... expressly makes school buildings or their construction any more

amenable to regulation by a municipal corporation than structures which are built and maintained by the state generally for its use.

To the contrary, other courts have held that school districts are subject to city building codes and regulations. *Kansas City v. Fee*, 174 Mo. App. 501, 160 S.W. 537 (1913); *Kansas City v. School Dist. of Kansas City*, 356 Mo. 364, 201 S.W.2d 930 (1947); *Port Arthur Independent Sch. Dist. v. City of Groves*, 376 S.W.2d 330 (Tex. 1964); *Edmonds Sch. Dist. No. 15 v. City of Mountlake Terrace*, 77 Wash. 2d 609, 465 P.2d 177 (1970); *Cedar Rapids Com. Sch. Dist. v. City of Cedar Rapids*, 252 Iowa 205, 106 N.W.2d 655 (1960). These courts have emphasized, however, that the city's regulations must be reasonable and must not conflict with the school district's performance of its education function. For example, in *Edmonds*, 465 P.2d at 179-81, the court commented:

The City of Mountlake Terrace cannot ... impair the educational processes of or limit the standards prescribed by the state for the operation of the public schools ... for that would be an infringement upon state sovereignty. But ... subordinate municipalities [are] free to regulate each other in those activities which traditionally are thought to lie within their particular competence and are more proximate to their respective functions.

....

[N]othing in the constitution or existing law ... would enable a city ... [to] interfere with the conduct and operation of the public schools. We do not apprehend that requiring the Edmonds School District to ... [comply] with the city building code empowers the city to assume any responsibilities or control over the way the education process is conducted. Such matters as curriculum, textbooks, teaching methods ... or ... the selection, tenure and compensation of school personnel ... remain outside of the authority and control of the cities.

Similarly, in *Fee*, 160 S.W. at 538, the court stated:

The work of education and everything necessary, or impliedly necessary, to the carrying on of the work is committed to the school board, and the city has no right to interfere with that work or direct how it shall be done

[F]ining of this janitor-fireman for running a boiler without a city license is [not] an interference with the board in its work of education. To say that the board, in order to be left wholly free to carry on its work of education, must, with its employes, be absolutely free from all matters of purely police regulation is to say that the board cannot attend to the work of education unless it is allowed to violate, or at least pay no attention to, such regulations. The absurdity of such a statement is its own refutation.

...

....

The board's control, management, direction, operation, and care of school property, the policy to be followed in school work, the teachers to be selected, and all other matters directly, or even merely incidentally, connected with the subject of education in general is left free and untrammelled. And it is only in those matters which involve *purely* a police regulation necessary to the health and safety of persons and property that the city can interfere.

See also Cedar Rapids, 106 N.W.2d at 655.

In addition, these courts emphasized that no authority had been conferred upon the school districts to regulate the area, *Cedar Rapids*, 106 N.W.2d at 658; *cf. Board of Education v. City of St. Louis*, 267 Mo. 356, 184 S.W. 975 (1916), nor had the area of regulation been legislatively preempted. *Edmonds*, 465 P.2d at 180.

Given this background, the court held in *Hartford Union High School v. Hartford*, 51 Wis. 2d 591, 187 N.W.2d 849 (1971), that the school district *was* subject to the city building code. Initially, the court observed, 51 Wis. 2d at 593:

In many of the cases in other jurisdictions the courts have decided this ever-recurring conflict between school districts and

municipalities solely on the basis of whether education in that jurisdiction was a state function and if so, sovereign immunity completely protected the school district from municipal building regulations. The more modern approach to the problem admits the building of public schools is a part of education and may be a state function but recognizes immunity of the school district, not because of sovereignty but because the state has affirmatively acted in such a comprehensive manner as to preempt the area and thus exclude any application of police power by a municipality whether under home rule or otherwise.

The court rejected the city's contention that the school district was subject to the city building code because "construction of a school building ... is not education and therefore not a state function." 51 Wis. 2d at 594. To the contrary, the court stated that "a broad view of education must be taken and the construction of schools is included in the state's concern." *Id.*

In discussing the preemption approach, the court identified four factors which must be given consideration: (1) nature of the educational mandate, (2) structure of the governmental arm empowered to carry out that mandate, (3) the specific legislation delegating the responsibility for construction to the state agency, and (4) the nature and comprehensiveness of the legislation regulating the construction of public school buildings. 51 Wis. 2d at 595. Applying the preemption approach, the court decided that neither specific authority delegated to school districts over selection and management of school property, ch. 121, Stats., nor the provisions of the comprehensive state building code, ch. 101, Stats., indicated legislative intent to preempt the field of regulating school construction. 51 Wis. 2d at 597-99.

The court acknowledged that *McGregor* "may well support the school's argument of immunity from the city's building code" but the court concluded that "[t]hat case was decided on the sovereignty theory, an approach we do not follow in this case" (emphasis added). 51 Wis. 2d at 594, 599. It is uncertain whether the sovereignty approach of *McGregor*, or the preemption approach of *Hartford*, or some other approach would be applied by the court if it were

required to decide whether vocational school districts are subject to city equal employment opportunity ordinances.

One possible approach would be to construe *McGregor* as granting immunity to state agencies but not to school districts which carry out the state's education function. Cf. *Edmonds*, 465 P.2d at 181 (Neill, J., concurring). There is at least reasonable doubt that the court would have reached the same result in *Hartford* if a state agency such as the Board of Regents were involved rather than a school district. On the other hand, the court recognized in *Hartford*, 51 Wis. 2d at 594, that *McGregor* and *Monroe* "may well support the school's argument of immunity."

Another possible approach would be to attempt to distinguish for immunity purposes between those matters which are and those which are not part of the state's education function. For example, immunity might extend to matters such as curriculum, textbooks, teaching methods, or the selection, tenure and compensation of school personnel, but immunity might not extend to matters such as construction of school buildings. *Edmonds*, 465 P.2d at 180-81; *Fee*, 160 S.W. at 538; *Cedar Rapids*, 106 N.W.2d at 659. This approach, however, was explicitly rejected in *Hartford*, 51 Wis. 2d at 594, where the court took a "broad view of education."

A third possible approach would be to extend immunity to school districts only where application of a city regulation would conflict with the performance of a school district's education function. Cf. *Monroe*, 3 Wis. 2d at 202; *Edmonds*, 465 P.2d at 180-81; *Fee*, 160 S.W. at 538; *Cedar Rapids*, 106 N.W.2d at 659. Although *McGregor* apparently confers total immunity regardless of conflict, the court did emphasize that the "state was not only not expressly included in the charter power of regulation, but the general law of the state ... quite plainly commanded the Board of Regents to erect the building without regard to the judgment of any one outside of its own members." 140 Wis. at 38; see *Fee*, 160 S.W. at 539.

In 66 Op. Att'y Gen. 342 (1977), I concluded that a foster home licensed under state law was not subject to a city zoning ordinance because the zoning ordinance was in direct conflict with and would seriously frustrate a state licensed activity. I distinguished *Hartford*

on the grounds that *Hartford* involved mere inconvenience, not prohibition, and that preemption was involved only where there were two levels of legislation on the identical subject matter. 66 Op. Att'y Gen. at 348. I suggested that where "a state licensed activity ... is in direct conflict with local zoning regulations. ... [T]he court probably would return to the principle established in ... *Milwaukee v. McGregor* ... and hold that this state licensed activity is immune from local regulations." 66 Op. Att'y Gen. at 348-49.

Turning to the question you raise, it is my opinion that the City of Madison ordinance prohibiting employment discrimination neither conflicts with the education function of District No. 4 nor is it preempted by state law. The Wisconsin Fair Employment Act, secs. 111.31-111.37, Stats., prohibits discrimination in employment. Although the prevention of employment discrimination is a matter of state-wide concern, sec. 111.31, Stats., cities are not preempted thereby from adopting equal employment opportunity ordinances. *Cf. Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 533-34, 271 N.W.2d 69 (1978).

On the contrary, the Legislature has encouraged cities to adopt such ordinances. Sec. 66.433(3), Stats.; *cf.* 55 Op. Att'y Gen. 231 (1966). Indeed, in *Federated Rural Electric Insurance Corp. v. Madison EOC*, No. 79-538, 26 E.P.D. para. 32,077 (Wis. Ct. App. April 27, 1981), the court expressly decided that the Wisconsin Fair Employment Act does not preempt the Madison equal opportunity ordinance.

I conclude, therefore, that the Madison Equal Opportunities Commission does have jurisdiction over the employment practices of District No. 4. Your second question concerns the extent of such jurisdiction.

The general rule is that absent clear legislative authorization to the contrary, cities cannot give their ordinances extra-territorial effect and cannot prohibit activities outside city boundaries. 56 Am. Jur. 2d *Municipal Corporations* sec. 436. As the court stated in *Wis. Environmental Decade, Inc.*, 85 Wis. 2d at 533, n. 8: "[T]he jurisdiction and authority of a city is ... limited to the territory within its boundaries. ... *Safe Way Motor Coach v. Two Rivers*, 256 Wis. 35,

39 N.W.2d 847 (1949). Its ordinances have no extra-territorial effect. *Cegelski v. Green Bay*, 231 Wis. 89, 285 N.W. 343 (1939)."

In the case of city equal opportunity ordinances, there is no legislative indication that such ordinances may be given extra-territorial effect. Contrariwise, such ordinances are encouraged only to benefit persons "residing or working within the municipality." Sec. 66.433(3)(a), Stats. Accordingly, it is my opinion that the jurisdiction of the Madison Equal Opportunities Commission over the employment practices of District No. 4 is limited to employment within the geographic boundaries of the City of Madison.

BCL:DCR

County Board; District Attorney; Neither the soil and water district board nor the county board has the power to retain private counsel except as provided by sec. 59.44(3), Stats. The district is primarily liable for legal fees incurred to date. OAG 59-81

November 13, 1981.

RUSSELL L. HANSON, *Acting District Attorney*
Vernon County

You indicate that you have been appointed by the circuit judge pursuant to sec. 59.44(1), Stats., to perform the duties of the district attorney during the temporary disability of the elected district attorney.

You request my opinion on several questions related to the following factual situation. In 1939, the Vernon County Board of Supervisors declared the county to be a soil conservation district, currently a soil and water conservation district operating under powers set forth in ch. 92, Stats. In 1980, the district was sued by a contractor and the district board of supervisors passed a resolution to hire a private law firm to represent the district in the suit. The county board of supervisors passed a resolution approving of the district board's retention of private counsel. The suit is the only civil litigation, other than civil forfeiture actions, in which the county or the soil and water conserva-

tion district is involved. The lawsuit is, however, a complicated action and the private law firm has already made substantial charges for attorneys fees. Further, substantial charges for legal fees and expenses will be necessary to bring the matter to conclusion. You ask my opinion on the following questions:

1. Does the soil and water district have the power to hire its own attorney?

I conclude the district does not have that power. Section 59.47(2m), Stats., provides that the district attorney shall: "Give advice to supervisors of soil and water conservation districts and represent them and the district in all matters, proceedings and actions arising under ch. 92."

Where a statute is unambiguous, effect must be given to its ordinary and acceptable meaning. *Milwaukee v. Lindner*, 98 Wis. 2d 624, 297 N.W.2d 828 (1980). Section 59.47(2m), Stats., unambiguously imposes upon the district attorney the duty and the exclusive right to represent the district in all matters. Although sec. 92.08(8), Stats., gives the district the power to sue and be sued and enter into contracts, it is a basic rule of statutory construction that when there is an apparent conflict between a statute of general application and one that is specific, the latter prevails. Section 59.47(2m), Stats., was enacted after sec. 92.08, Stats. This fact reinforces the applicability of sec. 59.47(2m), Stats. As stated in *Martineau v. State Conservation Comm.*, 46 Wis. 2d 443, 449, 175 N.W.2d 206, 209 (1970): "It is a cardinal rule of statutory construction that when a general and a specific statute relate to the same subject matter, the specific statute controls and this is especially true when the specific statute is enacted after the enactment of the general statute."

Although the district is not strictly a county agency, since it is a separate body corporate and politic, the county is interested in the affairs of the district, and specifically the litigation, because it pays the expenses of the district. Secs. 59.07(60), 59.872, 92.08(12), Stats. Early in our state's history, our supreme court held that the county board of supervisors had no authority to employ a private law firm to aid the district attorney in prosecuting an indictment for murder. *Montgomery v. Board of Supervisors of Jackson County*, 22

Wis. 67 (1867). In *Frederick v. Douglas County*, 96 Wis. 411, 71 N.W. 798 (1897), the court held that the county board of supervisors had no authority to employ private counsel to conduct county tax litigation on behalf of the county even when the district attorney concurred in that employment. In short, in the absence of a statute specifically providing otherwise, the authority to advise and represent the county rests solely with the district attorney or corporation counsel. 70 Op. Att'y Gen. 136 (1981).

2. Does the district have the power to hire an attorney other than the district attorney without county approval?

As explained above, neither the district nor the county has the authority to hire an attorney other than the district attorney. Therefore, the county board's approval of the district board's hiring of an attorney makes no difference whatsoever.

3. Is approval of the circuit court necessary before the district retains counsel?

I conclude that it is. Section 59.44(3), Stats., provides:

When there is an unusual amount of civil litigation to which the county is a party or in which it is interested, the circuit court may, on the application of the county board, by order filed with the clerk of said county, appoint an attorney or attorneys to assist the district attorney, and fix his or their compensation.

As I mentioned earlier, in the situation you describe the county is not a party, but is interested. In my opinion a single complex civil case could constitute "an unusual amount of civil litigation" within the meaning of the statute. The county board could, therefore, pursuant to sec. 59.44(3), Stats., ask the circuit court to appoint an attorney or attorneys to assist the district attorney. These attorneys must be under the supervision and control of the district attorney. See generally 65 Op. Att'y Gen. 245 (1976).

The procedure outlined in sec. 59.44(3), Stats., is not the only avenue available to the county board, however. The board could create the office of corporation counsel pursuant to sec. 59.07(44), Stats., and employ one or more attorneys to perform the required services. Alternatively, the county board of supervisors could autho-

rize the district attorney to appoint assistants pursuant to sec. 59.45, Stats., to aid in the duties of the office.

4. If the procedure that was followed is not proper, is either the soil and water district or Vernon County responsible for the legal fees that have been incurred to date?

Although the county may be entitled to the assets of a soil and water conservation district upon dissolution, sec. 92.15(3), Stats., and can make appropriations to expenses of a district, secs. 59.07(60), 59.872, 92.08(12), Stats., it is not a guarantor of the liabilities of the district which is a separate body corporate and politic. Sec. 92.08, Stats. The district, therefore, is primarily liable for the fees.

Section 66.295(1), Stats., permits counties to pay for benefits received before March 1, 1973, under any contract entered into in good faith for which there is a moral, but no legal, obligation to pay. In *Blum v. Hillsboro*, 49 Wis. 2d 667, 183 N.W.2d 47 (1971), the court held that when work has been performed for a municipality under a contract which is *malum prohibitum* and not *malum in se*, and the contract was entered into in good faith, the cause of action based upon the equitable doctrine of unjust enrichment could be maintained, sec. 66.295, Stats., notwithstanding.

BCL:AML

Children; County Board; Indian Child Welfare Act; Indians; Jurisdiction; Words And Phrases; Jurisdictional questions relating to the implementation of the Indian Child Welfare Act (25 U.S.C. sec. 1901 et seq.) discussed. OAG 60-81

November 23, 1981.

DONALD E. PERCY, *Secretary*
Department of Health and Social Services

You have asked for my opinion regarding the interpretation of several jurisdictional provisions of the Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. sec. 1901 et seq. You ask:

1. What jurisdiction do the Indian tribes and the state have over child custody proceedings involving Indian children who reside or are domiciled within the reservation of a PL 280, Wisconsin Indian tribe or of the non-PL 280 Wisconsin Menominee Tribe? Is the tribes' jurisdiction concurrent or exclusive as to the state?

The jurisdictional relationship between the state and the Indian tribes over domestic relations matters involving tribe members is not easily defined. The following analysis will show that in some situations and under varying circumstances both state and tribal courts may have jurisdiction over certain such matters.

Indian tribes are "a separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). One such retained power is a tribe's right to regulate the domestic relations of its members. *Fisher v. Dist. Court of Sixteenth Jud. Dist.*, 424 U.S. 382 (1976); *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978); Dept. of Interior, *Federal Indian Law*, at 395 (1966). Thirty years after *Kagama*, the United States Supreme Court again explained that "[a]t an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated ... according to their tribal customs and laws." *United States v. Quiver*, 241 U.S. 602, 603-04 (1916).

In *Williams v. Lee*, 358 U.S. 217, 220 (1959), the Court reaffirmed "the right of [Indian tribes] to make their own laws and be ruled by them," by declaring that states should refrain from exercising jurisdiction where essential tribal relationships are involved. Family matters, including child custody, involving members domiciled or living on the reservation, are essential tribal relations. See *Fisher; Wisconsin Potowatomies, etc. v. Houston*, 393 F. Supp. 719 (W. D. Mich. 1973); *Matter of Adoption of Buehl*, 87 Wash. 2d 649, 555 P.2d 1334 (1976); *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975); *State v. Superior Court*, 57 Wash. 2d 181, 356 P.2d 985 (1960); and *In re Colwash*, 57 Wash. 2d 196, 356 P.2d 994 (1960). Also see 37 Op. Att'y Gen. 213 (1948) concluding that state law does not apply to domestic relations of Indians on reservations.

The general rule is that before state jurisdiction can be extended over tribe members on a reservation it must be specifically authorized by federal legislation. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 231 F.2d 89 (8th Cir. 1956). The ICWA is the only act of Congress expressly dealing with Indian child custody proceedings. It provides: "An Indian tribe shall have jurisdiction exclusive as to any State over *any child custody proceeding* involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." 25 U.S.C. sec. 1911(a).

Although the act's definition of "child custody proceeding" is extremely broad, it excludes delinquency actions or placements based upon an act which, if committed by an adult, would be deemed a crime. Also excluded are divorce proceedings involving the award of custody to one of the parents. This opinion therefore will apply only to the domestic relations matters covered by the ICWA.

The first question that must be considered is whether Wisconsin has been "otherwise vested" with jurisdiction in child custody matters by existing federal law. For the reasons stated hereinafter, it is my opinion that except in limited circumstances the state has not been granted general jurisdiction over child custody matters involving Indian children who reside or are domiciled within a reservation. The limited exception is based on a federal statute and the exercise of state sovereign powers in such matters.

The only federal statute which may grant the state some jurisdiction in such matters is Pub. L. No. 280 (67 Stat. 558, 28 U.S.C. sec. 1360, 18 U.S.C. sec. 1162), which was enacted on August 15, 1953. This statute gave the State of Wisconsin limited civil and general criminal jurisdiction in "all Indian country within the state except the Menominee Reservation." The Menominee were subsequently brought within the coverage of Pub. L. No. 280, but were removed again effective March 1, 1976. *See La Tender v. Israel*, 584 F.2d 817, 821 (7th Cir. 1978). It is therefore clear that no federal statute authorizes the State of Wisconsin to exercise child custody jurisdiction over the Menominee Reservation.

It is my opinion that Pub. L. No. 280 (28 U.S.C. sec. 1360(a)) does not grant general jurisdiction over child custody matters to Wisconsin courts. The courts have narrowly construed the legislative grant of civil jurisdiction to the states under Pub. L. No. 280, which provides in part that certain named states "shall have jurisdiction over *civil causes of action* between Indians or to which Indians are parties."

In *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373 (1976), the United States Supreme Court stated unequivocally that the Pub. L. No. 280 reference to "civil causes of action" did not confer civil regulatory jurisdiction on the states. Although the court did not define "civil causes of action," it noted one commentator's suggestion that:

Congress intended 'civil laws' to mean those laws which have to do with private rights and status. Therefore, 'civil laws . . . of general application to private persons or private property' would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchises, etc.

Bryan, 426 U.S. at 384 fn. 10. The Court concluded that the intention of Congress in extending civil jurisdiction to states was to "redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by [sic] permitting the courts of the States to decide such disputes." 426 U.S. at 383. The Court noted (*Id.* at 389) that Congress conditioned the exercise of this limited jurisdictional grant by requiring, among other things, that states accord "full force and effect" to any tribal ordinance or custom "heretofore or hereafter adopted by an Indian Tribe ... if not inconsistent with any applicable civil law of the State." 28 U.S.C. sec. 1360(c). (*Compare* 25 U.S.C. sec. 1911(d), which provides: "[E]very State ... shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings.") The Court concluded that Pub. L. No. 280 was not enacted to subordinate Indians to the full panoply of state civil regulatory powers which would destroy tribal self-government. *Id.* at 388.

Also see, 65 Op. Att'y Gen. 276 (1976) and 69 Op. Att'y Gen. 183 (1980).

Your question does not differentiate among the different and varied child custody proceedings that may arise. It is assumed, for purposes of this opinion, that your concern is with those proceedings that involve some aspect of the state's regulatory jurisdiction such as involuntary termination of parental rights. By comparison, where the proceeding is not between the state and an individual, but rather primarily involves only private persons as in a voluntary foster care placement, state law may be applied under Pub. L. No. 280's jurisdictional grant. Since Pub. L. No. 280 does not provide a basis for the state to exercise regulatory jurisdiction in child custody matters, it is necessary to consider whether there is some other basis upon which the state can act, *i.e.*, whether there is any other source of federal law which vests such jurisdiction in the state.

In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the United States Supreme Court defined two independent barriers to the assertion of state regulatory authority over tribe members and reservations. One is infringement on the right of reservation Indians to make their own laws and be ruled by them (*Williams v. Lee*, 358 U.S. 217 (1959)), and the other is preemption by federal law.

Federal and state case law establishes that the exercise of state jurisdiction over most custody matters involving Indian children on the reservation infringes the right of tribe members to govern themselves. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978), the United States Supreme Court declared that in matters involving domestic relations:

[W]e have recognized that "subject [ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," *Fisher v. District Court*, 424 U.S. 382, 387-388, 96 S.Ct. 943, 947, 47 L.Ed.2d 106 (1976), may "undermine the authority of the tribal cour [t] . . . and hence . . . infringe on the right of the Indians to govern themselves." *Williams v. Lee*, 358 U.S., at 223, 79 S.Ct. at 272.

Other courts have said “there can be no greater threat to “essential tribal relations,” and no greater infringement on the right of the ... [t]ribe to govern themselves than to interfere with tribal control over the custody of their children.’” *Matter of Adoption of Buehl*, 87 Wash. 2d at 662, 555 P.2d at 1342 (1976); *Wakefield*, 347 A.2d at 237-38. Also see *Wisconsin Potowatomies, etc.*, 393 F. Supp. at 730, “[i]f tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right ... to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity.”

It is my understanding that most tribes in Wisconsin have adopted procedures to handle some child custody proceedings under the ICWA as well as domestic relations matters not covered by the Act. It is therefore my opinion that the exercise of state regulatory jurisdiction over tribe members residing on a reservation where the tribe is exercising jurisdiction over child custody matters constitutes an impermissible infringement upon tribal sovereignty. If a tribe is not exercising such jurisdiction, it is unlikely that a court would find that state action infringes upon that tribe’s sovereignty.

The ICWA also operates to preempt state action in custody matters involving Indian children beyond those areas of authority delegated under the Act. The federal policy behind the ICWA is clearly that of “keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes.” *Guidelines for State Courts*, (hereinafter, *Guidelines*) 44 Fed. Reg. 67,592 (1979). The Code of Federal Regulations acknowledges that the extent to which federal acts (such as Pub. L. No. 280) have subjected Indian child custody proceedings to state jurisdiction is unsettled and therefore the ICWA includes a provision which allows tribes to reassume exclusive jurisdiction over such matters (25 U.S.C. sec. 1918) “without relinquishing their claim that no federal statute had ever deprived them of that jurisdiction.” 25 C.F.R. sec. 13.1(b) (1980).

The Lac Courte Oreilles Band of Lake Superior Chippewa is the only tribe in Wisconsin that has utilized 25 U.S.C. sec. 1918 to “reassume” exclusive jurisdiction over Indian child custody proceedings.

The tribe's petition was granted effective May 5, 1981, 46 Fed. Reg. 15,579 (1981).

Although utilizing this procedure would remove any uncertainty regarding the effect of Pub. L. No. 280 in this subject area, it is my opinion that it is unnecessary, except perhaps for proceedings that do not involve civil regulatory jurisdiction. For nonregulatory proceedings, such as voluntary termination of parental rights, the tribal courts, and state courts pursuant to Pub. L. No. 280, have concurrent jurisdiction. To eliminate this limited concurrent jurisdictional relationship over private child custody matters covered by the ICWA and within the Pub. L. No. 280 definition of "civil causes of action," the tribe would either have to comply with 25 U.S.C. sec. 1918 and reassume exclusive jurisdiction or the state would have to retrocede its civil causes of action jurisdiction pursuant to 25 U.S.C. sec. 1323(a). As already indicated, the state retroceded all Pub. L. No. 280 jurisdiction over the Menominee Tribe effective March 1, 1976.

The history behind the ICWA lends additional support to the opinion expressed herein. The history of state intervention in Indian child custody proceedings nationally has shown state courts to be insensitive to Indian values and culture. Because state officials in some areas of the United States have tended to misinterpret Indian child rearing practices, statistics show that a disproportionate number of Indian children have been removed from their homes in comparison to non-Indian children. For this reason the ICWA confirmed that Indian tribes rather than states play the central role in child custody proceedings involving Indian children. S. Rep. No. 597, 95th Cong., 1st Sess. 35 (1977).

Reading the ICWA against "a backdrop of Indian sovereignty," *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 173 (1976), and applicable federal and state case law, and taking into consideration tribal assertion of jurisdiction, leads to the inescapable conclusion that "Pub. L. No. 280 and non-Pub. L. No. 280 Wisconsin Indian tribes" have exclusive *regulatory* jurisdiction over child custody proceedings involving Indian children who reside or are domiciled within the reservation.

The term "domicile" in the ICWA is a legal concept that depends on intent. A person does not abandon an old domicile until a new one has been established. An Indian child may be domiciled on a reservation without being physically present there. Likewise an Indian child may be residing on the reservation even though legally domiciled off the reservation. If the parent with whom the child lives maintains strong ties to the tribe and the reservation, then even though the child is temporarily located off the reservation, his or her domicile remains within it. See *Wisconsin Potowatomies, etc. The Guidelines*, 44 Fed. Reg. 67,588 (1979), provide that the state court shall determine the residence or domicile of the Indian child. *If either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceeding in state court shall be dismissed.*

2. What jurisdiction do the Indian tribes and the state have over child custody proceedings involving Indian children who are not residing or domiciled within the reservation of a PL 280 Wisconsin Indian tribe or of the non-PL 280 Wisconsin Menominee Tribe? Is the state's jurisdiction exclusive or concurrent as to the tribes?

The Indian Child Welfare Act (25 U.S.C. sec. 1911(a)) provides that if an Indian child has previously resided or been domiciled on a reservation, the state court must contact the tribe to see if the child is a ward of the tribal court. If it is determined that the child is a ward of the tribal court, the tribe has exclusive jurisdiction and the proceeding must be dismissed.

Any child who is not a ward of the tribal court who is off the reservation has generally the same rights and is subject to the jurisdiction of state courts to the same extent as non-Indian citizens. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); See F. Cohen, *Handbook of Federal Indian Law*, at 119 (1942 ed.). Cohen points out that there is an exception to this general rule. "If the subject matter of the transaction is a subject matter over which Congress has asserted its constitutional power, the state must yield to the superior power of the nation." *Id.*

Wisconsin normally would have exclusive jurisdiction over child custody proceedings involving children not domiciled or residing on a reservation. In cases involving foster care placement or termination of parental rights, the state, however, may be required to transfer jurisdiction to the child's tribe because of federal preemption. The ICWA (25 U.S.C. sec. 1911 (b)) provides:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

According to the ICWA's legislative history, the intention of this subsection was to ensure that state courts would apply a modified doctrine of *forum non conveniens* in these two types of proceedings to ensure that the rights of the child, the parent or custodian, and the tribe are protected. H.R. Rep. No. 1386, 95th Cong., 2d Sess. 21, reprinted in [1978] *U.S. Code Cong. & Ad. News* 7530, 7544. The doctrine generally gives a court discretionary authority to decline jurisdiction. *See, e.g., Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 527 (1947); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). Ordinarily, courts apply the doctrine to refuse jurisdiction and to transfer the action to an alternate forum. *See, e.g., Herbst v. Able*, 278 F. Supp. 664, 666 (S.D. N.Y. 1967); *Grubs v. Consolidated Freightways, Inc.*, 189 F. Supp. 404, 408 (D. Mont. 1960).

"Good cause" for not transferring a proceeding to tribal court may include, for example, the various criteria set forth in the *Guidelines*:

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

Guidelines, 44 Fed. Reg. 67,591 (1979). The federal government has thus qualified the power of the state in proceedings involving the foster care placement of, or termination of parental rights to, Indian children not domiciled or residing within the reservation of the Indian child's tribe by requiring transfer to tribal court in the absence of good cause to the contrary or objection by either parent.

In other types of child custody proceedings relating to Indian children *not domiciled or residing* within the reservation of the Indian child's tribe, the Act does not require transfer to tribal court. (See discussion following question no. 4.)

3. May a state court transfer jurisdiction over a foster care placement or termination of parental rights proceeding under 25 USC 1911(b) to any Wisconsin tribe or only to the Menominee Tribe if the conditions of 1911(b) are met?

For the reasons already stated, a state court must transfer jurisdiction over a foster care placement or termination of parental rights proceeding under 25 U.S.C. sec. 1911(b) to any Wisconsin tribe if the conditions of that section are met.

4. May a state court transfer jurisdiction to a tribe over a child custody proceeding involving an Indian child if the child resides or is domiciled within the tribe's reservation?

A state court *must* transfer jurisdiction to the Menominee Tribe and the Lac Courte Oreilles Band over any child custody proceeding involving an Indian child if the child resides or is domiciled within the respective reservation. Similarly, a state court *must* transfer jurisdiction to the Indian tribes over a child custody proceeding involving an Indian child if the child resides or is domiciled within the reservation and the case involves the exercise of state regulatory jurisdiction. Except for matters arising on the Menominee and Lac Courte Oreilles Reservations, it is within the discretion of the court in those proceedings which do not involve state regulatory jurisdiction whether to defer a matter to tribal court. Since the tribe member has voluntarily chosen to utilize the state court rather than the tribal court it is unlikely that there would be a transfer although the court could apply the doctrine of *forum non conveniens* in appropriate cases of this nature as well. (See discussion in response to question no. 2.)

5. May a state court transfer jurisdiction to a tribe over a proceeding for preadoptive or adoptive placement of an Indian child?

The answer to this question depends on whether or not the child resides or is domiciled within the reservation of the child's tribe. The answer also is affected by whether the proceeding is voluntary or involuntary.

Preadoptive and adoptive placements are included within the term "child custody proceeding." 25 U.S.C. sec. 1903. Subsection (a) of 25 U.S.C. sec. 1911, which deals with cases where a child is domiciled on the reservation, applies to "any child custody proceeding." As already indicated, if the Indian child resides or is domiciled within a reservation, a state court must transfer jurisdiction to the tribe over these two types of proceedings if the proceeding depends upon the exercise of regulatory jurisdiction as in any involuntary proceeding. Tribe members subject to Pub. L. No. 280, of course, retain the right in voluntary child custody proceedings to utilize state courts and state law in the absence of applicable tribal law. See 28 U.S.C. sec. 1360(c). In the event a tribe reassumes jurisdiction pursuant to the procedures set forth in 25 U.S.C. sec. 1918, jurisdiction which it now shares with the state under Pub. L. No. 280 (28 U.S.C. sec. 1360), tribal courts would have exclusive jurisdiction in such matters.

If the Indian child is not residing or domiciled within the reservation, 25 U.S.C. sec. 1911(b) applies. Since subsection (b) mentions only proceedings for foster care placement or termination of parental rights, the Act does not require state courts to transfer a proceeding for preadoptive or adoptive placement of an Indian child not residing or domiciled on the reservation. The court, of course, could apply the doctrine of *forum non conveniens* in these cases also.

6. May a state court transfer jurisdiction to a tribe over a proceeding under 25 USC 1911(b) if the tribal court, as defined in 25 USC 1903(12), does not have jurisdiction over child custody proceedings?

25 U.S.C. sec. 1911(b) provides that a state court shall transfer jurisdiction to a tribe "in the absence of good cause to the contrary." The *Guidelines*, published by the Department of Interior, (quoted above; see question no. 2), states that "[g]ood cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act." 44 Fed. Reg. 67,591 (1979). The definition of "tribal court" in 25 U.S.C. sec. 1903(12) is intended to include tribally established administrative tribunals, commissions, or any other alternative tribal adjudicatory mechanism given jurisdiction by the tribe over child welfare matters. S. Rep. No. 597, 95th Cong., 1st Sess. 43 (1977). If a tribe has not established any mechanism for exercising jurisdiction over child custody proceedings, a state court could find that such fact constitutes good cause for not transferring jurisdiction. (*Also see* discussion *infra* regarding questions 7 and 8.)

Your final two questions are interrelated and therefore they will be considered together.

7. Which Wisconsin tribes, if any, do not have tribal courts with jurisdiction over child custody proceedings?
8. What criteria should be used to determine whether a tribal court has jurisdiction over child custody proceedings?

There appear to be at least two conditions that must be met before a tribe can assume exclusive jurisdiction over child custody proceed-

ings under the ICWA. First, the tribe's constitution (if it has a constitution) must not disclaim jurisdiction over child custody proceedings. Second, the tribe must have an established mechanism which has been given the power to deal with child custody matters.

Typically, tribal constitutions make reference to very general powers although often vaguely described. Whether an ambiguous phrase encompasses or delegates a specific power is a matter of interpretation.

Indian tribes retain "attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). A crucial attribute of sovereignty is a government's right to interpret its own organizational documents. Recognizing this, federal courts have ruled that they lack "any general power to review and oversee the Tribal Courts in their resolution of questions concerning the authority and power of Tribal Courts." *Conroy*, 575 F.2d at 177. *Also see Federal Indian Law*, at 403 (1966).

Since, "[t]he right of tribal self-government is ultimately dependent on and subject to the broad power of Congress" (*White Mountain Apache Tribe*, 448 U.S. at 143), it is necessary to inquire whether the ICWA or any other federal act limits a tribe's right to decide for itself if its constitution disclaims jurisdiction over child custody matters. The ICWA does not reach this issue.

The 1934 Indian Reorganization Act (IRA), however, does deal with the organization of tribal governments. 25 U.S.C. sec. 476. Nothing in this statute (nor in the federal regulations enacted under it) qualifies inherent tribal governmental authority over child custody proceedings involving tribe members domiciled or residing on the reservation. As already indicated, an Indian tribe has inherent authority to determine what meaning attaches to its own constitutional language. *See Tom v. Sutton*, 533 F.2d 1101, 1106 (9th Cir. 1976). It is, therefore, highly unlikely that a state court would have reason to question the governmental power of a tribe under its constitution.

Once it is determined that a tribe's constitution does not disclaim jurisdiction over child custody matters, one can turn to the question

of whether the tribe has a "tribal court," as defined in 25 U.S.C. sec. 1903(12):

"[T]ribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

State courts will give great weight to a tribe's own determination as to its capacity to exercise jurisdiction under the ICWA. The above mentioned *Guidelines* support giving the tribes primary responsibility for judging the adequacy of their own institutions. "[R]eservation socio-economic conditions and the perceived adequacy of tribal institutions are not to be taken into account in making good cause determinations ... the Department believes such judgments are best made by tribal courts." 44 Fed. Reg. 67,592 (1979). The *Guidelines* point out that this approach is in keeping with the established congressional policy under the ICWA of "preferring tribal control over custody decisions affecting tribal members."

BCL:JDN

Discrimination; Housing; Industry, Labor And Human Relations, Department Of; The Wisconsin Open Housing Law permits, but does not require, the Department of Industry, Labor and Human Relations to receive and process class action complaints of housing discrimination. OAG 61-81

November 23, 1981.

LOWELL B. JACKSON, *Secretary*
Department of Industry, Labor
and Human Relations

Your predecessor asked whether the Wisconsin Open Housing Law, sec. 101.22, Stats., requires the Department of Industry, Labor and Human Relations (Department) to receive and process class action complaints of housing discrimination. In my opinion the law permits, but does not require, the receipt and processing of class action complaints by the Department.

The Wisconsin Open Housing Law embodies the "policy of this state that all persons shall have an equal opportunity for housing regardless of sex, race, color, handicap, religion, national origin, sex or marital status of the person maintaining a household, lawful source of income, age or ancestry." Sec. 101.22(1), Stats. The law prohibits discrimination in housing on the bases enumerated, with certain limited exceptions. Sec. 101.22(2) and (2)(g), Stats.

The Department is empowered to administer the Law. Sec. 101.22(3), Stats. The Department "may receive and investigate complaints" of housing discrimination. Where, after hearing, the Department finds that discrimination has occurred, the Department "shall ... order such action by the respondent as will effectuate the purposes of the [law]." Sec. 101.22(4)(d), Stats. The Department's order is subject to administrative review by the Labor and Industry Review Commission and to subsequent judicial review in circuit court. Sec. 101.22(4p) - (5), Stats. In circuit court, however, both the complainant and the respondent to the proceedings before the Department have a right to "a new trial on all issues relating to any alleged discrimination and a further right to a trial by jury." Sec. 102.22(5), Stats.

Alternatively, since May 7, 1980, a person alleging a violation of the Wisconsin Open Housing Law can commence a private civil action in circuit court. Sec. 101.22(7), Stats., created by ch. 188, Laws of 1979. Such civil action is "in addition to any other remedies contained in [the law]." Sec. 101.22(7)(c), Stats.

At the same time that the Wisconsin Open Housing Law was amended to authorize a private civil action, the Wisconsin Open Housing Law's definition of the terms "discriminate" and "discrimination" was amended in part as follows: "'Discriminate' and 'discrimination' mean to segregate, separate, exclude or treat any person or class of persons unequally because of sex, race, color, ... [etc].'" Sec. 101.22(1m)(b), Stats., as amended by ch. 188, Laws of 1979. The specific question posed by your predecessor is whether the reference in the amended definition to a "class of persons" requires the Department to receive and process class action complaints of housing discrimination.

A class action may be brought in court when (1) the named parties have a right or interest in common with the class of persons represented; (2) the named parties are able to fairly represent the common class interest for the benefit of the whole class; and (3) the joinder of all class members before the court would be impracticable. Sec. 803.08, Stats.; *Schlosser v. Allis-Chalmers Corp.*, 65 Wis. 2d 153, 169, 222 N.W.2d 156 (1974). The determination whether to allow an action to proceed as a class action is addressed to the discretion of the court. *Nolte v. Michels Pipeline Const., Inc.*, 83 Wis. 2d 171, 177, 265 N.W.2d 482 (1978). The court must weigh the benefits to be gained from disposing of the entire controversy in a single proceeding against the inherent difficulties in maintaining a class action. *O'Leary v. Howard Young Medical Center*, 89 Wis. 2d 156, 172, 278 N.W.2d 217 (Ct. App. 1979).

Class actions are proper where individual monetary recoveries are sought as well as where equitable relief is sought. As the court explained in *Schlosser*, 65 Wis. 2d at 175:

It may be true that class actions will more often be proper where equitable relief is sought, because such cases may present fewer problems of individual proof. Nevertheless, there is no theoretical or practical reason why class actions for damages may not be maintained where, under the facts of the case, a simplification of the lawsuit would result and a multiplicity of litigation could be avoided. A class action may not be appropriate if each class member would have to appear and testify individually about a complex and disputed set of facts unique to him, in order to

establish his right to recover. Little time economy would be achieved. On the other hand where, as here, the questions individual to each class member are simple and would require little individual participation, there is no reason why a class action would not be appropriate. The question as to which of these situations was present in a given action would, of course, have to be decided by the trial court after a careful review of the facts.

The Wisconsin Open Housing Law, sec. 101.22, Stats., contains no express reference to class actions. Clearly, however, the private civil actions authorized by the Wisconsin Open Housing Law, sec. 101.22(7), Stats., are subject to the rules of civil procedure including the provision permitting class actions. Sec. 803.08, Stats. It is less clear whether the Department is authorized to receive and process class action complaints under the Wisconsin Open Housing Law.

Neither the Wisconsin Open Housing Law, sec. 101.22, Stats., nor the Wisconsin Administrative Procedure Act, ch. 227, Stats., expressly authorize the Department to conduct class actions in the administrative process. Nonetheless, courts in other states have consistently construed other state anti-discrimination laws to permit processing of class actions. *Hotel, Motel, Restaurant, Etc., U. Loc. 879 v. Thomas*, 551 P.2d 942, 946 (Alaska 1976); *Richardson v. School Board of I.S.D. No. 271*, 297 Minn. 91, 210 N.W.2d 911 (1973); *Ferguson v. United Parcel Service*, 270 Md. 202, 311 A.2d 220 (1973); *Veeder-Root Co. v. Commission on Human Rts. & Op.*, 165 Conn. 318, 334 A.2d 443 (1973); *Commonwealth, Etc. v. United States Steel Corp. Etc.*, 10 Pa. Commw. Ct. 408, 311 A.2d 170 (1973). The Wisconsin Supreme Court has yet to consider the issue but has hinted that the Department could order prospective class-wide relief if the complaint were sufficiently broad. *Chicago, M., St. P. & P. RR. v. ILHR Dept.*, 62 Wis. 2d 392, 399-400, 215 N.W.2d 443 (1974); *Watkins v. ILHR Department*, 69 Wis. 2d 782, 797-99, 233 N.W.2d 360 (1975).

In my opinion, the Wisconsin Open Housing Law, sec. 101.22, Stats., implicitly authorizes the Department to receive and process class action complaints of housing discrimination. Such statutory interpretation is compelled, in my view, by the broad authority conferred upon the Department to administer the Wisconsin Open Hous-

ing Law, sec. 101.22(3) and (4)(a) - (d), Stats., and by the broad purpose of the Wisconsin Open Housing Law to assure equal opportunity for housing. Sec. 101.22(1), Stats.; *cf. Wisconsin Telephone Co. v. ILHR Dept.*, 68 Wis. 345, 368, 228 N.W.2d 649 (1975); *Richardson*, 210 N.W.2d at 914.

Although I conclude that the Wisconsin Open Housing Law *permits* the Department to receive and process class action complaints of housing discrimination, I further conclude that the Wisconsin Open Housing Law does not *require* the Department to do so. As noted earlier, the determination whether to allow an action to proceed as a class action is addressed to the discretion of the tribunal. *Nolte*, 83 Wis. 2d at 177. In the case of administrative proceedings under the Wisconsin Open Housing Law, the Department is the tribunal given the discretion.

I do not believe there is any clear legislative intent to *require* the Department to receive and process class action complaints of housing discrimination. On its face, the Wisconsin Open Housing Law imposes no such requirement. Although the term "discrimination" in the Wisconsin Open Housing Law was amended to encompass discrimination against a "class of persons," sec. 101.22(1m)(b), Stats., as amended by ch. 188, Laws of 1979, and although such amendment supports the conclusion that the Wisconsin Open Housing Law permits the Department to receive and process class action complaints, I do not believe that such amendment evidences legislative intent to restrict the Department's discretion and to require it to receive class action complaints.

I am informed by the Assembly Committee on Aging, Women and Minorities that when the bill was pending which eventually amended the Wisconsin Open Housing Law, testimony was received at committee hearings which urged amendment of the bill to allow class action complaints. I note, however, that the same amendment which added the phrase "class of persons" to the Wisconsin Open Housing Law's definition of the term "discrimination," ch. 188, Laws of 1979, also authorized persons alleging discrimination to bring a private civil action. Sec. 101.22(7), Stats. Thus, assuming that the addition of the phrase "class of persons" was intended by the Legislature to permit class action complaints, it is unclear whether such intent was lim-

ited to the private civil actions or whether it extended also to the Department's receipt and processing of complaints. Even if the Legislature intended the latter, however, there is no indication that the Legislature intended to *require* rather than to *permit* the Department to receive and process class action complaints.

I understand that the Department proposed to adopt a rule, section Ind 89.03(1)(c) Wis. Adm. Code, which would provide:

1. No class action complaints alleging housing discrimination may be filed with the [equal rights] division. However, for administrative convenience only, the division may combine complaints from different complainants for a consolidated hearing if each complaint alleges essentially the same type of discrimination against the same respondent. Any remedy ordered as a result of a consolidated hearing shall be individual relief granted to a complainant based upon the merits of his or her particular case. No class based remedies may be ordered, except that an order directing a respondent to cease and desist from engaging in discriminatory action in the future may be ordered.
2. Upon the objection of the respondent, the hearing examiner shall determine whether a consolidated hearing of multiple complaints would prejudice the respondent's case. If the hearing examiner so finds, the complaints shall not be consolidated.

The Joint Committee for Review of Administrative Rules objected to the proposed rule and, pursuant to sec. 227.018(5)(e), Stats., introduced bills which would amend the Wisconsin Open Housing Law, sec. 101.22(3), Stats., to prevent the Department from adopting a rule which would "prohibit the processing of any class action complaint or the ordering of any class-based remedy." 1981 Senate Bill 539; 1981 Assembly Bill 712. The bills presently are pending in the Senate and Assembly Committees on Rules. Even if such bills are enacted, however, they merely would preclude the Department from adopting a rule barring the receipt and processing of class action complaints. They would not, in my view, require the Department to receive and process every class action complaint. Rather, consistent with judicial class actions, I believe that the Department would remain free to determine in each case whether the benefits to be

derived from a class action procedure outweigh the inherent difficulties.

It is my opinion, therefore, that the Wisconsin Open Housing Law permits, but does not require, the Department to receive and process class action complaints of housing discrimination.

BCL:DCR

Schools And School Districts; Vocational And Adult Education; Section 38.08(1)(a), Stats., requires that "a school district administrator of a school district" appointed to a district board of Vocational, Technical and Adult Education have the qualifications specified in sec. 115.01(11), Stats. OAG 62-81

November 25, 1981.

ROBERT P. SORENSEN, PH.D., *State Director*
Board of Vocational, Technical
& Adult Education

You have asked my advice concerning the appointment of a person to fill a vacancy on the Board of the Gateway Vocational, Technical and Adult Education District which comprises Racine and Kenosha Counties and a part of Walworth County.

As you pointed out in your letter, sec. 38.10, Stats., provides for the use of appointment committees comprised of either county board chairmen or public school district board presidents. Because Gateway was organized by counties rather than school districts, the appointment committee is composed of the three county board chairmen of the counties making up the district. Section 38.10, Stats., also requires that before the appointments are made, a plan of representation must be formulated by the appointment committee. This plan governs membership on the board. Section 38.08(1)(a), Stats., requires that the membership of the board include, among others, "a school district administrator of a school district which lies within the district."

It appears that recently a number of vacancies have occurred on the Gateway Board and that it has been necessary to establish a plan of representation and make new appointments.

After the appointments are made, sec. 38.10(2)(c), Stats., imposes a duty on the State Board to require that the district board appointments comply with the provisions of the plan of representation.

The resume of the appointee to the school district administrator vacancy indicates that he is employed by the Kenosha Unified School District No. 1 as an "educational administrator." His job description and duties indicate that he is coordinator of pupil services. According to the records of the Department of Public Instruction, the appointee is not licensed as a public school administrator under the provisions of section PI 3.07(11) Wis. Adm. Code. He does have a license issued in 1949 permitting him to teach biology in grades seven through twelve. He also has a five-year renewable license good from July 1, 1980, to June 30, 1985, in school counseling for grades kindergarten through twelve.

In your letter you point out that sec. 115.01(11), Stats., defines school district administrator as "the school district superintendent, supervising principal or other person who acts as the administrative head of a school district and who holds an administrator's license."

Your specific question is whether the appointment of one who does not meet the definition of school administrator as used in sec. 115.01(11), Stats., is invalid for failure to comply with the plan of representation and sec. 38.08(1), Stats.

Since sec. 115.01(11), Stats., defines school administrator and sec. 38.08(1)(a), Stats., employs that term without any redefinition, the two sections deal with the same subject matter and are *in pari materia*. It is well-settled that statutes dealing with the same subject matter should be construed together so that the common terms may be given the same meaning. See *Good v. Starker*, 207 Wis. 567, 242 N.W. 204 (1932); *Schrab v. State Highway Commission*, 28 Wis. 2d 290, 137 N.W.2d 25 (1965); *Kugler v. City of Milwaukee*, 208 Wis. 251, 242 N.W.2d 481 (1932); 2A C. Sands, *Sutherland Statutory*

Construction, secs. 51.02 and 51.03 at 290-300 (4th Ed. 1973). It is therefore my opinion that it is appropriate in this situation to construe the two sections together.

This position is strengthened by consideration of the entire phrase "school district administrator of a school district which lies within the district." See sec. 38.08(1)(a), Stats. As you note in your letter, the term "school district" is defined in sec. 38.01, Stats., as "a school district operating high school grades." Kenosha Unified District is such a district. (See sec. 120.70, Stats.) This district is governed by ch. 115, Stats. *et seq.*, including sec. 115.01(11), Stats., defining the term "school district administrator." It is clear, therefore, that "a school district administrator from a school district operating high school districts" is one defined in sec. 115.01(11), Stats., and that the Legislature intended that the appointment to the local vocational, technical and adult education board include a school district administrator as defined in that section. The appointment of any person to the vacancy in question who does not have the qualifications as stated in sec. 115.01(11), Stats., would not fulfill the requirements of sec. 38.08(1)(a), Stats., and would therefore be unlawful.

BCL:JWC

Franchises; Intoxicating Liquors; Words And Phrases; Intoxicating liquors; wholesale permites; franchise sales area statements; price discrimination. Section 176.05(1a)(b), Stats., does not prohibit a wholesaler from selling intoxicating liquor to a retailer located outside the area described in the area statement provided the sale takes place within that area. State law does not prohibit nor does it require a separate charge by a wholesaler for delivery of intoxicating liquor to a retailer. OAG 63-81

December 21, 1981.

MARK E. MUSOLF, *Secretary*
Department of Revenue

You have submitted a series of eight questions relating to the existing regulation of business transactions between wholesalers and

retailers of intoxicating liquor in Wisconsin. A wholesaler is one who holds a permit from the Secretary of Revenue to sell intoxicating liquor to retailers and to other wholesalers, sec. 176.05(1a), Stats. A retailer is one who holds a "Class A" or a "Class B" license from a local government authority to purchase liquor from wholesale permittees for resale, sec. 176.05, Stats. Retail licensees are required to purchase liquor only from Wisconsin wholesalers, sec. 176.03, Stats.

Although the questions you have submitted involve several separate provisions within ch. 176, the focus of your inquiry appears to be upon sec. 176.05(1a)(b), Stats. That provision requires each wholesaler to provide to the Department of Revenue a franchise sales area statement indicating the brands of liquor that the wholesaler intends to sell and the area within which each brand will be sold. This subsection imposes no restraint upon the business dealings of the wholesaler. Every wholesaler is free to do business throughout the entire state or within any geographic portion. Nothing in this statute suggests that any wholesaler is to enjoy an exclusive right to distribute any liquor product within any trade area. Nothing prevents a wholesaler from filing a revised franchise statement as frequently as necessary. The Department of Revenue is not authorized to review or to reject a statement that is filed. Section 176.05(1a)(b), Stats., requires only that each wholesaler provide to the Department of Revenue timely notice of its planned business operations.

Section 176.05(1a)(b), Stats., is part of the comprehensive framework of ch. 176 intended to effect uniform statewide regulation of liquor sales. The fact that the wholesale liquor industry is subject to substantial government regulation does not mean, however, that competition need be eliminated within this industry. In my interpretation of sec. 176.05(1a)(b), Stats., I am cognizant of the Legislature's recent amendment of the state antitrust law which provides:

It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

Sec. 133.01, Stats.

I understand the purpose of ch. 176 to be the protection of the general public. I do not understand ch. 176 to be intended to protect any segment of the liquor industry from the healthy stimulus of competition.

You have framed your inquiry using the following hypothetical situation:

A wholesaler operating from a place of business within County A has filed with the Department of Revenue a franchise statement pursuant to sec. 176.05(1a)(b), Stats., indicating that it intends to sell liquor brand X only within County A and also intends to sell liquor brand Y within all seventy-two counties of the state. The hypothetical buyer is the holder of a retail liquor license for a place of business located outside County A.

1. May the wholesaler sell liquor brand X to the retailer who will pick the merchandise up at the wholesaler's place of business for resale at the retail establishment outside County A?

The wholesaler has indicated to the Department of Revenue that it will sell brand X only within County A. I believe that it is clear with respect to the above factual setting that the "sale" takes place at the wholesaler's place of business and thus poses no illegality with respect to the franchise statement filed. Section 176.01(4), Stats., defines "sale" as any transaction by which liquor is obtained. It is clear that the above transaction is a "sale" which is completed at the point that the retailer takes possession of the merchandise. The fact that the retailer plans to take the purchased liquor outside the wholesaler's sales area is a matter which is entirely subsequent to and separate from the sales transaction. The transaction described above is consistent with the franchise statement filed by the wholesaler and suggests no violation of sec. 176.05(1a)(b), Stats.

I note that my view of this matter is consistent with an early opinion of the Attorney General wherein it was stated that a "sale" by a liquor wholesaler takes place when and where the merchandise is sep-

arated from the general stock of the wholesaler and given to the buyer's agent or carrier. 1 Op. Att'y Gen. 530 (1912).

2. May the wholesaler deliver an order of brand X liquor to a public warehouse holding a permit pursuant to sec. 176.05(1d), Stats., within County A with the understanding that the merchandise will be picked up later by the retail licensee?

This situation again is clearly one of a sale taking place within County A. The arrangement is one by which liquor is obtained by the retailer within County A. The wholesaler's part in the transaction is complete upon delivery and the "sale," within the meaning of sec. 176.01(4), Stats., occurs within the area described in the wholesaler's franchise statement. Alternatively, under the Uniform Commercial Code, a "sale" takes place at the passing of title, sec. 402.106(1), Stats. The passing of title is further defined to occur when the seller completes its performance as to delivery, sec. 402.401(2), Stats. The wholesaler's performance is complete upon delivery to the warehouse and thus the sale takes place at that point within County A. The transaction, therefore, poses no conflict with the franchise statement which had been filed by the wholesaler pursuant to sec. 176.05(1a)(b), Stats.

It should be noted that the hypothetical wholesaler may be required to hold a second permit from the Secretary of Revenue in order to undertake the transaction described above. A wholesaler must hold a permit pursuant to sec. 176.70, Stats., to engage in solicitation of orders for future delivery. For purpose of this inquiry it is presumed that the wholesaler holds such a permit together with the basic permit required by sec. 176.05(1a), Stats.

3. May the wholesaler ship an order of brand X liquor by common carrier to the retailer's place of business outside County A?

In my view, the statement filed by the wholesaler pursuant to sec. 176.05(1a)(b), Stats., does not necessarily prohibit the transaction described in question 3. The definition of "sale" set out at sec.

176.01(4), Stats., is very broad and does not offer clear guidance in this specific situation. As discussed above, the Uniform Commercial Code defines the "sale" as occurring at the point that title passes from seller to buyer, sec. 402.106(1), Stats. Moreover, the parties may agree between themselves as to when title passes, sec. 402.401(2), Stats. The parties thus may agree that the merchandise becomes the property of the buyer at shipment in which case the above transaction would pose no conflict with the franchise statement filed by the wholesaler. On the other hand, if there exists no explicit agreement as to the passing of title and the sales contract obligates the seller to provide for delivery, title would then pass at delivery to the buyer and would then be a sale taking place outside of County A in violation of the applicable franchise statement, sec. 402.40(2)(b), Stats.

4. May a salesperson employed by the wholesaler solicit sales of brand X outside County A?

Chapter 176 expressly distinguishes and excludes solicitation of orders from the otherwise broad definition of "sale," sec. 176.01(4), Stats. The solicitation of orders for brand X outside County A would not be a "sale" and would pose no conflict with the franchise statement filed by the wholesaler.

5. The wholesaler intends to sell and deliver identical orders of brand Y to two retailers, one seventy-five miles away and another 250 miles away. Must the amount charged to each retailer be identical or may the total charge to the distant customer reflect the higher cost of the delivery service?

Section 176.17(5a), Stats., requires that the "prices charged" by a wholesaler be the same for all retailers purchasing in similar quantities. You indicate that it has been the practice of Wisconsin wholesalers to provide delivery service and to charge the same total amount to each retailer regardless of the distance between the wholesaler's place of business and that of the retail customer. Section 176.17(5a), Stats., does not require that a wholesaler deliver the liquor products that are sold nor does any other provision of ch. 176 mandate delivery. It may well be that such delivery service is the custom among Wisconsin liquor wholesalers but, as illustrated by

questions 1 and 3 above, it is not an essential part of the sales transaction. In my view, the liquor sold may properly be regarded as something separate from the service of delivering the liquor.

The obvious purpose of sec. 176.17(5a), Stats., is to protect retailers from discriminatory pricing by a wholesaler. An early interpretation of what is now sec. 100.22, Stats., a statute which prohibits price discrimination in the purchase of dairy products, recognized that the actual cost of delivery to a particular customer is a proper justification for a price differential. 16 Op. Att'y Gen. 68 (1927). Moreover, there exists a criminal penalty for the violation of sec. 176.17(5a), Stats., and thus a narrow construction of its prohibition is proper.

In consideration of the foregoing, it is my opinion that the wholesaler in the above illustration may charge a different amount to the two customers where that differential can be justified by actual transportation costs. I should also add that if a wholesaler chooses to charge for transportation service, the same method of calculating that charge should be applied with respect to each retailer who receives that service. To provide delivery service without charge to some but not all retailers would obviously be discriminatory and could well constitute a violation of sec. 176.17(5a), Stats.

6. May the price for a given quantity of liquor picked up by the buyer at the wholesaler's place of business be lower than the price for the same quantity of liquor where the wholesaler provides delivery service?

For the reasons stated in my response to question 5, I believe that sec. 176.17(5a), Stats., permits a wholesaler to establish a "dock price" provided that price is available to all retailers who purchase similar quantities and provided that it is based upon transportation costs saved.

7. Does the wholesaler violate sec. 176.17(2), Stats., if it charges the same total amount for selling and delivering identical orders to the two retailers described in question 5?

Section 176.17(2), Stats., requires that no "manufacturer, rectifier or wholesaler shall furnish, give, or lend any ... thing of value,

directly or indirectly” to a Class B retailer, one which sells liquor for consumption on the retail premises. For purpose of this inquiry, I presume that the two retailers, seventy-five and 250 miles distant, both hold Class B licenses. You are asking if the wholesaler improperly furnishes something of value to the distant retailer by not charging for the differential transportation cost. The question actually posed is whether the Legislature, by enacting sec. 176.17(2), Stats., so clearly intended to prohibit the practice of providing delivery without charge that the wholesaler should be subjected to criminal penalty for providing that service.

Section 176.17, Stats., is part of the “tied house” law which is intended to prevent manufacturers, rectifiers and wholesalers of liquor from gaining control of retailers. Section 176.17(2), Stats., prohibits wholesalers from providing “any money or other thing of value” to a Class B retailer. On its face that broad restriction appears to prohibit the entire business of selling liquor at wholesale to Class B retailers. It is therefore necessary, I believe, to interpret the scope of sec. 176.17(2), Stats., in light of the overall purpose of the “tied house” law. Moreover, my predecessors have also found it appropriate in two instances to look beyond the literal language of this subsection in order to render a proper interpretation. 16 Op. Att’y Gen. 277 (1927); 23 Op. Att’y Gen. 191, 214 (1934). See also *National Distributing Company, Inc. v. U. S. Treasury Department*, 626 F.2d 997 (D.C.Dir. 1980), which presents a comprehensive review of the legislative history of 27 U.S.C. 205, the federal analogue to the Wisconsin “tied house” law.

It is my understanding that delivery without charge has long been the common practice among wholesalers of intoxicating liquor in Wisconsin. It is also my understanding that the Department of Revenue has been aware of this practice and has never regarded it to be a violation of sec. 176.17(2), Stats. A long-standing interpretation of law by the agency charged with enforcement implies legislative acquiescence in that interpretation, *Department of Revenue v. Exxon Corp.*, 90 Wis. 2d 700, 281 N.W.2d 94 (1979); *aff’d*. 447 U.S. 207 (1980).

I do not believe that the business practice in question, particularly when the “free” delivery is provided to all retailers served by the

wholesaler, carries with it a danger of coercion or control. Nothing in the factual setting you have described implies that the wholesaler is obligated to continue a policy of "free" transportation beyond the sale in question. More importantly, nothing in your inquiry suggests that the retailer must continue buying or ever buy again from the wholesaler who does not charge for transportation service. Presumably, a policy of "free" transportation would be an inducement to business with a particular wholesaler just as lower prices and prompt service would also be inducements. So long as a policy of "free" transportation service does not entail an obligation on the part of the retailer to make future purchases, it is simply a term of a particular sales transaction and nothing more. The Legislature, in my view, did not intend by the enactment of sec. 176.17(2), Stats., to make criminal the business practice of providing, without charge, delivery to Class B retailers. As I have indicated above, the wholesaler may differentiate between customers based upon actual transportation costs. The wholesaler may also choose, however, to absorb the cost of delivery within the overhead of its business operation and in doing so, does not violate sec. 176.17(2), Stats.

8. Would a wholesaler found to be in violation of sec. 176.05(1a)(b), 176.17(2) or 176.17(5a), Stats., also be in violation of sec. 939.31, Stats.?

A wholesaler which violates any of the above three provisions of ch. 176 would be subject to a fine or imprisonment or both as provided in sec. 176.41, Stats. A violation of any of the three subsections is therefore a crime within the meaning of sec. 939.12, Stats. Section 939.31, Stats., provides that one who agrees with another to commit a crime may be punished for the agreement if one or more of the parties does some act in furtherance of that plan. A wholesaler who intentionally agrees with another party for the purpose of violating secs. 176.05, 176.17(2), or 176.17(5a), Stats., is in violation of sec. 939.31, Stats., at the point that one of the parties does some act in furtherance of the agreement. Moreover, it should be noted that one who is involved in a violation of any of the three foregoing statutes may well face liability for that violation as a party to the crime within the meaning of sec. 939.05, Stats.

Regents, Board Of; Retirement Systems; Words And Phrases;
The Board of Regents lacked and still lacks the authority to establish a retirement plan for former President Weaver in addition or supplementary to the State Teachers Retirement System. Wisconsin Constitution art. IV, sec. 26, precludes the Legislature from providing such a supplemental retirement program since Dr. Weaver is no longer employed by the Board. The Legislature is not, however, precluded from ensuring that a not legally enforceable employment agreement previously entered into is fully performed. OAG 64-81

December 24, 1981.

ED JACKAMONIS, *Speaker*
State Assembly

On behalf of the Committee on Assembly Organization you request my opinion on three questions relating to, in your words, "the deferred salary plan and supplemental retirement benefits granted to former University of Wisconsin President John Weaver." The questions will be answered *seriatim*.

1. Did the Board of Regents of the University of Wisconsin System have the authority to enter into an agreement with Mr. Weaver to provide a deferred salary plan under the Wis. Statutes then in effect (1970)?

By resolution dated June 18, 1971, the Board of Regents of the University of Wisconsin (hereinafter Board) provided the following deferred compensation or retirement plan for then University President Weaver. The resolution reads:

"That the Board of Regents of the University of Wisconsin, in accordance with the informal understanding at the time that President John C. Weaver was appointed, provide President Weaver with a deferred salary plan, subject to the provisions of sec. 20.903 Wisconsin Revised Statutes, as follows:

1. For each of the first 5 years of service as President of the University of Wisconsin, 6% of his average salary for the last 3 years as President.

2. For each of the second 5 years of service as President of the University of Wisconsin, 4% of his average salary for the last 3 years.

3. This deferred salary would be paid annually during President Weaver's lifetime provided his service as President reaches a minimum of 3 years. If he leaves the University any time after serving as President for 3 years, the deferred salary would be paid annually during lifetime as a deferred salary. If he leaves involuntarily prior to the 3-year minimum, he will be provided a lump sum settlement representing the then cash value of the then accrued deferred salary earned.

4. At such time as the deferred salary becomes payable in accordance with paragraphs 1, 2, and 3, he shall have the choice of accepting the deferred salary payments in a manner similar to the options available under the Wisconsin Teachers Retirement System."

Section 20.903(1), Stats. (1969), referred to in the first paragraph of the resolution, reads in material part:

LIABILITIES CREATED ONLY BY AUTHORITY OF LAW. It is unlawful for any state agency, or any officer or employe thereof, to contract or create, either directly or indirectly, any debt or liability against the state for or on account of any state agency, for any purpose whatever, without authority of law therefor, or prior to an appropriation of money by the state to pay the same, or in excess of an appropriation of money by the state to pay the same. Unless otherwise empowered by law, it is unlawful for any state agency to authorize, direct or approve the diversion, use or expenditure, directly or indirectly, of any funds, money or property belonging to, or appropriated or set aside by law for a specific use, to or for any other purpose or object than that for which the same has been or may be so set apart.

Section 36.06(1), Stats. (1969), authorizes the Board to establish the President's salary: "The board of regents shall ... elect a president and the requisite number of professors, instructors, officers and employes, and fix the salaries and the term of office of each."

Section 20.923(3), Stats. (1969), further provides, in part, as to the authority of the Board:

(3) Salaries for the following positions may be set by the appointing authority, subject to the restrictions otherwise set forth in the statutes:

....

(j) University of Wisconsin, state universities: all presidents

It is my opinion, based upon the statutory sections quoted above, that the Board lacked the authority to enter into an agreement with Dr. Weaver to provide a deferred salary or retirement plan. The same conclusion was reached by a previous Attorney General in an opinion dated January 6, 1972, reported at 61 Op. Att'y Gen. 6 (1972). That opinion was directed to the Regents of the University of Wisconsin System and undoubtedly was within the personal knowledge of then President Weaver.

Administrative boards have no common law power. As stated in *State (Dept. of Admin.) v. ILHR Dept.*, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977):

It is the general rule that an administrative agency has only those powers which are expressly conferred or which are fairly implied from the four corners of the statute under which it operates.

....

... This court has recognized the rule that any reasonable doubt of the existence of an implied power of an administrative agency should be resolved against the exercise of such authority.

See also Village of Silver Lake v. Department of Revenue, 87 Wis. 2d 463, 468, 275 N.W.2d 119 (Ct. App. 1978) and *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358, 190 N.W.2d 529 (1971).

Both secs. 36.06(1) and 20.923(3), Stats. (1969), authorize the Board to set the salary of the University President. Does the term

“salary” then include the right to provide a deferred compensation or other retirement plan? In my opinion it does not.

“Salary” is defined in *Webster’s Third International Dictionary* 2003 (1976), in part as “1: fixed compensation paid regularly (as by the year, quarter, month, or week) for services: STIPEND; *esp*: such compensation paid to the holders of official, executive or clerical positions.” The same dictionary defines “compensation,” at 463, in part as “2d: payment for value received or service rendered.” The terms “compensation” and “salary” have been interpreted as synonymous both in respect to constitutional language relating to compensation for services of public officers and judges while in office, and statutory language dealing with the amount of benefits available under the sec. 62.13(9)(a), Stats. (1977), policemen’s pension fund. *State ex rel. Manitowoc v. Police Pension Bd.*, 56 Wis. 2d 602, 610-12a, 203 N.W.2d 74 (1973). Since the meaning of “salary” cannot be gleaned from the two authorizing statutes, secs. 36.06(1) and 20.923(3), Stats. (1969), themselves, we must look to the other statutes bearing upon the compensation available to a university president in 1971.

The Legislature has included the office of president of the University in the State Teachers Retirement System (STRS). See sec. 42.20(20), (21)(a) and (22), Stats. It therefore can hardly be argued that the grant of authority in sec. 36.06(1), Stats. (1969), to set the president’s “salary” carries with it the necessary implication to provide another retirement plan. The authority to provide a deferred compensation or retirement plan other than the STRS is not specifically granted nor necessarily implied in sec. 36.06(1), Stats. (1969). Thus under the general rule set forth in *State (Dept. of Admin.) v. ILHR Dept.*, 77 Wis. 2d at 136 “any reasonable doubt of the existence of an implied power of an administrative agency should be resolved against the exercise of such authority.”

Moreover, a non-STRS retirement or deferred compensation plan would be inconsistent with sec. 42.44, Stats. (1969), which states:

Notwithstanding any other law, rule or regulation affecting the salary, pay, compensation or tenure of any member, payment of such salary, pay or compensation to such member less the required deductions herein provided shall be a full and com-

plete discharge and acquittance of all claims for service rendered by such member during the period covered by such payment.

This section contemplates that the periodic payment of "salary" or "compensation" less the "required deductions" for STRS participation constitutes full payment for services rendered. The Legislature has therein effectively negated any claim for a non-STRS retirement or deferred compensation benefit.

Dr. Weaver, as a member of the STRS, is therefore eligible for the tax-shelter annuity plan of 26 U.S.C. 403(b) which is implemented through the "additional deposits" provision of sec. 42.40(3), Stats. I am informed that Dr. Weaver, during his employment, filed an agreement under the provisions of 26 U.S.C. 403(b) to have the maximum allowable amount set aside from his salary to purchase a tax-deferred annuity on his behalf. Note sec. 36.11(15), Stats., which authorizes the Regents of the University of Wisconsin System to continue existing salary reduction agreements and enter into new salary reduction agreements under the requirements of 26 U.S.C. 403(b).

A search of ch. 42, Stats., dealing with the STRS, for requisite authority to provide a deferred salary plan (except under 26 U.S.C. 403(b)) is fruitless. For while such chapter cannot be said to be entirely devoid of ambiguity, if for no other reason than due to length and intricacy, it was designed to effect the singular purpose of establishment of a uniform retirement system for state teachers (including administrators). The apparent intent of the Legislature is to provide state retirement benefits through the STRS. I find no showing of legislative intent to allow any state agency to implement or establish any other supplementary retirement plan or system. Section 20.921, Stats., specifies the purposes for which a voluntary deduction may be made from the salary of a state employe. There is therein no category listed which would cover the tax-deferred annuity payment at issue here. While it could be argued that the tax-deferred annuity plan does not present a salary deduction situation, the legislative intent to provide for little diversity in deductions is clear.

2. Does the Board of Regents of the University of Wisconsin System or any other state agency have authority to provide

a deferred salary plan to Mr. John Weaver under Wis. Statutes now in effect?

Dr. Weaver is no longer President of the University. I am informed that his last day on the University payroll was August 31, 1977. Therefore, any authority in the Regents to implement a deferred salary plan to Dr. Weaver necessarily depends on the authority of the Board to provide such a plan while he was employed as University President. As I have concluded in response to your first question, the Board lacked that authority.

Consequently, I construe the intent of your second question to ask whether, under the statutes as they exist today, there is authority to provide a deferred compensation plan for the President of the University of Wisconsin System. I find no authority to provide such a deferred compensation or supplemental retirement plan in the statutes as they exist today.

Section 36.09(1)(j), Stats., now provides:

The board shall establish salaries for persons not in the classified staff prior to July 1 of each year for the next fiscal year, and shall designate the effective dates for payment of the new salaries. In the first year of the biennium, payments of the salaries established for the preceding year shall be continued until the biennial budget bill is enacted. If the budget is enacted after July 1, payments shall be made following enactment of the budget to satisfy the obligations incurred on the effective dates, as designated by the board, for the new salaries, subject only to the appropriation of funds by the legislature and s. 20.865(6). This paragraph shall not limit the authority of the board to establish salaries for new appointments.

In addition sec. 20.923(4)(j), Stats., assigns the position of President of the University of Wisconsin System to executive salary group 10 with the following limitation on the Board's salary-setting powers set forth at sec. 20.923(1), Stats.:

The salary-setting authority of individual boards, commissions, elective and appointive officials elsewhere provided by law is subject to and limited by this section, and the salary rate for these positions upon appointment and subsequent thereto

shall be set by the appointing authority pursuant to this section, unless the position is subject to article IV, section 26 of the state constitution.

I see nothing in the present quoted statutes that changes the basis for my answer to question 1, namely that the term "salary," as used, does not include a deferred compensation or retirement plan. Thus I find no authority in the Board under existing statutes to implement a deferred compensation plan other than that authorized by sec. 36.11(15), Stats.

3. Would any legislation introduced during the 1981 session to provide a deferred salary plan to Mr. John C. Weaver be restricted or prohibited by Article IV, Section 26 of the Wis. State Constitution?

Wisconsin Constitution art. IV, sec. 26, states in part:

The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, 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 This section shall not apply to increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system when such increased benefits are provided by a legislative act passed on a call of ayes and noes by a three-fourths vote of all the members elected to both houses of the legislature, which act shall provide for sufficient state funds to cover the costs of the increased benefits.

It is my opinion that the Legislature is prohibited by Wis. Const. art. IV, sec. 26, from providing a deferred salary plan to Dr. Weaver.

Wisconsin Constitution art. IV, sec. 26, though prohibiting an increase in compensation, does allow the Legislature to increase "benefits for persons who have been or shall be granted benefits of any kind under a retirement system." This language indicates that the legislative authority granted notwithstanding the general prohibition against raising compensation is limited to increasing the benefits under an existing retirement system. The authority granted does not

include establishment of a deferred salary plan not part of a retirement system properly existing during the subject person's period of employment. That this grant of authority to augment existing retirement systems was intended to be so limited appears from 1973 Senate Joint Resolution 15, the basis for the amendment. Joint Resolution 15 stated the ratification question to be:

Shall section 26 of Article IV of the constitution be amended to permit the legislature to increase the pensions of persons who already have retired under any public retirement system (such retirement benefits already may be granted to teachers), and to require the state to provide sufficient state funds to cover the costs of the increased benefits to all persons retired under a public retirement fund.

The Report of the Joint Survey Committee on Retirement Systems printed as an appendix to 1973 Senate Joint Resolution 15 also indicates that the legislative power granted was to augment existing system benefits. The report states as follows at 2:

The present law allows the adjustment of a retirement pension received by a retired teacher under a teacher's retirement system within the state. However, it precludes such an adjustment being made for retired members of all other public retirement systems, excepting federal, the Milwaukee City Employees Retirement system and the Milwaukee County Employees Retirement system, located within the state.

Many retirement systems throughout the United States have adopted provisions allowing the pensions of their retired members to be periodically adjusted. They are properly funded and, in many cases, tied to the Cost of Living Index. Such a provision has been under consideration recently in Wisconsin but implementation will not be possible unless this Joint Resolution is enacted. The former governor indicated an interest in this matter by including it in his policy statement in his 1967-69 Executive Budget.

It hardly seems equitable that retired members of all teacher retirement systems within the state are granted this benefit while, at the same time, the retired members of all other public retirement systems, excluding federal, are denied them.

It is thus my opinion that the Legislature is limited in its pension-adjustment authority to increasing benefits of participants in retirement systems who were members of such systems while employed.

It must be here noted, however, that the prohibition of Wis. Const. art. IV, sec. 26 is against payment of "extra compensation"--not a prohibition against proper payment for services after they are performed. This distinction is discussed in *Department of Administration v. WERC*, 90 Wis. 2d 426, 431, 280 N.W.2d 150 (1979), in these words of the supreme court:

The constitutional provision here under consideration does not prohibit payment of wages after services have been performed. In fact, as we understand it, most all state payroll payments are made after the work is performed. The issue is what constitutes extra compensation. This court first considered this question in *State ex rel. Dudgeon v. Levitan*, 181 Wis. 326, 193 N.W. 499 (1923), where the question was whether a teacher's annuity could include funds attributable to years of service prior to the enactment of the annuity plan. This court held that such funds were not intended as compensation for past years of service, but rather represented an attempt to induce experienced teachers to continue to work.

We recognize that the retroactive wage increase sought here would constitute compensation for services that had already been performed. However, as previously stated, the issue is whether such payments constitute extra compensation within the prohibition of the Constitution.

1981 Senate Bill 418, introduced by request of the State Claims Board if enacted would provide for future payments to Dr. Weaver based upon the June 18, 1971 resolution of the Board. This bill resulted from a claims board hearing on February 16, 1981. I take notice that a letter dated June 6, 1980 from Herbert J. Grover, as President of the Board of Regents, to the Claims Board is a part of the hearing record. This letter states as follows:

The Board of Regents of the University of Wisconsin System has reviewed the claim of John C. Weaver, dated February 28, 1980.

The Board of Regents supports the recognition of the claim as providing a proper means of fulfilling the firm commitment made to Dr. John C. Weaver by the pre-merger Board of Regents on June 18, 1971.

Discussions by the Board of Regents centered on the question of whether President Weaver's statements at the January 7, 1972, meeting, of which an excerpt from the minutes is attached, effectively renounced any claim to future payment of the deferred salary benefits which he was offered and accepted. While President Weaver asked that no further consideration be given to the matter at that time, he did not do so in a way which waived or removed legal responsibility on the part of the Board of Regents acting for state government.

The Board recommends recognition of the claim because it believes that in addition to the legal responsibility, fair dealing and the reputation of the State of Wisconsin, and its University System, for honorable fulfillment of commitments undertaken require that the obligation to Dr. Weaver be discharged in an equitable and responsible manner.

There is therefore a question of fact as to what were the terms of the understanding entered into between the Board and Dr. Weaver. My finding, previously stated above, that the Board lacked the authority to provide the deferred salary plan embodied in the Board resolution dated June 18, 1971 states only what is not an authorized part of the employment contract--not what remains. If the Legislature were to provide future payments to Dr. Weaver not on the basis that an enforceable employment contract contained a deferred salary plan, but rather, on the equitable basis that a salary plan not legally enforceable because beyond the authority of the Regents ought to be honored by the Legislature, such a determination, in conjunction with the determination that the salary subsequently was earned, would not constitute "extra compensation" prohibited by Wis. Const. art. IV, sec. 26.

Moreover, I cannot state as a matter of law whether Dr. Weaver's statements at the January 7, 1972, meeting of the Board of Regents constituted a withdrawal of his claim to payment of this portion of his compensation. A month-to-month acceptance of wages does not nec-

essarily bar an employe's later claim that he was not fully compensated under his agreement with his employer. *Davies v. J. D. Wilson Co.*, 1 Wis. 2d 443, 467, 785 N.W.2d 459 (1957).

While administrative agencies have only the specific and necessarily implied authority granted by statute, a Legislature's prerogatives are not limited by a prior Legislature's enactments. Further, the scope of the Legislature's constitutional authority is determined by a less restrictive test. As stated in *Buse v. Smith*, 74 Wis. 2d 550, 564 (1976): "[I]t is a fundamental rule that when dealing with the state constitution as contrasted with the federal constitution, the search is not for a grant of power to the legislature, but for a restriction thereon." I find no provision of the Wisconsin Constitution prohibiting the Legislature from paying a claim based upon an employment agreement except as discussed above. Nor is the "public purpose" doctrine a bar since an expenditure may be based upon a legislative determination of a moral rather than a legal obligation and still be for a public purpose. *State ex rel. Singer v. Boos*, 44 Wis. 2d 374, 384 (1969).

Since the terms of the compensation agreement involve a question of both fact and law, I cannot state as a matter of interpretation of law what constitutes the terms of the compensation agreement. If, however, the Legislature determines that Dr. Weaver was not fully paid under the terms of his agreement with the Board of Regents then Wis. Const. art. IV, sec. 26 does not preclude the Legislature from fulfilling the agreement under the rationale set forth in *Department of Administration v. WERC*.

BCL:WMS

Intoxicating Liquors; Minors; An adult who furnishes beer or liquor to a minor may not be charged with contributing to the delinquency of a child under sec. 947.15(1)(a), Stats., if based on the minor's possession of such items. OAG 65-81

December 24, 1981.

DAVID E. HOEL, *District Attorney*
Columbia County

You have requested my opinion as to whether an adult who furnishes beer or liquor to a minor may be charged criminally with contributing to the delinquency of a child under sec. 947.15(1)(a), Stats., or whether only civil action may be taken against the adult under secs. 66.054(20)(a) or 176.30(2), Stats.

Section 947.15(1)(a), Stats., provides:

(1) The following persons are guilty of a Class A misdemeanor, and if death is a consequence are guilty of a Class D felony:

(a) Any person 18 or older who intentionally encourages or contributes to the delinquency of any child as defined in s. 48.02(3m) or the neglect of any child. This subsection includes intentionally encouraging or contributing to an act by a child under the age of 12 which would be a delinquent act if committed by a child 12 years of age or older

Section 48.02(3m), Stats., defines delinquent as follows: " 'Delinquent' means a child who is less than 18 years of age and 12 years of age or older who has violated any state or federal criminal law, except as provided in ss. 48.17 and 48.18."

Section 48.17, Stats., relates to jurisdiction over traffic and boating, civil law and ordinance violations. It covers both civil and criminal matters involving children. Section 48.18, Stats., sets forth the procedure for waiving jurisdiction of the juvenile court for alleged criminal law violations involving children sixteen years or older.

Pursuant to sec. 48.344, Stats., unlawful possession of beer or liquor violations by minors are civil in nature. Noting the reference to sec. 48.17, Stats., in sec. 48.02(3m), Stats., you ask whether an unlawful possession of beer or liquor violation by a minor, a civil offense, constitutes an act of a "delinquent" which would permit prosecution of the furnishing adult under sec. 947.15(1), Stats. In

other words, does the reference to sec. 48.17, Stats., in sec. 48.02(3m), Stats., permit the definition of "delinquent" to be expanded beyond criminal law violations?

It is my opinion that your questions must be answered no.

A review of legislative history is informative. The crime of contributing to the delinquency of a child initially was created as sec. 48.45(4)(a), Stats., as part of the Children's Code by ch. 575, Laws of 1955. It provided criminal penalties for, "[a]ny person 18 or older who intentionally encourages or contributes to the delinquency or neglect of any child." Neither sec. 48.45(4), Stats., nor sec. 48.02, Stats. (definitions), enacted at the same time, defined "delinquent." However, sec. 48.12, Stats., provided in part that: "The juvenile court has exclusive jurisdiction except as provided in ss. 48.17 and 48.18 over any child who is alleged to be delinquent because: (1) He has violated any state law or any county, town, or municipal ordinance."

Sections 48.17 and 48.18, Stats., related to jurisdiction of other state courts in cases of violations of civil and criminal laws by children.

Section 48.45(4), Stats., was renumbered to sec. 947.15, Stats., in 1957.

Chapter 125, Laws of 1971, repealed and recreated sec. 48.12, Stats., to provide in part:

The juvenile court has exclusive jurisdiction, except as provided in s. 48.17 and 48.18 over any child:

(1) Who is alleged to be delinquent because he has violated any federal criminal law, criminal law of any state, or any county, town or municipal ordinance that conforms in substance to the criminal law

Chapter 354, Laws of 1977, repealed and recreated sec. 48.12, Stats., defining delinquency therein as follows: "The court has exclusive jurisdiction, except as provided in ss. 48.17 and 48.18, over any child 12 years of age or older who is alleged to be delinquent because he or she has violated any federal or state criminal law."

Chapter 135, Laws of 1979, created sec. 48.02(3m), Stats., defining "delinquent" and, together with ch. 300, Laws of 1979, amended and renumbered sec. 48.12, Stats., to provide: "The court has exclusive jurisdiction, except as provided in ss. 48.17 and 48.18, over any child 12 years of age or older who is alleged to be delinquent as defined in s. 48.02(3m)."

Section 48.344, Stats., created by ch. 331, Laws of 1979, mandates that unlawful possession violations against children be disposed of as civil forfeiture actions. Pursuant to sec. 939.12, Stats., conduct punishable only by a forfeiture is not a crime.

Based on the legislative history and development of the pertinent statutes, it clearly appears that the definition of "delinquent" presently is intended to apply only to children who violate criminal laws.

Section 48.02(3m), Stats., should be construed *in pari materia* with sec. 48.12(1), Stats. *Jung v. State*, 55 Wis. 2d 714, 720, 201 N.W.2d 58 (1970). When this is done, it is apparent that the phrase "except as provided in ss. 48.17 and 48.18" operates to exclude from the jurisdiction of the juvenile court those allegedly delinquent children whose cases are governed by secs. 48.17 and 48.18, Stats. Although there is no apparent need for the phrase to appear in sec. 48.02(3m), Stats., as well as in sec. 48.12(1), Stats., the Legislature may have inserted it into sec. 48.02(3m), Stats., on the notion that this harmonized the section defining delinquency with the section governing jurisdiction over alleged delinquents. At any rate, the history of these and related statutes clearly shows that the Legislature did not intend to expand the definition of delinquent by its reference to secs. 48.17 and 48.18, Stats. As was stated in 63 Op. Att'y Gen. 95, 98 (1974): "The legislative intent in enacting sec. 48.12 is clear. It is intended to grant exclusive jurisdiction to the juvenile court over all crimes committed by persons under 18 years of age, except as specifically provided in secs. 48.17 and 48.18."

Further, since sec. 947.15, Stats., is a criminal statute it must be strictly construed. As indicated above, an interpretation expanding its application to a minor's civil violations is not supportable.

BCL:DAM

Bench Warrant; Circuit Court; Law Enforcement; The circuit court has neither statutory nor inherent authority to issue a bench warrant for the arrest of a violator of a county ordinance who has received a citation pursuant to sec. 66.119, Stats., and who neither posts a cash deposit nor appears at the citation return date. OAG 66-81

December 24, 1981.

JOHN D. OSINGA, *District Attorney*
Portage County

You have requested my opinion as to whether a bench warrant can be issued when an alleged violator has been issued a county ordinance violation citation pursuant to sec. 66.119(1), Stats., and that violator neither makes a cash deposit nor appears in court on the date specified in the citation. Citations issued pursuant to sec. 66.119, Stats., involve violations of county ordinances that do not have statutory counterparts.

You state that you have formed a tentative opinion that a bench warrant cannot be issued under the described circumstances. I agree. In a follow-up question, you ask whether a bench warrant may issue in the course of an action commenced under ch. 778, Stats. In my opinion, it may not.

This opinion addresses the following issues:

1. Whether there is statutory authority for the issuance of a bench warrant when a person who has been cited pursuant to sec. 66.119, Stats., fails to make a cash deposit by the citation return date and also fails to appear on the citation return date.
2. Whether the circuit court has inherent authority to issue a bench warrant or a similar order under such circumstances.
3. Whether there is statutory authority for the issuance of a bench warrant in the context of an action to collect the forfeiture under ch. 778, Stats.

I.

Statutory authority for issuance of a bench warrant at citation return date.

Section 66.119(3), Stats., prescribes the procedures to be followed in a court at the appearance date given in a citation. In regard to the circumstances that are the subject of your letter, sec. 66.119(3)(c), Stats., states in part:

[I]f the alleged violator does not make a cash deposit and fails to appear in court at the time specified in the citation, an action for collection of the forfeiture and penalty assessment may be commenced. ... [A] county or town may commence action under s. 778.10. The citation may be used as the complaint in the action for the collection of the forfeiture and penalty assessment.

Consistent with the above-quoted provision, sec. 66.119(1)(b)7.d., Stats., requires that the citation form include a statement that: “[i]f the alleged violator does not make a cash deposit and does not appear in court at the time specified, an action may be commenced against the alleged violator to collect the forfeiture and the penalty assessment imposed by s. 165.87.”

You ask whether under these circumstances, the county may seek a bench warrant. I am of the opinion that a bench warrant cannot be issued pursuant to the authority of sec. 66.119, Stats., or any arguably related section. There are several reasons for this conclusion.

First, there is no explicit authority in sec. 66.119, Stats., for the issuance of a bench warrant at this stage of proceeding.

Moreover, the above-quoted provisions, secs. 66.119(3)(c) and 66.119(1)(b)7.d., Stats., create the strong inference that the Legislature intended that a bench warrant ought not issue in this situation. For example, the notice required by sec. 66.119(1)(b)7.d., Stats., is that the county may commence a forfeiture action if the violator does not make a cash deposit and does not appear in court at the time specified. The required notice implies that this is the only consequence the Legislature intended the violator to face in the event he or she elects not to appear and not to post the cash deposit.

Second, the inference regarding the legislative intent gleaned from a review of the text of sec. 66.119, Stats., is supported by a comparison of sec. 66.119, Stats., with similar provisions. For example, the Legislature has provided for the issuance of a bench warrant and notice to the violator that a bench warrant may issue in similar situations in statutes regulating the procedure for enforcement of other types of citations. See, for example, secs. 800.02(2)(a)(9), 800.04(2)(c), Stats., relating to municipal court procedures. Obviously, the Legislature is aware that it could authorize the issuance of a bench warrant under these circumstances. Therefore, we may reasonably infer that the Legislature intended that the commencement of a civil action be the only potential consequence faced by the violator who elects to do nothing after receiving a citation issued pursuant to sec. 66.119, Stats.

It is also my opinion that sec. 968.09, Stats., does not constitute authority for issuance of a bench warrant instead of or in addition to the remedies set forth in sec. 66.119, Stats. Section 968.09, Stats., begins: "When a defendant or a witness fails to appear before the court *as required*" (emphasis added). Section 968.09, Stats., was designed to function where a defendant or witness fails to make a mandatory appearance. It cannot be utilized when a defendant misses an optional appearance.

It is clear that the appearance time given in a citation issued pursuant to sec. 66.119, Stats., is an optional appearance. The provisions of sec. 66.119(3), Stats., entitled "Violator's Options; Procedure on Default," make it clear that a violator is not required to do anything after receiving a citation. The violator may elect not to appear in court and not to post a deposit, although the violator may then be sued under ch. 778, Stats. Nowhere in sec. 66.119(3), Stats., is there any language that supports the proposition that a violator cited pursuant to sec. 66.119, Stats., must appear in court.

You raise the question of whether 62 Op. Att'y Gen. 208 (1973), is authority for the issuance of a bench warrant in this situation. This opinion was issued prior to the creation of sec. 66.119, Stats. in 1975; therefore, that opinion was issued without reference to the provisions of sec. 66.119, Stats. Also, that opinion did not deal with the same questions. Rather, it presumed a properly issued bench warrant and

discussed the effectiveness of that bench warrant throughout the state. The opinion did not touch upon the foundation question of when, if ever, the court may issue a bench warrant under sec. 968.09, Stats., in the course of a county ordinance enforcement proceeding. In short, 62 Op. Att'y Gen. 208 (1973), should not be read to extend the authority contained in sec. 66.119(3), Stats., or in sec. 968.09, Stats., to support the issuance of a bench warrant in the circumstance you refer to.

II.

Inherent power of the circuit court to issue a bench warrant or similar order on the citation return date.

I am also of the opinion that the circuit court judge does not have inherent power to issue a bench warrant or similar order in the situation where an alleged violator cited pursuant to sec. 66.119, Stats., does not post a cash deposit and does not appear on the citation return date. Of course, courts do have inherent authority to issue all orders "essential to the existence of the court and necessary to the orderly and efficient exercise of the court's jurisdiction." *State v. Braunsdorf*, 92 Wis. 2d 849, 851, 286 N.W.2d 14 (Ct. App. 1979), *aff'd* 98 Wis. 2d 569, 297 N.W.2d 808 (1980). Given this precept, the issue is whether a court can properly issue a bench warrant or a similar order in aid of the exercise of its jurisdiction under sec. 66.119, Stats. A review of the jurisdictional provisions of sec. 66.119, Stats., is helpful.

In the situation that we are concerned with, unless the alleged violator makes a voluntary appearance at the citation return date, the court has no personal jurisdiction over the violator, limited subject matter jurisdiction and no civil action for the recovery of a forfeiture has been commenced. Section 66.119(2)(b), Stats., provides:

The issuance of a citation by a person authorized to do so under par. (a) shall be deemed adequate process to give the appropriate court jurisdiction over the subject matter of the offense for the purpose of receiving cash deposits, if directed to do so, and for the purposes of (3)(b) and (c). *Issuance and filing of a citation does not constitute commencement of an action.*

Section 66.119(3)(b), Stats., states in part: "If a person appears in court in response to a citation, . . . such appearance confers personal jurisdiction over the person."

Unless the violator voluntarily appears in court, the court's subject matter jurisdiction is severely circumscribed. For example, if the violator has posted a cash deposit, the court may enter judgment based on an implied plea of no contest. It is obviously neither necessary nor appropriate for the court to issue a bench warrant or similar order in aid of this limited subject matter jurisdiction especially where the court has no personal jurisdiction.

Assuming the court retains both its statutory and inherent power to respond to contempt of court in matters brought before it pursuant to sec. 66.119, Stats., this power does not encompass general authority for the issuance of a bench warrant or similar order simply because the defendant has not appeared at the citation return date. The violator is not required to appear at the citation return date under sec. 66.119, Stats.; therefore, there is nothing contemptuous about the failure of the violator to appear at the citation return date.

III.

Statutory authority for the issuance of a bench warrant in the course of a proceeding under ch. 778, Stats.

There does not appear to be authority for the issuance of a bench warrant upon the mere default of a defendant to answer or otherwise appear in an action commenced under ch. 778, Stats. Because such an action is purely a civil action, the bench warrant, which is a statutorily created tool of criminal procedure, cannot be issued in these actions.

Section 778.10, Stats., authorizes counties to sue and recover forfeitures "pursuant to this chapter." Section 778.01, Stats., states with regard to statutory forfeitures that they may be "recovered in a civil action unless the act or omission is punishable by fine and imprisonment or by fine or imprisonment." The procedures for such "civil actions" are set forth in ch. 778, Stats. Therefore, an action based on ch. 778, Stats., is a civil action.

The proposition that actions instituted pursuant to ch. 778, Stats., are civil is supported by several Wisconsin cases and an opinion of the Attorney General all of which categorize actions under ch. 778, Stats., or its predecessor, ch. 288, Stats., as civil actions. *See, e.g., Neenah v. Alsteen*, 30 Wis. 2d 596, 142 N.W.2d 232 (1966); *Kuder v. State*, 172 Wis. 141, 178 N.W. 249 (1920) and 66 Op. Att'y Gen. 226 (1977). In *Neenah*, the court contrasted the "purely civil" action contained in ch. 288, Stats. (the statutory predecessor of ch. 778, Stats.), with the quasi-criminal procedures available to municipalities under other statutes. 30 Wis. 2d at 600. In addition, in *Neenah*, the court reviewed a series of Wisconsin cases that held that the rules of civil procedure were applicable and the rules of criminal procedure were not applicable in actions for the collection of forfeitures. 30 Wis. 2d at 601-02.

Obviously the procedures available to the plaintiff in an action involving a county ordinance violation cited under sec. 66.119, Stats., are far more cumbersome than the procedures available for enforcement of municipal ordinances and the collection of municipal forfeitures. *See*, secs. 800.02, 800.04, Stats. You may wish to seek amendment of the provisions of sec. 66.119, Stats., so that your enforcement and collection efforts could benefit from the types of procedures available to municipal authorities. Absent legislative amendment, I believe that your county ordinance enforcement under sec. 66.119, Stats., is a purely civil matter and that your enforcement and collection procedures must track the civil rather than the criminal process.

BCL:DN

Arrest; Parking; Section 349.03(2m), Stats., prohibits both pre-judgment and postjudgment arrest for failure to pay a parking forfeiture. OAG 67-81

December 30, 1981.

FRED A. RISSER, *President*
State Senate

As chairman of the Senate Committee on Organization, you request my opinion whether sec. 349.03(2m), Stats., created by ch. 20, Laws of 1981, applies to prejudgment as well as postjudgment arrests. That section reads: "No person may be arrested for failure to pay a forfeiture for violation of any stopping, standing or parking regulation enacted under s. 349.06 or 349.13 by any local authority."

Where a defendant is found guilty of violating a traffic regulation, sec. 345.47(1), Stats., provides that the court may enter judgment for a monetary amount not to exceed the maximum forfeiture, and shall order imprisonment or suspension of the operating privilege if the judgment is not paid. Section 345.47(2), Stats., provides that payment of the judgment may be deferred for up to sixty days. Where payment is not made during that period, the defendant is subject to arrest so that he can be imprisoned. This is clearly an arrest for non-payment of the forfeiture. This procedure is applicable to all traffic regulation cases. However, new sec. 349.03(2m), Stats., makes an exception for stopping, standing and parking violations. It provides that in such cases a person may not be arrested for failure to pay a forfeiture. It is clear that this applies to postjudgment arrests. However, the question arises whether prejudgment arrest is also prohibited.

Prejudgment arrest is authorized by sec. 345.28, Stats., with respect to parking violations. This statute reads:

(1) A person charged with a nonmoving traffic violation may mail the amount of the forfeiture to any of the places specified in s. 345.26(1) or to a violations bureau, or to the city, town or county clerk or treasurer if the traffic citation so provides. In that case, the citation shall not be filed in court. A nonmoving traffic violation is any parking of a vehicle in violation of a statute or an ordinance.

(2) If the alleged violator does not mail the amount of the forfeiture as provided in sub. (1), a summons or warrant under

ch. 968 may be issued for him. Upon his appearance, the procedure under ss. 345.32 to 345.36 shall apply.

This provides that a person charged with a parking violation may mail the amount of the forfeiture, and that if the person does not mail the amount of the forfeiture a warrant may be issued. Thus, he may be arrested if he does not mail the amount of the forfeiture. The language of sec. 349.03(2m), Stats., "failure to pay a forfeiture" is the substantial equivalent of the language of sec. 345.28, Stats., "does not mail the amount of the forfeiture." Under either phraseology, it is the failure to pay that brings the arrest, and this new statute prohibits such arrest. Statutes *in pari materia*, although in apparent conflict, are so far as reasonably possible construed to be in harmony with each other. But if there is an irreconcilable conflict between a new provision and prior statutes relating to the same subject matter, the new provision will control because it is the later expression of the Legislature. *Nat. Exchange Bank of Fond du Lac v. Mann*, 81 Wis. 2d 352, 361, 260 N.W.2d 716 (1978). Similarly, repeals by implication are not favored in the law. The earlier act will be considered to remain in force unless it is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together. *Pattermann v. Whitewater*, 32 Wis. 2d 350, 356, 145 N.W.2d 705 (1966). Section 345.28, Stats., which authorizes arrest, is in direct and unreconcilable conflict with sec. 349.03(2m), Stats., which prohibits arrest. Thus, the new statute is controlling because it is the later expression of the Legislature.

It has been suggested that prejudgment arrest is for failure to appear in court, not for failure to pay. This is not correct. The statute makes it clear that the arrest is for failure to pay. However, if a summons were served first and the person failed to appear, then the court would have jurisdiction to issue a bench warrant for failure to appear.

In *West Allis v. State ex rel. Tochalauski*, 67 Wis. 2d 26, 226 N.W.2d 424 (1975), the court held that a person may not be imprisoned for failure to pay a forfeiture if he is indigent. It is argued that the Legislature, in enacting sec. 349.03(2m), Stats., merely meant to extend this same principle to all persons who do not pay parking for-

feitures after judgment. For reasons stated above I cannot accept this conclusion.

I am also aware that the Circuit Court for Milwaukee County, in *State ex rel. Wood v. Breier*, Case No. 559-692, has held that sec. 349.03(2m), Stats., applies only to postjudgment forfeitures. The reasoning of the court appears to be that a forfeiture arises only as the result of a judgment, just as a fine arises only as the result of judgment. It is suggested that, since there is no such thing as a fine before judgment, there can be no forfeiture before judgment. I feel this analysis overlooks the specific language of the statutes involved. One statute refers to failure to pay a forfeiture and the other refers to failure to mail in the amount of the forfeiture. They both refer to the same thing, the failure to pay prior to judgment. The language of sec. 349.03(2m), Stats., seems to be aimed directly at the language of sec. 345.28, Stats.

For all of those reasons, it is my opinion that a person cannot now be arrested for failure to pay a parking forfeiture either before or after judgment.

BCL:AH

**STATUTES AND CONSTITUTIONAL PROVISIONS,
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- Prisons And Prisoners; Reapportionment; Institutional populations, as well as other populations which may include persons disenfranchised for some reason, are part of the total population included in the 1980 federal decennial census of population and may not be disregarded for congressional or state legislative redistricting purposes. U.S. Const. art. I, sec. 2; Wis. Const. art. IV, sec. 3. Although the Legislature may constitutionally authorize the use of voter population or citizen population for local apportionment purposes, when total population is used for the purpose of equal population redistricting of county supervisory or city aldermanic districts on the basis of the 1980 census population, institutional populations cannot be excluded from the total population count. OAG 22-81* 80

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