OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOLUME 71

January 1, 1982 through December 31, 1982

BRONSON C. LA FOLLETTE

ATTORNEY GENERAL

MADISON, WISCONSIN
1982

ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

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

BRONSON C. La FOLLETTE, Madison..... from Jan. 5, 1965, to Jan. 6, 1969
ROBERT W. WARREN, Green Bay..... from Jan. 6, 1969, to 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

DEPARTMENT OF JUSTICE

LEGAL SERVICES DIVISION

BRONSON C. LA FOLLETTE ..... Attorney General
F. JOSEPH SENSENBRENNER, JR ..... Deputy Attorney General
HOWARD J. KOOP ..... Executive Assistant
JAMES D. JEFFRIES ..... Admin., Legal Services Division
JAMES P. ALTMAN ..... Assistant Attorney General
WALTRAUD A. ARTS ..... Assistant Attorney General
THOMAS J. BALISTRERI ..... Assistant Attorney General
DAVID J. BECKER ..... Assistant Attorney General
CHARLES A. BLECK ..... Assistant Attorney General
MARY V. BOWMAN ..... Assistant Attorney General
RICHARD J. BOYD ..... Assistant Attorney General
JOHN W. CALHOUN ..... Assistant Attorney General
PETER J. CANNON ..... Assistant Attorney General
BRUCE A. CRAIG ..... Assistant Attorney General
F. THOMAS CREERON III ..... Assistant Attorney General
LEROY L. DALTON ..... Assistant Attorney General
THOMAS DAWSON ..... Assistant Attorney General
THOMAS L. DOSCH ..... Assistant Attorney General
STEVEN D. EBERT ..... Assistant Attorney General
SHARI EGGLESON ..... Assistant Attorney General
DANIEL S. FARWELL ..... Assistant Attorney General
WILLIAM FIELDS ..... Assistant Attorney General
FRED A. FINK, JR ..... Assistant Attorney General
DAVID T. FLANAGAN ..... Assistant Attorney General
MATTHEW FRANK ..... Assistant Attorney General
JEFFREY M. GABRYSIAK ..... Assistant Attorney General
DAVID J. GILLES ..... Assistant Attorney General
JOHN J. GLINSKI ..... Assistant Attorney General
SUSAN GREENBERGER[1] ..... Assistant Attorney General
JOHN DOUGLAS HAAG ..... Assistant Attorney General
ALBERT O. HARRIMAN ..... Assistant Attorney General
CHRIS HEIKENEN ..... Assistant Attorney General
CHARLES D. HOORNSTRA ..... Assistant Attorney General
RUBY JEFFERSON-MOORE ..... Assistant Attorney General
DONALD P. JOHNS ..... Assistant Attorney General
STEPHEN W. KLEINMAIER ..... Assistant Attorney General
MICHAEL R. KLOS ..... Assistant Attorney General
KIRBIE KNUTSON ..... Assistant Attorney General
CHARLES R. LARSEN ..... Assistant Attorney General
ROBERT W. LARSEN ..... Assistant Attorney General
ALAN M. LEE ..... Assistant Attorney General
MICHAEL J. LOSSE ..... Assistant Attorney General
PAMELA MAGEE-HEILPRIN ..... Assistant Attorney General
EDWARD MARION ..... Assistant Attorney General
ROBERT B. McCONNELL ..... Assistant Attorney General
JAMES H. McDERMOTT ..... Assistant Attorney General
MAUREEN A. McGLYNN ..... Assistant Attorney General
JAMES C. McKAY, JR. ..... Assistant Attorney General
DANIEL A. MILAN ..... Assistant Attorney General
ROY G. MITA[3] ..... Assistant Attorney General
MARGUERITE M. MOELLER ..... Assistant Attorney General
JOHN C. MURPHY ..... Assistant Attorney General
LOWELL E. NASS ..... Assistant Attorney General
DIANE M. NICKS ..... Assistant Attorney General
STEPHEN J. NICKS ..... Assistant Attorney General
JOHN D. NIEMISTO ..... Assistant Attorney General

DANIEL O'BRIEN ..... Assistant Attorney General
KEVIN J. O'CONNOR ..... Assistant Attorney General
BRUCE A. OLSEN ..... Assistant Attorney General
PETER A. PESHEK ..... Assistant Attorney General
THEODORE L. PRIEBE ..... Assistant Attorney General
PIERCE T. PURCELL ..... Assistant Attorney General
ROBERT D. REPASKY ..... Assistant Attorney General
DAVID C. RICE ..... Assistant Attorney General
RAYMOND M. RODER ..... Assistant Attorney General
NADIM SAHAR ..... Assistant Attorney General
GORDON SAMUELSEN ..... Assistant Attorney General
JEROME S. SCHMIDT ..... Assistant Attorney General
WARREN M. SCHMIDT ..... Assistant Attorney General
GEORGE B. SCHWAHN ..... Assistant Attorney General
ROBERT A. SELK[2] ..... Assistant Attorney General
CARL A. SINDERBRAND ..... Assistant Attorney General
JONATHAN P. SINER ..... Assistant Attorney General
DONALD W. SMITH ..... Assistant Attorney General
MARK E. SMITH ..... Assistant Attorney General
STEPHEN M. SOBOTA ..... Assistant Attorney General
ANDREW L. SOMERS ..... Assistant Attorney General
DANIEL D. STIER ..... Assistant Attorney General
DEWITT STRONG ..... Assistant Attorney General
MARYANN SUMI ..... Assistant Attorney General
JOHN R. SWEENEY ..... Assistant Attorney General
BARBARA W. TUERKHEIMER ..... Assistant Attorney General
STEVEN C. UNDERWOOD ..... Assistant Attorney General
ROBERT J. VERGERONT ..... Assistant Attorney General
RICHARD A. VICTOR ..... Assistant Attorney General
SALLY L. WELLMAN ..... Assistant Attorney General
STEVEN B. WICKLAND ..... Assistant Attorney General
GERALD S. WILCOX ..... Assistant Attorney General
WILLIAM H. WILKER ..... Assistant Attorney General
WILLIAM C. WOLFORD ..... Assistant Attorney General
E. GORDON YOUNG ..... Assistant Attorney General
MICHAEL L. ZALESKI ..... Assistant Attorney General

[1]Resigned, 1982

[2]Appointed, 1982

[3]Retired, 1982

OPINIONS

OF THE

ATTORNEY GENERAL

Volume 71

Physicians And Surgeons; If a submission of controversy under ch. 655, Stats., is dismissed on the merits by voluntary agreement, the claimant is barred from commencing a second action on the same claim, but claimant may be relieved from the dismissal stipulation and the matter may be effectively "reopened" if there is a basis for according relief and the Patients Compensation Panel exercises its discretion to grant such relief. OAG 1-82

January 11, 1982.

J. DENIS MORAN, *Director*
State Courts

You ask the following questions regarding submissions of controversy under ch. 655, Stats., which establishes a quasi-judicial system for resolving medical malpractice claims:

1. May a Submission of Controversy be commenced against a respondent after a similar action alleging the same acts of

medical malpractice has been dismissed on the merits in favor of the respondent?

2. Upon stipulation of all parties, can the original Submission of Controversy be reopened in order to return it to the jurisdiction of the Patients Compensation Panels for hearing, thus allowing for an appeal in circuit court of the panel decision?

You provide the following factual background:

Plaintiff, through his attorney, filed a Submission of Controversy against a doctor on November 1, 1979. The allegations of medical malpractice noted on the Submission of Controversy are alleged to have occurred between December 20, 1977, and October 29, 1978. The Submission was dismissed on the *merits* by agreement of both attorneys for the parties on May 28, 1980.

There is a significant disagreement between plaintiff and his attorney as to the quality of legal services provided throughout this period of time, in that plaintiff says he never knew a Submission of Controversy was filed on his behalf much less dismissed, and the attorney's office indicates that plaintiff was not responsive to correspondence from his office.

Plaintiff states that after an extensive physical examination in a Michigan hospital in the fall of 1980, he was informed as to the extent of physical impairment he had received as a result of treatment by the doctor during the time period alleged in the original Submission of Controversy.

Plaintiff filed a second Submission of Controversy naming the doctor as a respondent in August of this year.

In my opinion, the claimant is barred from commencing a second action on the same claim, but the claimant may be relieved from the dismissal stipulation and the matter may be effectively "reopened" if there is a basis for according relief and the Patients Compensation Panel exercises its discretion to grant such relief.

By virtue of sec. 655.17(1), Stats., "a formal panel shall be bound by the law applicable to civil actions" unless otherwise provided by ch. 655, Stats.

Section 655.16(1), Stats., provides that "disposition of a controversy may be made by compromise, stipulation, agreement or default without hearing." Since the consequences of disposition by agreement are not expressly stated, it is necessary and proper to look to the law applicable to civil actions.

The law applicable to civil actions is contained in chs. 801-47, Stats. Sec. 801.01(2), Stats. Section 805.04, Stats., pertains to voluntary dismissals. Subsection (1) reads:

> An action may be dismissed by the plaintiff without order of court by serving and filing a notice of dismissal at any time before service by an adverse party of responsive pleading or motion or by the filing of a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is not on the merits, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim.

According to your recitation of facts, the voluntary dismissal in the instant matter was "on the merits." Thus the claimant is barred from commencing a second action on the same claim. *See* sec. 805.04(1), Stats.; *Dunn v. Fred A. Mikkelson, Inc.*, 88 Wis. 2d 369, 376-77, 276 N.W.2d 748 (1979); *Pattermann v. Whitewater*, 32 Wis. 2d 350, 360, 145 N.W.2d 705 (1966); 9 Wright & Miller, Federal Practice and Procedure: Civil § 2367 (1971).

As to your second question, it is my opinion that it is within the power of the panel to relieve the claimant of the stipulated dismissal.

As stated earlier, sec. 655.17(1), Stats., provides that except as otherwise provided in ch. 655, Stats., "a formal panel shall be bound by the law applicable to civil actions." Among judicial powers is the power to "relieve a party or legal representative from a judgment, order or stipulation" upon a motion for such relief and upon a showing that one of the reasons for relief specified in the statute is satisfied. Sec. 806.07, Stats.

The panel's power to act under sec. 806.07, Stats., is supported by the recent decision in *Mazurek v. Miller*, 100 Wis. 2d 426, 303 N.W.2d 122 (Ct. App. 1981), *petition for review denied*, May 11,

1981. Using the logic advanced above, the court of appeals held that a panel has the authority to dismiss a claim where the claimant refuses to comply with a discovery order issued by the panel. It held that "[t]he powers of a court under sec. 804.12(2) are granted to a panel by virtue of sec. 655.17(1) unless provided otherwise in ch. 655." 100 Wis. 2d at 432-33. It follows that a panel also has the power under sec. 806.07, Stats., to grant relief from a judgment, order or stipulation.

Your specific question is whether the panel may "reopen" the matter upon stipulation of all parties. In my opinion, a stipulation of all parties is one factor to be considered by the panel in determining whether relief should be granted, but it is not controlling. The granting of relief is within the discretion of the panel. It would be inadvisable to consider that the panel's discretionary authority may be overridden by stipulation of the parties. In other words, the panel should maintain control.

It would be improper for me to venture any opinion as to whether relief should be granted to the particular claimant who prompted your questions. Given the disputes as to material facts and the discretionary nature of the power, it is for the panel to decide whether any ground for relief under sec. 806.07(1), Stats., has been satisfied and whether it will exercise its discretion to grant relief.

BCL:RWL

County Highway Committee; Criminal Law; Public Officials; Claim for expense reimbursement by a public officer, under specific fact situation, is both an action taken in such officer's official capacity and an action growing out of performance of official duties thereby permitting municipal government to pay expenses associated with criminal charge against such officer based upon such claim pursuant to sec. 895.35. Stats. OAG 2-82

January 11, 1982.

MATTHEW F. ANICH, *District Attorney*
Ashland County

You have requested my opinion as to whether sec. 895.35, Stats., is applicable to criminal charges brought against a former member

of the county highway committee based upon alleged fraudulent filing of expense vouchers. You indicate that at the preliminary hearing the court failed to find probable cause and dismissed all criminal charges. Specifically you have asked:

1. Whether a former member of a county highway committee is an "officer" as that term is used in sec. 895.35, Stats.

2. Whether criminal charges commenced against a former county highway committee member based upon submission of vouchers for payment for meals are charges "brought against an officer in his official capacity."

3. Whether criminal charges based upon submitting expense vouchers to a county can be said to "grow out of the performance of official duties."

Section 895.35, Stats., provides in pertinent part:

> Whenever in any city, town, village, school district, vocational, technical and adult education district or county charges of any kind are filed or an action is brought against any officer thereof in his official capacity, or to subject any such officer, whether or not he is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action is discontinued or dismissed or such matter is determined favorably to such officer, or such officer is reinstated, or in case such officer, without fault on his part, is subjected to a personal liability as aforesaid, such city, town, village, school district, vocational, technical and adult education district or county may pay all reasonable expenses which such officer necessarily expended by reason thereof.

You first ask whether a member of a county highway committee is an officer of the county as that term is used in sec. 895.35, Stats. According to *Black's Law Dictionary*, a public officer is one who holds a position by election or appointment and exercises a part of the sovereign power of government. *Black's Law Dictionary* 976-77 (5th ed. 1979). *See also* the definition of public official set forth in *Black's Law Dictionary* 1107 (5th ed. 1979). Members of the county highway committee are elected or appointed for a fixed term, sec.

83.015(1), Stats.; 61 Op. Att'y Gen. 116 (1972), and exercise powers and duties pursuant to legislative enactment and authority of the county board, sec. 83.015(2), Stats. Moreover, my predecessors have on several occasions referred to the position as an office. 61 Op. Att'y Gen. 116 (1972); 48 Op. Att'y Gen. 241 (1959); 46 Op. Att'y Gen. 175 (1957). It is therefore my opinion that a member of the county highway committee is an officer as that term is used in sec. 895.35, Stats.

The fact that the individual involved was no longer a member of the county highway committee at the time the criminal charges were brought against him does not change my opinion. The information which you have provided for me indicates clearly that the charges arise out of the period of time when he was such a member. In my view it would be patently unreasonable to apply the statute on the basis of the time when the charges are made rather than the time when the alleged offense occurred. Furthermore, my opinion that the statute is applicable to former officers as long as the charges are based on incidents occurring while they were officers is in keeping with the position which this office has consistently taken on behalf of state officers, employes and agents pursuant to secs. 165.25(6), 893.82 and 895.46, Stats. While those statutes all deal with civil actions, rather than criminal, as here, the applicability of the statutes is based upon the status of the official at the time of the incident giving rise to the suit, not the time of commencement of the suit.

Your second question inquires whether criminal charges based upon submission of an allegedly false expense voucher are "brought against an officer in his official capacity." In my opinion, on the facts as you present them, the answer is yes. While I caution that questions concerning whether a public officer is acting in his official capacity must be determined on a case-by-case basis, it is my opinion that when a public officer is alleged to have completed an expense statement or voucher falsely then he is alleged to have acted in his official capacity in that he is alleged to have misused his official position.

Your third question inquires whether criminal charges based upon an officer's submission of expense statements or vouchers can be said to "grow out of the performance of official duties." In my opinion, the answer is yes. The phrase, "growing out of the performance of official duties," as used in sec. 895.35, and the same, or simi-

lar, phrases used in secs. 893.82 and 895.46, Stats., must be construed broadly to effect the legislative purpose of providing protection for public officers in all appropriate circumstances. The very use of the two different phrases in the statute, inquired about in your second and third questions, indicates a legislative intent to provide broad coverage for public officers. Again, while I would caution that different circumstances arising under this statute would have to be evaluated on a case-by-case basis, under the facts, as you present them, it is my opinion that a public officer submitting an expense voucher as a result of travel on government business is performing an act "growing out of the performance of official duties."

You are, of course, quite correct in your conclusion that *Bablitch & Bablitch v. Lincoln County,* 82 Wis. 2d 574, 263 N.W.2d 218 (1978), holds that payment of such expenses pursuant to sec. 895.35, Stats., is permissive, not mandatory as it would be in the case of a civil action involving sec. 895.46, Stats. It is therefore my opinion that since sec. 895.35, Stats., provides that the government has authority to pay expenses either based upon an action brought against an officer in his official capacity, or imposing a liability growing out of the performance of official duties, and since both tests are met in the fact situation you describe, the county is empowered to pay such expenses if it sees fit to do so.

BCL:CRL

Funeral Directors And Embalmers; Insurance; Section 632.41(2), Stats., does not prohibit the naming of a funeral director as beneficiary of a life insurance policy in conjunction with a separate agreement between the insured and the funeral director that the proceeds will be used for funeral and burial expenses. OAG 3-82

January 13, 1982.

DAVID L. RUSCH, *Chairman*
Funeral Directors and Embalmers Examining Board

You request my opinion as to "whether Wisconsin Statutes sec. 632.41(2) prohibits a funeral director (or a funeral home) being named beneficiary of a life insurance policy, where the insured and beneficiary separately agree that the purpose of naming of the

funeral director as beneficiary of the policy is to pre-arrange payment for funeral and burial services to be provided by the funeral director/beneficiary." I assume that the life insurance policy provides only for payment of a specific amount of money to a named beneficiary and makes no reference to payment of funeral, burial or other expenses related to disposition of the body of the deceased.

I also assume that the contract of insurance is solely between the insurer and the insured and that it makes no reference to any actual or contemplated contract between a funeral director, or any other person doing business related to burials, and the person who is insured, which involves payment for funeral and burial services.

Section 632.41(2), Stats., provides: "No contract in which the insurer agrees to pay for any of the incidents of burial or other disposition of the body of a deceased may provide that the benefits are payable to a funeral director or any other person doing business related to burials."

In my opinion sec. 632.41(2), Stats., does not prohibit naming of a funeral director or funeral home as beneficiary of a life insurance policy in conjunction with a separate agreement, between the insured and the funeral director or funeral home, to use the proceeds for funeral and burial expenses.

I find no ambiguity in the statute requiring construction. As stated in *Wis. Bankers Ass'n v. Mut. Savings & Loan,* 96 Wis. 2d 438, 450, 291 N.W.2d 869 (1980):

> In the absence of ambiguity in a statute, resort to judicial rules or interpretation and construction is not permitted, and the words of the statute must be given their obvious and ordinary meaning. ... A statute, phrase, or word is ambiguous when capable of being interpreted by reasonably well-informed persons in either of two or more senses.

"Insurer" as used in the statute is defined in part at sec. 600.03(27), Stats., as: "[A]ny person or association of persons doing an insurance business."

Section 632.41(2), Stats., thus prohibits a person engaged in the insurance business from writing an insurance contract providing benefits payable to a funeral director if the benefits consist of payment for incidents of burial or other disposition of the deceased. The

life insurance policy contemplated by your question is not prohibited by this statute since it does not provide payment for costs of burial or other disposition of a body. Nor is the separate agreement between the insured and the funeral director prohibited since that agreement does not constitute one involving the insurer. The insurer, in your example, has contracted only to pay a specified sum of money to a named beneficiary. Section 632.41(2), Stats., does not prohibit that beneficiary from being a funeral director nor does it prohibit the benefit from being used for funeral purposes.

Neither an agreement between an *insured* and a funeral director to use life insurance benefits for payment of funeral and burial expenses nor the naming of the funeral director as beneficiary in furtherance of such agreement is prohibited by the statute. What is prohibited is a contract in which the *insurer* agrees to both "pay for any of the incidents of burial" and "provide that the benefits are payable to a funeral director or any other person doing business related to burials."

BCL:WMS

Public Records; Vocational And Adult Education; Words And Phrases; A local vocational, technical and adult education district is a "school district" within the meaning of the Wisconsin Public Records Law. Sec. 19.21, Stats. Except for any pupil records under sec. 118.125, Stats., a VTAE district must preserve records at least seven years before destruction. Sec. 19.21(7), Stats. A VTAE district may not maintain records on microfilm. OAG 4-82

January 13, 1982.

ROBERT P. SORENSON, PH.D., *State Director*
Board of Vocational, Technical and Adult Education

You ask three questions concerning the applicability of the Wisconsin Public Records Law, sec. 19.21, Stats., to local vocational, technical and adult education districts (VTAE districts). Your questions are prompted by the tremendous volume of records maintained by the VTAE districts and the costs of storage, filing and record retrieval.

Your first question is whether a VTAE district is a "school district" within the meaning of the Wisconsin Public Records Law, sec. 19.21, Stats. In my opinion, the answer is yes.

Section 19.21(1), Stats., provides:

> Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

The Wisconsin Public Records Law, created by ch. 178, Laws of 1917, reflects public policy which favors the right of inspection of public documents and records. *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 426-27, 279 N.W.2d 179 (1979). It should be liberally construed to effectuate that public policy. *See* sec. 19.81(4), Stats. Thus, although sec. 38.01(2) and (4), Stats., distinguish "VTAE districts" and "school districts" for purposes of ch. 38, Stats., I believe that the term "school district" as used in sec. 19.21(1), Stats., should be interpreted in its generic sense to include VTAE districts.

The term "school district" has been given various meanings depending upon the context in which it is used. *Green Bay Met. S. Dist. v. Voc., T. & A. Bd.*, 58 Wis. 2d 628, 637, 207 N.W.2d 623 (1973). In the *Green Bay* case, 58 Wis. 2d at 638, the court concluded that a VTAE district was "a school district created under the laws of this state" and was not a "municipality" for certain tax purposes. *See also Binder v. Madison*, 72 Wis. 2d 613, 619-20, 241 N.W.2d 613 (1976); *Egan v. Wisconsin State Board of Vocational, T. & A. Ed.*, 332 F. Supp. 964, 966 (E.D. Wis. 1971); and 68 Op. Att'y Gen. 148, 149 (1979) where I stated:

> [T]he term "any ... school district" in the context of sec. 66.30, Stats., clearly includes vocational, technical and adult education school districts. The Legislature initially provided for local vocational school boards in ch. 616, Laws of 1911. Moreover, the Wisconsin Supreme Court has consistently referred to elementary and secondary school law in interpreting statutes implementing the vocational system. *See, e.g., West Milwau-*

kee v. Area Board of Vocational, Technical and Adult Education, 51 Wis. 2d 356, 187 N.W.2d 387 (1971), and *Wood County v. Board of Vocational, Technical and Adult Education,* 60 Wis. 2d 606, 211 N.W.2d 617 (1973).

This rationale is equally applicable to the present question and it is thus my opinion that a VTAE district is a "school district" within the meaning of sec. 19.21(1), (7), Stats. *See also West Milwaukee v. Area Bd. Vocational, T. & A. Ed.,* 51 Wis. 2d 356, 373, 187 N.W.2d 387 (1971). In 61 Op. Att'y Gen. 297 (1972), my predecessor concluded that a list of students awaiting a particular program in a VTAE district school was a public record within the meaning of the Wisconsin Public Records Law. Thus, it is my opinion that a VTAE district is a "school district" within the meaning of sec. 19.21(1), Stats.

Even if a VTAE district were not a "school district" within the meaning of the Wisconsin Public Records Law, it nonetheless would be subject to the law because it would come within the phrase "or other ... district" contained in sec. 19.21(1), Stats. However, whether a VTAE district is a "school district" or only a "district" under the Wisconsin Public Records Law is crucial to resolving your second question, namely, how long must VTAE district records be preserved? If a VTAE district is a "school district" within the meaning of the law, the answer to your second question is found in sec. 19.21(7), Stats., which provides: "Any school district ... may provide for the destruction of obsolete school records. ... The period of time a school district record shall be kept before destruction shall be not less than 7 years. This section shall not apply to pupil records under s. 118.125."

If on the other hand a VTAE district is not a "school district," it is without authority to destroy records which fall within sec. 19.21(1), Stats., and which are not pupil records under sec. 118.125, Stats. This is the conclusion reached by my predecessor in 63 Op. Att'y Gen. 272 (1974) with respect to the records of school districts. That conclusion led to the creation of sec. 19.21(7), Stats., which specifically addresses destruction of obsolete school records. *See* ch. 202, Laws of 1977.

Since I have concluded that a VTAE district *is* a "school district" within the meaning of the Wisconsin Public Records Law, it is my

opinion that except for any pupil records under sec. 118.125, Stats., a VTAE district must preserve records at least seven years before destruction. Sec. 19.21(7), Stats.

Your third question is whether a VTAE district may maintain public records on microfilm. In my opinion, the answer is no.

Replacement of original public records with microfilm or by other photographic means requires specific approval by the Legislature. Photographically reproduced public records are not original records unless so provided by the Legislature.

Sections 19.21(5)(c) and 59.715-59.717, Stats., provide for the photographic reproduction of public records of certain local units of government. Section 16.61, Stats., covers retention of state records and provides standards whereby photographically reproduced records may be deemed the original.

In this connection, it should be noted that although sec. 16.61, Stats., does provide for the reproduction of public records by microfilm, it permits the substitution of microfilm records for the original only where the records of a state agency are involved. The procedure for this is found in sec. 16.61(6), Stats. However, since VTAE districts are not state agencies but quasi-municipalities, this section does not apply to them.

By comparison, the Legislature has failed to authorize VTAE districts to substitute photographically reproduced records for the original records. Since the Legislature specifically has conferred power on certain local units of government and the state to maintain records on microfilm, but has not specifically conferred such power on VTAE districts, "it is evidence of legislative intent not to permit the exercise of the power." *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974). Thus, a VTAE district may not maintain records on microfilm.

BCL:JWC

Criminal Law; Intrusive searches of the mouth, nose or ears are not covered by sec. 968.255(3), Stats. However, searches of those body orifices should be conducted by medical personnel to comply with the fourth and fifth amendments. OAG 5-82

January 14, 1982.

GERALD L. ENGELDINGER, *Corporation Counsel*
Winnebago County

You have requested my opinion regarding strip searches under sec. 968.255, Stats. Specifically, you ask the following questions:

> Do the words "body cavity" as used in sec. 968.255(3) include the mouth, nose or ears of a person? Can an officer search a mouth, nose or ear? Must a search of a mouth, nose or ear be conducted only by a properly licensed physician, physician's assistant or registered nurse?

You have not described the particular circumstances under which a search of the mouth, nose or ears is anticipated. Therefore, in this response I am assuming that the basis for the search is constitutionally correct and that it is conducted pursuant to a search warrant or is a legal, warrantless search.

Section 968.255, Stats., entitled "Strip searches," provides in pertinent part as follows:

> (1)(b) "Strip search" means a search in which a detained person's genitals, pubic area, buttock or anus, or a detained female person's breast, is uncovered and either is exposed to view or is touched by a person conducting the search.
>
> (2) No person may be the subject of a strip search unless he or she is a detained person and if:
>
> (a) The person conducting the search is of the same sex as the person detained, unless the search is a body cavity search conducted under sub. (3);
>
> (b) The detained person is not exposed to the view of any person not conducting the search;
>
> (c) The search is not reproduced through a visual or sound recording;
>
> (d) A person conducting the search has obtained the prior written permission of the chief, sheriff or law enforcement administrator of the jurisdiction where the person is detained, or his or her designee, unless there is probable cause to believe that the detained person is concealing a weapon; and

(e) A person conducting the search prepares a report identifying the person detained, all persons conducting the search, the time, date and place of the search and the written authorization required by par. (d), and provides a copy of the report to the person detained.

(3) No person other than a physician, physician's assistant or registered nurse licensed to practice in this state may conduct a body cavity search.

As defined by paragraph (1)(a), the word "detained" refers to a person arrested or taken into custody for any felony or certain misdemeanors.

Section 968.255, Stats., does not define "body cavity" or "body cavity search," and I am not aware of any court decisions interpreting the statute. Nor does the legislative history of sec. 968.255, Stats., provide any clarification.

To answer your questions it is necessary to determine whether subsec. (3) should be construed as standing alone rather than together with, and in the context of, the other provisions of sec. 968.255, Stats. Accepted rules of statutory construction provide that a statute should be construed to avoid an unreasonable or absurd result. The intent of a given section of a statute must be derived from the act or statute as a whole. Each part of a statute is to be construed in connection with every other part so as to produce a harmonious whole. *State v. Burkman,* 96 Wis. 2d 630, 642, 292 N.W.2d 641 (1980); *State v. Wachsmuth,* 73 Wis. 2d 318, 323, 243 N.W.2d 410 (1976); *Milwaukee County v. ILHR Dept.,* 80 Wis. 2d 445, 454 fn. 14, 259 N.W.2d 118 (1977).

The word "person" (the one conducting the search) is not defined in subsec. (3), and the term "body cavity search" is neither defined nor expressly limited to a search of a detained person. A multitude of common occurrences could be construed as "body cavity searches" and become criminal acts unless performed by the designated medically trained persons. Standing alone, subsec. (3) is unclear, very ambiguous and could be interpreted to lead to absurd results.

Subsection (3) is further clarified, however, when construed with sec. 968.255, Stats. As defined in sec. 968.255(1)(b), Stats., a strip

search is the uncovering of specified body parts followed by either the exposure to view and/or touching of those body parts. The opening clause of subsec. (2) provides that only a "detained person" may be the subject of a strip search. Paragraphs (2)(a) through (2)(e) then refer to "the search." Clearly the phrase "the search," as used twice in para. (2)(a), and also in paras. (2)(b) through (2)(e) refers to a strip search. It logically follows that the term "body cavity search" as used in para. (2)(a) means a strip, body cavity search or, put another way, a search of body cavities that commences within the scope of a strip search as defined. Since subsec. (3), when read standing alone, is devoid of necessary definitions and would work results obviously not intended by the Legislature, it is reasonable and harmonious with the overall intent and purpose of sec. 968.255, Stats., to interpret the term "body cavity search" as used in subsec. (3) as having the same meaning as it has in para. (2)(a).

Therefore, it is my opinion that the scope of a body cavity search specified in subsec. (3) is limited by definition to those parts of the body listed in para. (1)(b), and does not cover searches of the mouth, nose or ears.

However, I must add a note of caution. Although intrusive searches of the mouth, nose and ears are not covered by sec. 968.255(3), Stats., such searches are subject to fourth and fifth amendment review. A search of the mouth, nose or ears which involves something more than touching the outside surfaces or observing what is in plain view may not pass constitutional scrutiny. If the search is an intrusion beyond the body's surface special care is required. It would be advisable to have trained medical personnel perform the search to avoid physical harm and pain to the person searched and to insure sanitary conditions. Law enforcement officers should refrain from probing into those body orifices with a finger or instrument. A comprehensive discussion of searches involving intrusions into the body, and the pertinent constitutional questions, is found in LaFave, *Search and Seizure* secs. 4.1(d) and 5.3(c) at 10-21, 321-30 (1978).

You expressed concern about the county's liability for civil rights violations under 42 U.S.C. sec. 1982. The potential for such liability will greatly decrease if intrusive searches of the mouth, nose, ears and other body cavities are conducted by medical personnel, and all other aspects of the search comply with constitutional mandates. It

certainly would be prudent for law enforcement agencies to carefully prepare rules concerning such searches, as authorized by sec. 968.255(6), Stats.

BCL:DAM

Implied Consent Law; Indigent; Public Defenders; The State Public Defender, under sec. 977.05(4)(h), Stats., may, if he deems it appropriate to do so, provide legal services to an indigent at a so-called "Refusal Hearing" conducted pursuant to sec. 343.305(8)(b)1. and 2., Stats., where such indigent, prior to such hearing, has been charged with a criminal offense or offenses based on the same situation as that giving rise to the indigent's refusal to provide a sample of his/her breath, blood or urine pursuant to sec. 343.305(2)(b), Stats. OAG 6-82

January 14, 1982.

MICHAEL W. GAGE, *District Attorney*
Outagamie County

You request my opinion on this question: does the State Public Defender (hereinafter "Defender") have the power or authority to represent an indigent individual (hereinafter "indigent") at a hearing, conducted under sec. 343.305(8)(b)1. and 2., Stats., relative to such indigent's refusal to provide a sample of his/her breath, blood, or urine pursuant to sec. 343.305(2)(b), Stats., where such indigent, prior to such hearing, has been charged with a criminal offense or offenses based on the same situation as that giving rise to his/her above-described refusal?

Your office has advised me that this opinion request is prompted by the presence in your county of two regularly recurring situations. In the first (hereinafter "Situation I"), an indigent has made the above-described refusal, and has then been charged, as a result of the occurrence productive of such refusal, with a violation of sec. 346.63(1), Stats. (driving or operating a motor vehicle while under the influence of an intoxicant or a controlled substance), punishable as a misdemeanor under sec. 346.65(2)(a)2. or 3., Stats. In such situation, you advise me that a representative of the Defender *always* appears at the above-described hearing (hereinafter "Refusal Hear-

ing"), and there represents the indigent involved, over your objection. In the second situation (hereinafter "Situation II"), an indigent has made the above-described refusal, and, as a result of the occurrence productive of such refusal, has been charged with a first violation of sec. 346.63(1), Stats., punishable only by a forfeiture under sec. 346.65(2)(a), Stats., but has, as a result of such occurrence, also been charged with a violation of criminal law, as, *e.g.*, a violation of sec. 343.44, Stats. (driving after license revoked or suspended), or of sec. 346.04(3), Stats. (knowingly fleeing or attempting to elude a traffic officer under conditions described in sec. 346.04(3), Stats.). In Situation II you advise me that a representative of the Defender *sometimes* appears at the Refusal Hearing, and there represents the indigent involved, over your objection.

Your office has further informed me that the apparent position of the Defender in both Situations I and II is that he has the right to represent the indigent there involved at the Refusal Hearing because he will represent such indigent in the criminal case arising out of the occurrence producing the refusal and Refusal Hearing; and because such indigent, unless represented by the Defender at the Refusal Hearing, might make statements which would prove damaging to him/her at the trial of such case. I would also surmise that in Situation I the Defender might believe that his representation of the indigent would be helpful, under certain circumstances, to establish that the indigent's "refusal" cannot be deemed such, *i.e.*, that the Defender could help to bring about a showing by a preponderance of the evidence "that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of intoxicants or controlled substances." *See* sec. 343.305(8)(b)2., Stats. Such a showing would mean that the indigent, if charged with driving while intoxicated, would not be faced at trial with evidence of "refusal" as proof of such indigent's consciousness of guilt. *See State v. Albright*, 98 Wis. 2d 663, 672, 298 N.W.2d 196 (1980).

In pertinent part, sec. 977.05, Stats., reads:

> (4) Duties. The state public defender shall:
>
> . . . .
>
> (h) Accept requests for legal services from indigent persons entitled to counsel under s. 967.06 or otherwise so entitled

under the constitution or laws of the United States or this state and provide such persons with legal services when, in the discretion of the state public defender, such provision of legal services is appropriate.

(i) Provide legal services in:

1. Cases involving persons charged with a crime against life under ss. 940.01 to 940.12.

. . . .

3. Cases involving persons charged with a misdemeanor not specified under subd. 1.

In considering the above-quoted portions of sec. 977.05, Stats., and the powers (referred to under the heading "Duties") conferred thereby, a rule well-imbedded in Wisconsin law comes into play, namely, that, "[i]n addition to powers expressly conferred upon him by statute, an officer has by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or such as may be fairly implied from the statute granting express powers." *Kasik v. Janssen*, 158 Wis. 606, 610, 149 N.W. 398 (1914).

Looking first at sec. 977.05(4)(i)1. and 3., Stats., above-quoted, in the light of such rule, I find no express power in the Defender to appear in Situations I and II above-described to represent the indigent there involved at the Refusal Hearing. In such situations, the indigent is a person involved in a case wherein he is "charged with a misdemeanor not specified under subd. 1." of sec. 977.05(4)(i), Stats., *i.e.*, the charged violations there involved, all crimes *not* punishable by imprisonment in the Wisconsin state prisons, and therefore misdemeanors as defined by sec. 939.60, Stats., are not the sole misdemeanor falling within the scope of sec. 977.05(4)(i)1., Stats., namely, that described in sec. 940.04(3), Stats. And by virtue of sec. 977.05(4)(i)3., Stats., the Defender has the express duty, and therefore the power, to provide legal services to the indigent "in" such cases, involved in Situations I and II; but nowhere in sec. 977.05, Stats., is any express power given the Defender to render services to such indigent *outside* such case, in a matter such as the Refusal Hearing, which is clearly not a part of such case, even though its conduct and/or outcome could conceivably have a bearing thereon.

At this juncture, let me emphasize the significance of the word "in" appearing in the words "[p]rovide legal services *in*" appearing in sec. 977.05(4)(i), Stats. "In," as used therein, obviously is used as a preposition in its most common and usual sense, *i.e.*, in the *limiting* sense of "within." *See General American Indemnity Co. v. Pepper*, 161 Tex. 263, 339 S.W.2d 660, 662 (1960) wherein it is said:

> The word "in" means *inside of, within the bounds or limits of*—American and English Encyclopaedia of Law (2d Ed.), Vol. 16, p. 123. Webster's Dictionary defines "in" to mean: "Primarily, *in* denotes situation or position with respect to a surrounding, encompassment, or enclosure, ... indicating being within, as a bounded place, a limited time, an encompassing material...." At page 16 of Volume 20, Words and Phrases, the word "in" is said in its most usual significance and popular use to mean enclosed or surrounded by limits, as in a room.

See also Verdine v. Olney, 34 N.W. 975, 978, 77 Mich. 310 (1889), wherein the court said: "The definition of 'in' by Webster is 'within; inside of;' and with such meaning the preposition is commonly and generally used." It is thus clear that when the statutory language above quoted imposes on the Defender the duty (and gives him the concomitant power) to "Provide legal services *in*: ... 3. *Cases* involving persons charged with a misdemeanor not specified under subd. 1," such duty obtains only in, *i.e., within,* such *cases,* and its statutory imposition creates no duty (and no power) in the Defender to represent the indigent charged in such case *at the Refusal Hearing, because such hearing is not a part of the indigent's misdemeanor case.* As is said in *Suspension of Operating Privilege of Bardwell,* 83 Wis. 2d 891, 902, 266 N.W.2d 618 (1978), "A hearing to determine the reasonableness of a refusal *is a proceeding separate and distinct from the prosecution for operating a motor vehicle while intoxicated brought under sec. 346.63(1)(a) or a municipal ordinance in strict conformity therewith"* (emphasis supplied). In the light of this plain and explicit holding, and the fact that sec. 977.05(4)(i)3. clearly provides only that the Defender must provide legal services *in* the cases described therein, it is, in my opinion, indisputably clear that the Defender has no power or duty under such statute to represent the indigent accused at the Refusal Hearing, which is extraneous to the misdemeanor case involved, or, as the above-quoted *Bardwell* holding shows, "separate and distinct" from such misdemeanor case.

Is the power to render the services in question, however, one "fairly implied from" sec. 977.05(4)(i)3., Stats., granting the express power above mentioned? In my opinion, no, as there is nothing in the language of sec. 977.05(4)(i)3., Stats., from which an inference may fairly be drawn that the express power thereby conferred to render legal services *in* a criminal case is accompanied by an implied power to render legal services in a civil matter such as the Refusal Hearing in question. But is the power to represent the indigent in Situations I and II, at the Refusal Hearing, conferred by implication on the Defender as an "additional" power "necessary for the due and efficient exercise" of the power expressly granted to him under sec. 977.05(4)(i)3., Stats., to represent such indigent in the criminal cases involved in Situations I and II? In my opinion, no. It might be true that the Defender's representation of the indigent at the Refusal Hearing would improve, or at least might improve, the indigent's position at the trial of the criminal charge against him/her; but in my judgment it cannot be said that *sans* the probability or possibility of such improvement, the Defender, expressly empowered to provide legal services to the indigent only *in* such criminal case, would find it impossible to exercise such power in a due and efficient manner. It would perhaps be "convenient" to the exercise of such express power in such manner to have the power to represent the indigent at the Refusal Hearing; but in my opinion it would not be "necessary" to the exercise of such express power in such manner for the Defender to possess the implied power to represent the indigent at the Refusal Hearing; and I therefore do not believe he has such implied power under that portion of the rule set forth above, which reads "an officer has by implication such additional powers as are *necessary* for the due and efficient exercise of the powers expressly granted" (emphasis supplied).

As above shown, subsec. (h) of sec. 977.05(4), Stats., provides that the Defender shall:

> [A]ccept requests for legal services from indigent persons entitled to counsel under s. 967.06 or otherwise so entitled under the constitution or laws of the United States or this state *and provide such persons with legal services when, in the discretion of the state public defender, such provision of legal services is appropriate.*

With respect to this statute, it is plain that the indigent involved in Situation I or II, faced with a misdemeanor charge punishable by imprisonment, is entitled to counsel under the Sixth Amendment of the United States Constitution. *See Argersinger v. Hamlin,* 407 U.S. 25, 37, 38 (1972). It would also appear that such indigent would be entitled to counsel under sec. 967.06, Stats., in Situations I and II, since they involve detention or arrest in connection with an offense, or offenses, punishable by incarceration. Consequently, it is my opinion that the Defender, under the broad discretion vested in him by the second sentence of subsec. (h), sec. 977.05(4), Stats., is empowered, if he deems it "appropriate" to do so, to provide the indigent involved in Situations I and II with legal services in the form of representation at the Refusal Hearing.

In giving the opinion immediately above-stated, I wish four things clearly understood. First, I discern no conflict between such opinion and the opinion which precedes it, which is that the Defender has no implied power to render the above-described services, rising out of a necessity, which I view as nonexistent, for the Defender to have such implied power in order to exercise the express power he has under sec. 977.05(4)(i)3., Stats., in a due and efficient manner. There is a marked difference between the Defender having the discretion he clearly has under subsec. (h), sec. 977.05(4), Stats., to provide legal services he merely deems "appropriate," and then providing the legal services in question as "appropriate," and his having an implied power to render such services because it is "necessary" to render them for the due and efficient exercise of a power expressly granted to the Defender.

Second, I wish it understood that in opining that the Defender may render the legal services in question under the broad discretion vested in him by sec. 977.05(4)(h), Stats., if he deems their rendition "appropriate," I am *not* opining that his judgment of what is "appropriate" in the exercise of such discretion is free of the restraints of law, and would permit him to render legal services *of any kind* to an indigent requesting them, even if such services had no reasonably substantial relationship to the offense with which the indigent was charged or the trial thereon, and could not possibly benefit the indigent's interests in the criminal case involved. Thus, I am not opining that the Defender, in Situations I and/or II could, for example, represent the individual there involved in a will contest, a

divorce, or real estate transaction, in the exercise of his above-mentioned discretion. I am confident, of course, that as a responsible state officer, the Defender would not attempt to mislabel any one of such services "appropriate," and then render it to the indigent. The Defender, I am sure, shares my awareness of the principles well-expressed in the following language of *State v. Knox*, 153 Fla. 165, 14 So. 2d 262, 264 (1943):

> The discretion conferred by law on an officer is required to be exercised according to established rules of law. The officer when exercising the discretion *is not permitted or allowed to act in an arbitrary or capricious manner.* He is not permitted to exercise the discretion conferred by law for personal, selfish or fraudulent motives *or for any reason or reasons not supported by the discretion conferred by law. See* 38 C.J. 598-600, par. 74. ...

(Emphasis supplied.)

Third, I wish it understood that it is my belief that the Defender, under the circumstances involved in Situations I and II, and described above, would have good reason to conclude that the rendering of the legal services to the indigent involved at the Refusal Hearing was "appropriate," *i.e.*, "fit, proper." *See Webster's Third New International Dictionary, Unabridged* 106 (1968).

Fourth, I believe it desirable to stress that the power I hereby discern in the Defender is purely statutory, and that, in my opinion, an indigent in Situation I or II could not successfully contend that the Defender must give him representation at the Refusal Hearing under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. It has only recently been held by the Supreme Court of the United States, in *Lassiter v. Department of Social Services of Durham Cty., N.C.*, decided June 1, 1980, 49 U.S.L.W. 4586, 6-2-81, that there exists "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." 49 U.S.L.W. at 4588. An indigent "losing" a Refusal Hearing may not be deprived of his or her physical liberty as a result of such loss. Although the presumption above-mentioned is a rebuttable one, as *Lassiter* makes clear (49 U.S.L.W. at 4588-89), the decision as to whether it has been rebutted, so that due process requires appointment of counsel, is not for the Defender to make, under the rationale of *Lassiter*, but for the court con-

ducting the Refusal Hearing to make. 49 U.S.L.W. at 4589. In my judgment, it is not likely that the above-mentioned presumption could be overcome so as to require a "due process" appointment of counsel to represent an indigent in Situation I or II at a Refusal Hearing; and I therefore view the power here in question, as above indicated, as one derived solely from statute, not from the Due Process Clause of the Fourteenth Amendment.

In closing this opinion, let me state that although in my view it is arguable that sec. 955.05(4)(m), Stats., imposing on the Defender the duty to "[p]erform all other duties necessary or incidental to the performance of any duty enumerated in this chapter," also confers on him the power in question, it is unnecessary to address herein the issue of whether it does so, since, as shown above, sec. 977.05(4)(h), Stats., so clearly gives the Defender such power.

BCL:JHM

Firewood; Natural Resources, Department Of; The Department of Natural Resources has authority to assess a fee for firewood produced on state lands. Legislative committee recommendation that funding and positions be withdrawn from a proposed state wood energy program does not affect DNR authority to sell firewood. Although DNR has authority to sell firewood, there is no requirement that it do so. While DNR is not required to charge for firewood permits, it may do so. DNR does not have a fee schedule for the sale of firewood. OAG 8-82

January 18, 1982.

ED JACKAMONIS, *Speaker*
State Assembly

You request my opinion as to the authority of the Department of Natural Resources (DNR) to assess a fee for firewood on state lands. You ask two central questions: Does the Department of Natural Resources have the authority to charge for firewood, and, if so, does DNR have authority to set the fees charged for the sale of firewood? In addition, you ask whether the Department must charge for firewood, and whether the DNR fee schedule is legal.

DNR Authority To Sell Firewood

The Department of Natural Resources has the authority to sell firewood. Section 23.11, Stats., provides that DNR has responsibility for the care, protection and supervision of state forests, parks, fish hatcheries and all state lands not in the care of another governmental body. Sec. 23.11(1), Stats. By sec. 28.05, Stats., the Legislature provided DNR with authority to sell forest products removed in cultural or salvage cuttings and set out a procedure by which they could be sold. Section 28.05(1) and (2), Stats., provides:

> (1) LIMITATIONS. Cutting shall be limited to trees marked or designated for cutting by a forester in the professional series of the state classified civil service or by a department-designated employe equally qualified by reason of long, practical experience. The department may sell products removed in cultural or salvage cuttings and standing timber designated in timber sale contracts, but all sales shall be based on tree scale or on the scale, measure or count of the cut products.
>
> (2) PROCEDURE. Sales of cut products or stumpage having an estimated value of $500 or more shall be by public sale after publication of a class 2 notice under ch. 985, in the county wherein the timber to be sold is located. Sales with a value of $1,000 or more shall require approval by the secretary.

This law granting the DNR authority to sell forest products is consistent with other statutory provisions. Section 28.01, Stats., states that the DNR shall execute all matters pertaining to forestry within the jurisdiction of the state. Section 28.04(1), Stats., provides that the primary use of forests is silviculture and that forests are productive properties which provide employment, commodities essential to consumers' needs and returns on investment. Since the Legislature has declared forests to be productive properties, it is consistent that the administering agency, the Department of Natural Resources, also be given authority to sell these products. This has been done pursuant to sec. 28.05, Stats.

Administrative agencies have authority to act within the confines of the statutes. Where the Legislature has set forth the essential features of a law, an administrative agency can exercise the administrative authority to carry it into effect. *Milwaukee v. Sewerage Commis-*

sion, 268 Wis. 342, 67 N.W.2d 624 (1954). In *Peterson v. Natural Resources Board*, 94 Wis. 2d 587, 288 N.W.2d 845 (1980), the Wisconsin Supreme Court said that an administrative agency "has only those powers which are expressly conferred or fairly implied from the statutes under which it operates." *Id.* at 592. Section 28.05, Stats., expressly confers on the DNR the authority to sell firewood and to set the fees for such sale. Sections 23.11, 28.01 and 28.04, Stats., are in accord. The Wisconsin Legislature, by these statutes, has stated that forests are to be productive properties and has provided DNR the authority to sell the results of this production.

In requesting this opinion, concern has been expressed that the DNR, by charging for firewood, was disregarding legislative intent, since the Legislature's Joint Finance Committee withdrew funding from the Department's proposed wood energy program, which would have been in charge of selling the wood. However, the committee action dealt with funding for a new program and did not expressly or by implication repeal the statutes authorizing DNR sale of firewood.

For the 1981-1983 biennium the Governor requested that the Legislature provide funding of $490,000 and 5.0 positions to establish a state Wood Energy Program in which wood residues currently wasted during timber harvest, or timber which is not merchantable for other purposes, would be made available as fuel. The Legislature's Joint Finance Committee recommended the elimination of the funding and the positions for the program. *See* 1981-1983 Wisconsin State Budget, Comparative Summary of Budget Recommendations of Governor and Joint Committee on Finance, Assembly Substitute Amendment 1 to Assembly Bill 66, Volume II, Legislative Fiscal Bureau (June, 1981), pages 582-83. The money and the positions were eliminated as no provision is made including them in the budget. *See* Executive Budget Bill, 1981 (ch. 20, Laws of 1981).

A legislative committee's recommendation that funding and personnel be withdrawn from this *proposed* DNR program does not remove or modify DNR's existing authority pursuant to sec. 28.05, Stats., to sell firewood. The committee recommendation is certainly not an express repeal of sec. 28.05, Stats. That would require the abrogation or annulling of sec. 28.05, Stats., by the enactment of a subsequent statute declaring that section to be revoked and abrogated. *Heider v. Wauwatosa*, 37 Wis. 2d 466, 478, 155 N.W.2d 17

(1967). Nor is the committee recommendation an implied repeal of sec. 28.05, Stats. Repeal by implication would occur if a subsequent statute were enacted containing provisions so contrary to or irreconcilable with those of sec. 28.05, Stats., that only one of the two statutes could stand in force. *Heider*, 37 Wis. 2d at 478. In this case, there is no such subsequent statute. In those instances where there is one, the Wisconsin Supreme Court has said: "Implied repeal of statutes by later enactments is not favored in statutory construction. All statutes passed and retained by the Legislature should be held valid unless the earlier statute is completely repugnant to the later enactment." *State v. Zawistowski*, 95 Wis. 2d 250, 264, 290 N.W.2d 303 (1980).

There Is No Requirement That DNR Sell Firewood

You ask whether DNR *must* sell firewood. The answer is no. While the sale of firewood is clearly authorized by sec. 28.05, Stats., it is not required. If DNR had to sell firewood, the second sentence of sec. 28.05(1), Stats., rather than providing that "[t]he department *may* sell products ..." would no doubt read "[t]he department *shall* sell products...." Further indication that the Department is not directed to sell firewood is the use in sec. 28.05(1), Stats., of the word "shall" in requiring DNR to limit cutting to properly marked trees, as contrasted with the use in the same subsection of the word "may" in authorizing DNR to sell timber products. A standard rule of statutory construction applies to precisely this situation:

> Generally, the word "may" is permissive when used in the statute, and this is especially true where the word "shall" appears in close juxtaposition in other parts of the same statute.... The general rule is that the word "shall" is presumed mandatory when it appears in a statute.

Scanlon v. Menasha, 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962).

You pose several questions regarding DNR permits for firewood, namely, whether DNR has to charge for firewood permits and if DNR has the authority to charge for firewood permits. In responding to these questions, a distinction must be drawn between the firewood, for which DNR imposes a charge, and the *permits* for firewood, for which there is no charge.

DNR Is Not Required To Charge For Firewood Permits

DNR does not have to charge for firewood permits. There is no such statutory requirement. Further, the Department rules requiring that a permit be obtained prior to removal of firewood do not specify that a charge be imposed for a permit. Section NR 45.01(1) and (2) Wis. Adm. Code, makes it unlawful for any person to remove any state property from land under the management, supervision and control of the DNR, but there is no requirement in chapter NR 45 Wis. Adm. Code that a charge for such a permit be imposed, and, in fact, DNR does not charge for firewood permits.

DNR Has Authority To Set Fees Charged For The Sale Of Firewood

DNR does have the authority to set the fees charged for firewood and for firewood permits. As explained above, sec. 28.05, Stats, provides the authority. DNR does not charge for the permits themselves, but does charge for the firewood. Section 28.05(2), Stats., details the procedure to be used when the wood has an estimated value of $500 or more. DNR's authority to set fees for sales of firewood valued at less than $500 is fairly implied from sec. 28.05, Stats. *See Peterson v. Natural Resources,* 94 Wis. 2d at 592. In other words, authority for sale is granted by sec. 28.05, Stats. Authority to set fees for firewood having an estimated value of $500 or more is expressly set forth in sec. 28.05(2), Stats., which specifies how the fee is to be determined. Fairly implied from sec. 28.05, Stats., is the authority for the DNR to determine the procedure it will use in setting the fee for the sale of firewood having an estimated value of less than $500.

There Is No DNR Fee Schedule For The Sale Of Firewood

Finally, you ask about the legality of the fee schedule imposed by DNR for the sale of firewood. There is no fee schedule. All surplus wood is appraised and the wood is sold by advertised public auction or negotiated direct sale, depending upon the demand for firewood in the area. Where demand for fuel wood exceeds available wood supply, the sales are advertised publicly. Where supply exceeds demand, the sale may be by negotiated direct sale. Such practice does result in different prices being paid for firewood in different sections of the state. This is a reflection of the law of supply and

demand in the marketplace. It is also in accord with sec. 28.05, Stats., which provides for public sale.

BCL:SBW

Children; Education; Health And Social Services, Department Of; Words And Phrases; The Department of Health and Social Services must treat a parent's failure to respond as a denial of permission for evaluation and placement for exceptional educational needs. The Department of Health and Social Services has no authority to appoint a surrogate parent when a child's parent cannot be located, and must utilize alternative procedures under state law. OAG 9-82

January 18, 1982.

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

On May 12, 1981, you wrote to renew your request for my opinion on the question of the authority of the Department of Health and Social Services (Department) to consent to evaluation of children in its legal custody for exceptional educational needs (EEN). Your inquiry relates to children committed to the Department as delinquent under sec. 48.34(4m), and children in the legal custody of the Department because of disabilities under sec. 48.34, Stats. A previous opinion request in 1979 on similar questions had been withdrawn.

Your specific questions, as stated in your May 12 letter, are:

1. Where parental permission is necessary for an EEN evaluation or placement to occur, and the child in question is in the legal custody of the Department of Health and Social Services, should a parent's failure to respond to requests for permission be treated the same as a refusal of permission?

2. What if the parent cannot be found at all to receive the request for permission?

3. In either case, may the department treat the parent as unavailable pursuant to 45 CFR 121a. 514 and 20 U.S.C. §

1415(b)(1)(B), appoint a "surrogate parent", and have the surrogate parent make the EEN decision?

As an initial matter, ch. 115, subch. V, Stats., requires written parental permission in order to conduct a multidisciplinary team screening of a child. Sec. 115.80(3)(b), Stats. For the purposes of ch. 115, Stats., the definition of "parent" includes a guardian. Sec. 115.76(6), Stats. In answering your questions, I will assume that a parent's or guardian's permission, as opposed to a legal custodian's permission, is required to conduct an evaluation or placement of a child pursuant to sec. 115, subch. V, Stats.

Question 1

A parent's refusal to respond to a request for permission for an evaluation or placement of a child in the Department's legal custody must be treated as a refusal of permission.

The relevant state law governing this question of evaluation is sec. 115.80(3)(b), Stats.:[1]

> The multidisciplinary team shall, *upon written parental approval,* examine any child who has attained the age of 3 years and who as a result of screening under sub. (2) is believed to have exceptional educational needs, or is referred to it by a parent as a result of an individual's report under sub. (1)(a), by the governing body of a state or county residential facility or by a school board.

The statutory language is clear and unambiguous, and therefore the plain meaning of the words should prevail. The ordinary and accepted meaning of the language must govern without any resort to judicial construction. *National Amusement Co. v. Dept. of Revenue,* 41 Wis. 2d 261, 163 N.W.2d 625 (1969). The statute requires an affirmative act of consent by the parent or guardian, and a failure to consent does not satisfy the Legislature's mandate.

---

[1] *See* chapter P.I. 11.03(4) Wis. Adm. Code, which repeats the statutory requirement for written parental consent prior to screening. Prior to screening, parents must be informed of a referral of their child for the screening process. Chapter P.I. 11.02(1)(b)1.b. Wis. Adm. Code.

The placement of a child after evaluation also requires written parental consent:[2] "The school board after consultation with the multidisciplinary team *and after the parent has consented in writing* shall place in an appropriate special education program a child who has been recommended for special education by a multidisciplinary team and who resides in the school district." Sec. 115.85(2), Stats. The plain meaning rule applied to this unambiguous statutory language requires a similar conclusion that affirmative, written consent is required, and that a failure to respond would not satisfy the statute.

An examination of the relevant federal law compels the same conclusion. The Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.*, and the implementing regulations at 45 C.F.R. § 121a *et seq.* (1980), provide numerous procedural safeguards to assure parents a role in the decisions regarding the education of their children with special needs.

"Parent" is defined at 45 C.F.R. § 121a.10 (1980):

> As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 121a.514. The term does not include the State if the child is a ward of the State.

Procedural safeguards for handicapped individuals are outlined at 45 C.F.R. § 121a Subpart E (1980). "Consent" is defined as follows:

> As used in this part: "Consent" means that: (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;
>
> (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

[2] Chapter P.I. 11.04(1)(a) Wis. Adm. Code specifically requires that there be no placement until parental consent is secured.

> (c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

45 C.F.R. § 121a.500 (1980).

The definition of "parent," which specifically excludes the state, taken together with the definition of "consent" which requires voluntary agreement in writing after notice, manifest an intention that a parent's failure to respond must be treated as a refusal of permission. The requirement of a knowing, free, affirmative act by a child's biological or legal parent cannot be satisfied when there is a failure to respond.

Question 2

Your second question asked what is the recourse of the Department when a parent of a child in the Department's legal custody cannot be found?

Chapter 115, Stats., and chapter P.I. 11 Wis. Adm. Code are silent on the issue of how to proceed when a parent cannot be located.

Federal law requires that participating states receiving assistance have

> [p]rocedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian.

20 U.S.C. § 1415(b)(1)(B).

These procedures are a condition of eligibility for state participation. 20 U.S.C. § 1412(5)(A).

The implementing federal regulations provide:

(a) *General.* Each public agency[3] shall insure that the rights of a child are protected when:

(1) No parent (as defined in § 121a.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interest of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraphs (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to:

---

[3] In Wisconsin the "public agency" referred to in the regulations is the Wisconsin Department of Public Instruction. 45 C.F.R. § 121a.11 (1980).

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

45 C.F.R. § 121a.514 (1980).

The procedural safeguards of 20 U.S.C. § 1415 have been interpreted as controlling when there is a conflict between state and federal procedural requirements. *Vogel v. School Bd. of Montrose R-14 School Dist.*, 491 F. Supp. 989 (W.D. Mo. 1980); *Monahan v. State of Neb.*, 491 F. Supp. 1174 (D.C. Neb. 1980).

Although Wisconsin has not adopted any "surrogate parent" regulation, another federal regulation indicates state law procedures apply at least in situations where parental consent is withheld: "*Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, *State procedures govern the public agency in overriding a parent's refusal to consent.*" 45 C.F.R. § 121a.504(c)(1) (1980).

Since there is no comparable surrogate parent procedure in state law, it is appropriate to consider other state procedures which could be utilized by the Department when a parent cannot be located. At least two procedures are available under state law that do not conflict with the procedural requirements of federal law.

The first available state procedure is sec. 48.13, Stats., which gives state circuit courts jurisdiction of children alleged to be in need of protection or services. One of the criteria for a court's acquiring jurisdiction is that a child be without a parent or guardian. Sec. 48.13(1), Stats. The Department could petition a court under this section to order EEN evaluation or placement for a child whose parents cannot be located.

The second procedure is a temporary guardianship. Sec. 880.15, Stats. The Department may proceed *ex parte* under sec. 880.15(1), Stats., to have a temporary guardian appointed for a period of not more than sixty days. The statute also allows the authority of the temporary guardian to be limited to a specific set of duties, *e.g.*, EEN evaluation and placement.

Question 3

Your third question asks if the Department can use the federal surrogate parent procedure when a parent fails to respond to a request for consent or cannot be located. The answer is no.

The surrogate parent regulation[4] requires the "public agency" to insure children's rights by assigning an individual to act as a surrogate parent when it has been shown there is a need. "Public agency" is defined in the regulations. "As used in this part, the term 'public agency' includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivision of the State which are responsible for providing education to handicapped children." 45 C.F.R. § 121a.11 (1980).

The Department is neither a state nor a local educational agency nor is it a political subdivision of the State responsible for providing education to handicapped children. Neither state nor federal law gives the Department the authority to appoint a surrogate parent.

In my opinion, the Department must utilize the procedures available in secs. 48.13 and 880.15, Stats., since no other procedures are available in state law when a parent cannot be located or refuses EEN services.

BCL:WAA

Legislation; Mental Health Act; Amendment of the Mental Health Act as proposed in 1981 Assembly Bill 262 would be unconstitutional. OAG 10-82

January 19, 1982.

ED JACKAMONIS, *Speaker*
State Assembly

You ask whether 1981 Assembly Bill 262, which would amend the grounds for emergency detention and involuntary commitment under the Mental Health Act (hereinafter "the Act"), would be constitutional if enacted. The answer is no.

---

[4] 45 C.F.R. § 121a.514 (1980).

The Act provides that emergency detention or involuntary commitment may not occur unless the person sought to be detained is dangerous to himself or herself or to others. Secs. 51.15(1)(a), 51.20(1)(a)2., Stats. Dangerousness is defined as a substantial probability of serious physical harm, as evidenced by a recent act or omission. As analyzed by the Legislative Reference Bureau, 1981 AB 262 modifies the dangerousness standard as follows:

> 1. The bill specifies that "recent act or omission" means acts or omissions occurring up to 180 days before the person is taken into custody under emergency detention or before a petition for involuntary commitment of the person is filed.
>
> 2. The bill removes the requirement that a "substantial probability" of imminent death or serious physical harm exist, requiring instead that a "reasonable possibility" exist.
>
> 3. The bill removes the requirement that "serious" physical harm exist, requiring only a showing of physical harm.

1981 AB 262 seeks to amend secs. 51.15(1)(a)4. and 51.20(1)(a)2.d., (1m), Stats., which are restricted to those instances where individuals are dangerous to themselves.

The "substantial probability," "serious harm" and "recent act or omission" requirements were incorporated into the Act as a result of a three-judge court's decision in *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded for a more specific order*, 414 U.S. 473, *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974); *vacated and remanded on other grounds*, 421 U.S. 957 (1975); and *order reinstated on remand*, 413 F. Supp. 1318 (1976). *Lessard* is the leading case in setting forth the constitutional due process requirements for civil commitments, having been followed by a number of other courts throughout the country. *Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980); *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. N.D. 1974); and *Bell v. Wayne County General Hospital at Eloise*, 384 F. Supp. 1085 (E.D. Mich. S.D. 1974).

The court in *Lessard* held that due process requires that the state must demonstrate a compelling interest before it may interfere with

an individual's substantial interest in remaining at liberty. 349 F. Supp. at 1091. The court therefore required application of:

> [A] balancing test in which the state must bear the burden of proving that there is an extreme likelihood that if the person is not confined he will do immediate harm to himself or others. Although attempts to predict future conduct are always difficult, and confinement based upon such a prediction must always be viewed with suspicion, we believe civil confinement can be justified in some cases if the proper burden of proof is satisfied and dangerousness is based upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another.

Lessard, 349 F. Supp. at 1093. It is my opinion that adoption of the proposed amendments to the Act would leave the Act far short of meeting the requirements of the balancing test set forth in *Lessard.* Having merely to establish a "reasonable possibility" of physical harm does not meet the *Lessard* burden of proving the "extreme likelihood" that a person is dangerous to himself or herself. Similarly, deletion of the requirement that physical harm be "serious" runs counter to the *Lessard* requirement of "substantial harm." Finally, the definition of "recent act or omission" as any act or omission occurring within 180 days prior to initiation of detention or commitment would appear to conflict with the requirement of "immediate" harm. It is difficult to comprehend how an act occurring six months in the past could reasonably support a finding of immediate harm. I therefore conclude that 1981 AB 262 fails to meet the constitutional due process requirements for emergency detention and civil commitment enunciated in *Lessard.*

It might be argued that *Lessard's* precedential value is diminished because of its unusual procedural history. The three-judge court's decision was twice appealed to the United States Supreme Court. On the first appeal, the Supreme Court vacated the decision and returned the case to the lower court for clarification of its decision. The three-judge court clarified the decision, and on the second appeal, the Supreme Court again vacated the decision and returned the matter to the lower court for consideration of the questions of whether the case should have been decided at all. The three-judge court concluded that the case had been properly decided, and the court's earlier decision was reinstated. However, in the meantime,

the Legislature incorporated the *Lessard* requirments into the Act. The litigation thus ended at this point, and the Supreme Court never reached the merits of the *Lessard* decision.

The United States Supreme Court has never expressly stated the constitutional limits of civil commitment. It has, however, clearly recognized that civil commitment involves a "massive curtailment of liberty." *Vitek v. Jones*, 445 U.S. 480 (1980) and *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). The Court has held that such a significant deprivation of liberty requires due process protection. *Addington v. Texas*, 441 U.S. 418, 425 (1979) and *Jackson v. Indiana*, 406 U.S. 715 (1972). And in *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975), the Court's holding that "'mental illness' alone cannot justify a State's locking a person up against his will," indicates that civil commitment is justified only when a state's interest in confinement outweighs the individual's interest in remaining at liberty. Such "interest balancing" suggests application of a balancing test similar to that utilized in *Lessard*. *See* 44 U. Chi. L. Rev. 562, 591-92 (1977). Thus, even absent any consideration of the *Lessard* decision, it is my opinion that recent United States Supreme Court decisions strongly suggest that the proposed amendments to the Act contained in 1981 AB 262 could not survive a due process challenge.

Of course, all legislative acts are entitled to a presumption of constitutionality. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973). Courts are obligated, "if possible, to so construe the statute as to find it in harmony with accepted constitutional principles." *State ex rel. Harvey v. Morgan*, 30 Wis. 2d 1, 13, 139 N.W.2d 585 (1966). But it is my opinion that a court's only method of preserving the constitutionality of 1981 AB 262 would be to read back into the Act the requirements that the Bill attempts to delete, thus rendering the amendments of no practical effect. It is unlikely, however, that a court would engage in such a futile exercise, and the probable result would be a declaration of unconstitutionality.

In conclusion, it is my opinion that amendment of the Act as proposed in 1981 AB 262 would be unconstitutional.

BCL:DDS:cm

Corporations; Real Estate Brokers; A corporation cannot be licensed as a real estate salesperson under ch. 452, Stats. (1979-80), or as revised by ch. 94, Laws of 1981. OAG 11-82

January 25, 1982.

CLETUS J. HANSEN, *Director*
Real Estate Bureau
Department of Regulation and Licensing

You request my opinion as to whether a corporation can be licensed as a real estate salesperson under ch. 452, Stats. In my opinion, the answer is no under 1979-80 statutes and under ch. 452 as revised by ch. 94, Laws of 1981, which becomes effective April 1, 1982. The session law last referred to abolishes the real estate examining board, creates a real estate board and transfers powers of issuance of licenses to the Department of Regulation and Licensing. The power to discipline licensees remains in the real estate board.

Admittedly, the question is a close one. Section 452.05, Stats. (1979-80), would seem to permit licensure of a corporation as a real estate salesperson. Section 452.05, Stats. (1979-80), and its renumbered counterpart, sec. 452.09, Stats., as amended, shown in brackets, by ch. 94, Laws of 1981 provides:

> (1) FORM OF APPLICATION. Any person desiring to act as a real estate broker or salesperson shall submit to the examining board [department] an application for a license. Said [the] application shall be in such form as the examining board [department] prescribes and shall set [include] forth:
>
> . . . .
>
> (b) The name and address of the applicant; if the applicant is a partnership, the name and address of each member; if the applicant is a corporation, the name and address of each of its officers.

Similar implicit permission to incorporate as a real estate salesperson is found in secs. 452.06 and 452.20, Stats. (1979-80), renumbered to secs. 452.10, 452.22, Stats., by ch. 94, Laws of 1981. In a case which did not involve the issue here raised, it was held that a corporation was a person within the meaning of former secs. 136.02,

136.11, Stats. (1957), renumbered to secs. 452.03, 452.13, Stats. (1979-80), by reason of the statutory construction statute, sec. 990.01(26), Stats. *Kemmerer v. Roseher,* 9 Wis. 2d 60, 100 N.W.2d 314 (1960). The statutes there involved prohibited any person from engaging in business "as a real estate broker or salesman" without a license, and prohibited "any person" not licensed as a real estate broker or "salesman" from maintaining an action for collection of a commission.

My opinion is primarily grounded on sec. 452.08, Stats. (1979-80), and its renumbered counterpart which specifically address the licensure of corporations and imply that a corporation may not be licensed as a real estate salesperson. Section 452.08(2), Stats. (1979-80), and as renumbered to sec. 452.12(2), Stats., by ch. 94, Laws of 1981 provides:

> CORPORATIONS; PARTNERSHIPS. If the licensee is a corporation, the license issued to it entitles the president thereof or such other officer as is designated by the corporation to act as a broker. For each other officer who desires to act as a broker in behalf of the corporation, an additional license shall be obtained. ... No license as a real estate salesperson shall be issued to any officer of a corporation or member of a partnership to which a license was issued as a broker. If the licensee is a partnership, the license issued to it entitles one member to act as a broker, and for each other member who desires to act as a broker an additional license shall be obtained.

Under the above statute, it appears that the only real estate corporate license available is a brokerage license. Had the Legislature intended otherwise, it would have qualified the "corporation" referred to in the first sentence as a brokerage corporation. It also would have included "corporations" along with officers of corporations and members of partnerships as being ineligible for a salesperson's license once having been issued a brokerage license. When a statute is not explicit, the legislative intent must be obtained from the context of the statute. *State ex rel. Madison v. Industrial Comm.,* 207 Wis. 652, 242 N.W. 321 (1932).

Section 452.08, Stats., renumbered to sec. 452.12(2), Stats., by ch. 94, Laws of 1981, is the controlling statute in this case. It is the only

statute which specifically addresses the scope of the Board's authority to issue real estate licenses to corporations.

Sections 452.05, 452.06 and 452.20, Stats. (1979-80), and their renumbered counterparts, are general statutes concerned only with the procedural aspects of real estate licenses: application, verification and certification. Although statutes *in pari materia* must be construed together, *Good v. Starker,* 207 Wis. 567, 242 N.W. 204 (1932), it is a cardinal rule that where a general statute and a specific statute relate to the same subject matter, the specific statute controls. *Wauwatosa v. Grunewald,* 18 Wis. 2d 83, 118 N.W.2d 128 (1962); *Maier v. Racine County,* 1 Wis. 2d 384, 84 N.W.2d 76 (1957).

My answer is further buttressed by judicial recognition of the fact that corporations are creatures of the state, and it is the state which has the power to create corporations, either private or public. *Madison v. Hyland, Hall & Co.,* 73 Wis. 2d 364, 243 N.W.2d 422 (1976), *appeal dismissed,* 429 U.S. 953 (1976). A statute conferring a new right, such as the right to be licensed as a real estate salesperson, should not be given such effect unless the intention that the statute be given such effect is clearly expressed. *Northern Supply Co. v. Milwaukee,* 255 Wis. 509, 39 N.W.2d 379 (1949).

The conclusion I have reached is also supported by the administrative interpretation the Real Estate Examining Board and its predecessor, the Real Estate Brokers Board, have placed on sec. 452.08, Stats. (1979-80), and other pertinent statutes including sec. 452.01(3), Stats. (1979-80), which provides: "'Real estate salesperson' means one who is employed by a real estate broker to perform any act authorized by this chapter to be performed by a real estate broker." Chapter 94, Laws of 1981, repeals this statute effective April 1, 1982, and replaces it with sec. 452.01(7), Stats., which provides: "'Salesperson' means any person who is employed by a broker to perform any act authorized by this chapter to be performed by a broker."

Whereas it can be argued that the words "employed by" would include an independent contractor relationship, the licensing agency has always interpreted the statutes as requiring a master-servant relationship. Contracting responsibility has been placed on brokers where licensees join in an effort to sell a property, and a salesperson has been compensated for his or her efforts out of proceeds received

by his or her sponsoring broker. Section 452.08(3), Stats. (1979-80), and its counterpart as renumbered sec. 452.12(3), Stats., by ch. 94, Laws of 1981, includes language which support the master-servant rather than an independent contractor relationship and provides in part:

> BROKER'S LIABILITY FOR ACTS OF EMPLOYES. (a) Each broker shall be responsible for the acts of any salesperson acting as the broker's agent.
>
> (b) If a real estate broker maintains any branch offices within this state, each branch office must be under the direct full-time supervision of a licensed real estate broker who is also a *licensed salesperson of employer licensee* and who resides in the county in which the branch office is located or within 50 miles of the branch office. The employer-broker shall be responsible for the acts and conduct *of all licensed employes* of the branch office, including the broker who is supervisor of the branch office.

If the Legislature desires to permit corporations to be licensed as real estate salespersons it should pass specific legislation authorizing the same. It has not chosen to do so at its present session.

BCL:RJV:rr

Courts; Prisons And Prisoners; Courts cannot place conditions on a sentence of incarceration. Pursuant to statutes, a court may order a defendant to perform community service work in lieu of part or all of a fine imposed by the court or as a condition of probation. A court cannot impose probation or order a defendant to perform community service work in lieu of imposing a statutorily required minimum jail sentence. OAG 12-82

January 25, 1982.

GERALD P. PTACEK, *District Attorney*
Racine County

You have asked for my opinion concerning the legality of various sentencing practices adopted by some Racine circuit courts. Apparently the courts have adopted these sentencing practices to alleviate the crowded conditions in the county jail. These programs generally

provide alternatives to incarceration. For example, a convicted defendant may be ordered to perform a specified number of hours of work in community service, such as snow shoveling or assistance to the elderly, or to remain at home in lieu of imposing mandatory minimum sentences such as those required by sec. 343.44(2), Stats.

Authority to fashion any particular disposition in a criminal case must derive from the statutes. *Grobarchik v. State,* 102 Wis. 2d 461, 467, 307 N.W.2d 170 (1981). In Wisconsin, if a court sentences a defendant, the sentence may be in the form of either a fine or imprisonment or both. *Grobarchik,* at 468. Probation is not a sentence. *Prue v. State,* 63 Wis. 2d 109, 114, 216 N.W.2d 43 (1974). Absent specific statutory authority, courts cannot place conditions on a sentence of incarceration. *State v. Gibbons,* 71 Wis. 2d 94, 98, 237 N.W.2d 33 (1976). No authority exists for the type of conditions described in your opinion request. Therefore, if the court does not place the convicted defendant on probation but sentences the defendant to a period of incarceration, the court cannot impose conditions on that incarceration.

If a statute, such as sec. 343.44(2), Stats., provides a minimum mandatory jail term, the court cannot refuse to impose that mandatory sentence. *State v. Sittig,* 75 Wis. 2d 497, 500, 249 N.W.2d 770 (1977). In such a situation, the court must sentence the defendant to at least the minimum term of incarceration required by statute. The court can neither place conditions on that sentence nor order the defendant to remain confined at home for part or all of the mandatory minimum sentence.

After your opinion request was received by this office, ch. 88, Laws of 1981, created sec. 973.05(3), Stats. (effective November 28, 1981). This new statute permits courts to order a defendant to perform community service work for a public agency or nonprofit charitable organization in lieu of part or all of a fine. This law does not require that the community service work be a condition of probation. Therefore, a court now may order a defendant to perform community service work in lieu of part or all of a fine. This statute does not, however, authorize a court to order a defendant to perform community service work in lieu of part or all of a sentence of incarceration. There is no authorization for a court to order a defendant to remain at home in lieu of part or all of a fine.

Section 973.09(1)(a), Stats., provides that a court may withhold sentence or impose sentence and stay its execution and in either event place a person on probation. The statute authorizes the imposition of any conditions of probation which "appear to be reasonable and appropriate." An imposition of probation places the probationer in the custody of the Department of Health and Social Services. *State v. Tarrell,* 74 Wis. 2d 647, 654, 247 N.W.2d 696 (1976). There is no authority for the court to place a person on probation to the court or any other agency except the Department of Health and Social Services. 60 Op. Att'y Gen. 271 (1971). Therefore, if a court places a convicted defendant on probation subject to conditions, those conditions must be enforced by the Department, not court personnel.

Section 973.09(7m)(a), Stats., also created by ch. 88, Laws of 1981, permits a court to require community service work for a public agency or nonprofit charitable organization as a condition of probation. Unlike sec. 973.05(3)(a), Stats., however, the condition of probation under sec. 973.09(7m)(a), Stats., would be enforced by the Department of Health and Social Services. Our supreme court has adopted the American Bar Association's *Standards Relating to Probation.* Any condition of probation must be measured by how well it serves to effectuate the dual goals of probation, the rehabilitation of those convicted of crime and the protection of the state and community interest. *Huggett v. State,* 83 Wis. 2d 790, 798, 266 N.W.2d 403 (1978). Therefore, ordering a convicted defendant to remain at home as a condition of probation must meet the standards discussed in *Huggett.*

In any case in which a defendant received a legally impermissible sentence, resentencing is required. *State v. Upchurch,* 101 Wis. 2d 329, 336, 305 N.W.2d 57 (1981).

BCL:AML

Hospitals; Public Records; Documents in the possession of the Wisconsin Hospital Rate Review Committee are not public records and, therefore, are not subject to right of inspection under sec. 19.21, Stats. The contract creating the Committee does not give the right to compel access to documents in the possession of the staff members of the Hospital Rate Review Program. OAG 13-82

January 26, 1982.

ANN JANSEN HANEY, *Secretary*
Department of Regulation and Licensing

As a member of the Wisconsin Hospital Rate Review Committee you ask several questions relating to public access to records of the Committee.

Access to public records is governed by secs. 16.61 and 19.21, Stats.

Section 16.61, Stats., provides, in part:

> (2) DEFINITIONS. As used in this section:
>
> . . . .
>
> (b) "Public records" means all books, papers, maps, photographs, films, recordings, or other documentary materials or any copy thereof, regardless of physical form or characteristics, made, or received by any agency of the state or its officers or employes in connection with the transaction of public business ....
>
> . . . .
>
> (12) ACCESS TO PHOTOGRAPHIC REPRODUCTIONS. All persons may examine and use the photographic reproductions of public records subject to such reasonable rules as may be made by the responsible officer of the state agency having custody of the same.

Section 19.21, Stats., states in pertinent part:

> (1) Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other

persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof prescribes, examine or copy any of the property or things mentioned in sub. (1).

Whether the records of the Committee are public records depends in this case on whether the Committee is an agency of the state and whether its members are officers or employes of a state agency.

In my opinion, the Committee is not an agency of the state and its members are not officers or employes of a state agency as those terms are used in secs. 16.61 and 19.21, Stats.

The Committee was established pursuant to a contract entered into under the provisions of sec. 146.60, Stats., which provides in part:

(1) CONTRACT RATES. The department [of health and social services] may enter into a contract with the Wisconsin hospital association and associated hospital services for the purpose of setting hospital rates prospectively.

(2) DEFINITIONS. In this section:

. . . .

(c) "Contract" means the policies and procedures governing the hospital rate review program, which agreement is mutually based involving the Wisconsin hospital association, associated hospital services, and the department of health and social services.

The contract governing the hospital rate review program establishes a Rate Review Committee. Relevant portions of the contract provide:

RATE REVIEW COMMITTEE

The Rate Review Committee is a committee of the State of Wisconsin, the Wisconsin Hospital Association, and Blue Cross of Wisconsin, and is charged with reviewing rate requests and ren-

dering decisions, subject to appeal, on the acceptance or rejection of these requests.

Composition of Committee. The Committee shall consist of 20 members: (1) six members appointed by the Governor, three of whom may not be employees of the State of Wisconsin; (2) six members appointed by the Wisconsin Hospital Association, three of whom may not be employees of hospitals or the association; (3) six members appointed by the Blue Cross Board of Directors, three of whom may not be employees of Blue Cross of Wisconsin and three of whom must be approved by the Wisconsin Hospital Association and the State Department of Health and Social Services; and, (4) two members selected jointly by the Wisconsin Hospital Association and the State Department of Health and Social Services. Efforts will be made to appoint physicians to the Committee.

Committee Selection. In selecting Committee members, membership should include a cross section of the health care consumer by involving members from industry, organized labor, and the health care professions (administrators and physicians). Committee appointments will be made annually and the Committee shall name its Chairperson. Members may be reappointed.

Thus, the Committee is not an entity created by state law, but rather is an entity created pursuant to a contract authorized by sec. 146.60, Stats.

The definition of a governmental body in Wisconsin's Open Meetings of Governmental Bodies Law, which may be considered *in pari materia* with sec. 19.21, Stats., is helpful. Section 19.82(1), Stats., provides in material part: "'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 ...."

It is self-evident that the Committee is not created by constitution, statute, ordinance, rule or order, nor is it a formally constituted subunit of any of the entities enumerated in sec. 19.22(1), Stats.

Nor are its members designated by state law. The *contract* provides that six of the twenty members are appointed by the Governor. There is no requirement that any of the Governor's appointees be state officers or employes. The only requirement is that three of the Governor's appointees not be state employes. Thus, the fact that one or more of the Governor's appointees happen to be state officers or employes is an incidental fact and has no relevance to their status as members of the Committee.

Discussing these concepts our supreme court in *Martin v. Smith,* 239 Wis. 314, 332, 1 N.W.2d 163 (1941), quoted with approval from *State v. Hawkins,* 79 Mont. 506, 257 P. 411 (1927):

> "[T]o constitute a position of public employment a public office of a civil nature, it must be created by the constitution or through legislative act; must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public; must have some permanency and continuity, and not be only temporary or occasional; and its powers and duties must be derived from legislative authority and be performed independently and without the control of a superior power, other than the law, except in case of inferior officers specifically placed under the control of a superior officer or body, and be entered upon by taking an oath and giving an official bond, and be held by virtue of a commission or other written authority."

The Governor's appointees are not appointed pursuant to the constitution or legislative act, they are appointed by the Governor by virtue of the provisions of a contract created under sec. 146.60, Stats. Indeed, the statute does not require that the contract provide for gubernatorial appointments.

The Committee members, as such, possess no delegation of a portion of the sovereign power of the state. Although the Committee may set rates for Title XIX reimbursement, it has no power to legally require that a particular health care facility adhere to its rate schedule. (Failure by a facility to adhere may result in disallowance of reimbursement, but this event would not be occasioned by legal action of the Committee.)

The Committee has no permanency or continuity since it exists at the pleasure of a contract that may be terminated by the parties.

The Committee's powers and duties do not flow from legislative authority but rather from the contract which established it.

And, of course, none of the Committee members takes an oath of office.

It follows, since the Committee is not a state agency nor are its members officers or employes of a state agency, that documents received by members of the Committee are not public records* subject to inspection under sec. 19.21, Stats.

You also ask whether, as a member of the Committee, you have a right of access either under sec. 19.21, Stats., or under the contract to all documents submitted to Blue Cross relating to a rate increase request.

Some background information is relevant.

To implement the Wisconsin Hospital Rate Review Program, the Committee reviews requests for rate increases by state hospitals. The Committee is staffed by Blue Cross of Wisconsin. Under the agreement, hospitals submit to the Committee staff data to support the rate increase requests, such as the hospital's capital equipment budget, real property acquisition budget, operating budget, interim financial statements, financial reports and other data relating to the rate increase. The staff summarizes and analyzes the information and presents it to the Committee with a recommendation. Not all documents received by Blue Cross relating to the request for rate increase are provided to Committee members.

As already noted, sec. 19.21, Stats., is inapplicable. Therefore, whatever right of inspection you may have is dictated by the contract.

Although the contract provides "[t]he Rate Review Committee will be staffed by Blue Cross of Wisconsin which will ensure that all data are presented in a manner which is equitable to all parties and gives the committee sufficient information with which to make an objective decision"; and further "[t]hroughout all phases of the Program, public accountability will be maintained and all rate review

* It does not necessarily follow that all documents in the possession of Committee members are not public records—some may be by virtue of their being duplicates or copies of documents that are already public records of a state agency or officer.

meetings will be open to any interested parties including the press," contract at 3-4, I find no provision in the contract that gives to any person, whether a Committee member or otherwise, the right to legally compel access to any document in the possession of Blue Cross staff.

BCL:WHW

Fish And Game; Words And Phrases; Section 29.245, Stats., which prohibits the "shining" of animals under certain circumstances, is a valid exercise of the police power. The rebuttable presumption contained in sec. 29.245(2), Stats., does not render the statute unconstitutional, but certain precautions should be observed in instructing juries and in weighing evidence under the statute. Although sec. 29.245(5), Stats., broadly prohibits night shining, it is not void for vagueness. OAG 14-82

January 27, 1982.

ED JACKAMONIS, *Speaker*
State Assembly

You have asked my opinion on the constitutionality of sec. 29.245, Stats., which prohibits the "shining" of animals under certain circumstances. "Shining" is defined in the statute as "the casting of rays of a light on a field, forest or other area for the purpose of illuminating, locating or attempting to illuminate or locate wild animals." Sec. 29.245(1)(d), Stats.

Materials accompanying your request elaborate on your inquiry. A constituent of yours has urged that the Wisconsin animal shining law violates constitutional guarantees of due process of law by lacking any rational relationship between the public welfare and the method used by the statute to achieve that end, as was held in *State of North Carolina v. Stewart,* 40 N.C. 693, 253 S.E.2d 638 (Ct. App. 1979). This constituent also urges that certain presumption language in the statute removes an accused person's constitutionally guaranteed presumption of innocence.

Before analyzing sec. 29.245, Stats., I note that the enactment of laws reasonably related to the protection of a state's wildlife population is a valid exercise of a state's police power. *Baldwin v. Fish and*

Game Commission of Montana, 436 U.S. 371 (1978); *Hughes v. Oklahoma*, 441 U.S. 322 (1979). So long as constitutional requirements are met, "'protection of the wild life of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection.'" *Baldwin*, 436 U.S. at 391, quoting *Lacoste v. Department of Conservation*, 263 U.S. 545, 552 (1924).

Further, all statutes are presumed to be constitutional, and the party challenging the constitutionality of a statute must prove the law unconstitutional beyond a reasonable doubt. *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 370, 293 N.W.2d 504 (1980). "Equal protection of the law is denied only where the legislature has made irrational or arbitrary classification.... The basic test is not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the classification." *Omernik v. State*, 64 Wis. 2d 6, 18-19, 218 N.W.2d 734 (1974). In the present case, we are concerned with the Legislature's classification of persons using lights under particular circumstances.

Wisconsin's animal shining law, sec. 29.245, Stats., was enacted in ch. 190, Laws of 1979, and replaced Department of Natural Resources ("DNR") regulations prohibiting the shining of wild animals while hunting or in possession of weapons (sections NR 10.07(3), 10.10(1)(a), and 10.102 Wis. Adm. Code (1978)). Relevant portions of the new law provide:[1]

> (1) DEFINITION. As used in this section:
>
> (a) "Flashlight" means a battery operated light designed to be carried and held by hand.
>
> (b) "Light" includes flashlights, automobile lights and other lights.
>
> (c) "Peace officer" has the meaning designated under s. 939.22(22).
>
> (d) "Shining" means the casting of rays of a light on a field, forest or other area for the purpose of illuminating, locating or attempting to illuminate or locate wild animals.

[1] All citations in this opinion will be to sec. 29.245, Stats., unless otherwise specified.

(2) PRESUMPTION. A person casting the rays of light on a field, forest or other area which is frequented by wild animals is presumed to be shining wild animals. A person may introduce evidence to rebut this presumption.

(3) SHINING DEER OR BEAR WHILE HUNTING OR POSSESSING WEAPONS PROHIBITED. (a) *Prohibition.* No person may use or possess with intent to use a light for shining deer or bear while the person is hunting deer or bear or in possession of a firearm, bow and arrow or crossbow.

(b) *Exception.* This subsection does not apply to a peace officer on official business, an employe of the department on official business or a person authorized by the department to conduct a game census.

(4) SHINING WILD ANIMALS WHILE HUNTING OR POSSESSING WEAPONS PROHIBITED. (a) *Prohibition.* No person may use or possess with intent to use a light for shining wild animals while the person is hunting or in possession of a firearm, bow and arrow or crossbow.

(b) *Exceptions.* This subsection does not apply:

1. To a peace officer on official business, an employe of the department on official business or a person authorized by the department to conduct a game census.

2. To a person who possesses a flashlight or who uses a flashlight at the point of kill while hunting on foot raccoons, foxes or other unprotected animals during the open season for the animals hunted.

(5) SHINING WILD ANIMALS AFTER 10 P.M. DURING CERTAIN TIMES OF THE YEAR PROHIBITED. (a) *Prohibition.* No person may use or possess with intent to use a light for shining wild animals between 10 p.m. and 7 a.m. from September 15 to December 31.

(b) *Exceptions.* This subsection does not apply:

1. To a peace officer on official business, an employe of the department on official business or a person authorized by the department to conduct a game census.

2. To a person who possesses a flashlight or who uses a flashlight at the point of kill while hunting on foot raccoons,

foxes or other unprotected animals during the open season for the animals hunted.

3. To a person who possesses a flashlight or who uses a flashlight while on foot and training a dog to track or hunt raccoons, foxes or other unprotected animals.

4. If rules promulgated by the department specifically permit a person to use or possess a light for shining wild animals during these times.

Subsection (6) of the law permits counties to enact more restrictive regulations of animal shining. Subsection (7) provides criminal penalties—a fine of not less than $1,000 nor more than $2,000, or not more than ninety days in jail, or both, plus revocation of all DNR licenses—for shining deer or bear while hunting or possessing weapons. Violations of subsecs. (4) or (5) may be penalized by a civil forfeiture of not more than $1,000.

I

Does the presumption stated in sec. 29.245(2) render the statute unenforceable?

In requesting this opinion, you furnished copies of letters from a constituent of yours, who asserts that the presumption stated in subsec. (2) of sec. 29.245, Stats., removes a criminal defendant's constitutionally guaranteed presumption of innocence until proven guilty.

The mere statement of a presumption in a statute does not violate anyone's constitutional rights. The problem, if any, would arise in the application of the presumption during a criminal trial, particularly as reflected in the court's instructions to the jury. You will recall that only subsec. (3), prohibiting the shining of deer or bear while a person is armed or is hunting, carries true criminal penalties of fines or imprisonment. However, the Wisconsin Supreme Court has labelled forfeiture provisions "penal." *State ex rel. Lynch v. Conta,* 71 Wis. 2d 662, 670, 239 N.W.2d 313 (1976). Also, while forfeiture actions are essentially civil in nature, due process requires that the state carry at least a burden of persuasion by the "clear, satisfactory, and convincing" standard. Sec. 23.76, Stats.; *City of Neenah v. Alsteen,* 30 Wis. 2d 596, 142 N.W.2d 232 (1966). Thus, the Legislature is not free to allocate the burden of persuasion to the

defendant as it could in a purely civil action. *Lavine v. Milne*, 424 U.S. 577, 585 (1976). I therefore assume that the DNR will observe the following precautions in actions under all subsections of sec. 29.245, Stats., and not just under the statute's one criminal subsection.

As described in sec. 903.01, Stats., a presumption, when used at trial, "imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." In the present case, the state would prove the basic fact that the defendant was "casting the rays of light on a field, forest or other area which is frequented by wild animals." Without any further proof by the state, the trier of fact would then be permitted or required to conclude that the defendant was "shining wild animals," as defined in sec. 29.245(1)(d), Stats., unless evidence offered by the defendant was found sufficient to rebut the presumption of shining.

My last statement raises a variety of questions which are articulated at length in two 1979 United States Supreme Court cases—*Sandstrom v. Montana*, 442 U.S. 510 and *Ulster County Court v. Allen*, 442 U.S. 140—and more than forty Wisconsin cases now pending in the federal courts, typified by *Pigee v. Israel*, 503 F. Supp. 1170, (E.D. Wis. 1980). The crux of these cases is the premise that the trier of fact can never relieve the state of its ultimate burden to prove every element of a crime beyond a reasonable doubt. (Our civil corollary would be that the state must always prove every element of a civil forfeiture offense by clear, satisfactory and convincing evidence.) Rather than engage in an extensive discussion of conclusive and rebuttable presumptions, which you can read in the cases cited above, I will try to offer some more practical guidelines by which the DNR can utilize the sec. 29.245(2) presumption and minimize constitutional challenges.

The presumption stated in sec. 29.245(2), Stats., could be applied in a constitutional or unconstitutional manner.[2] The application

[2] The rules of standing preclude a defendant from attacking a natural resources statute on the ground that it could be applied to *someone*—but not that defendant—in an

would be unconstitutional if the defendant had to introduce so much evidence in order to rebut the presumption that the state was relieved of its ultimate burden of proof on any element of the offense. The application would be constitutional if the trier of fact were merely *permitted to infer* shining from proof of the basic fact. *Ulster,* 442 U.S. at 157. The application would also be constitutional, in my opinion, if the presumption of shining could be rebutted by *any* evidence, even the defendant's bare denial, without introduction of any other facts. *Ulster,* 442 U.S. at 158 n. 16; *Muller v. Israel,* 510 F.Supp. 730 (E.D. Wis. 1981).

The presumption of constitutionality of statutes does not permit me to search for and rely on circumstances under which sec. 29.245(2), Stats., *might* be used illegally. I consider it *most* unlikely that any prosecutor would charge, or that any jury would convict, if the state's sole evidence were the basic fact of casting rays of light into an area frequented by wild animals. Since *any* evidence from the defendant should be considered sufficient to rebut the presumption, until we are advised otherwise in post-*Sandstrom* judicial decisions, I expect that every animal shining prosecution will involve proof of additional suspicious circumstances, such as a pattern of behavior, or presence of companions on foot with guns.

The presumption itself, as stated by the Legislature, is not unconstitutional.

II

Are the restrictions on shining while hunting or possessing weapons a valid exercise of the police power?

Your constituent contends that sec. 29.245, Stats., is unconstitutional for the same reasons given in *State of North Carolina v Stewart,* 40 N.C. 693, 253 S.E.2d 638 (Ct. App. 1979). The North Carolina court there rejected an assertion that the state's deer shining statute was unconstitutionally vague, but agreed that the statute was "so overbroad as to constitute arbitrary and unreasonable interference with innocent conduct and to deny due process." 253 S.E.2d at 641. I agree with the North Carolina court's general analysis, but

---

unconstitutional manner. Thus, the ultimate viability of the subsec. (2) presumption will be determined by the discretion with which prosecutors use it in presenting cases.

would not apply its holding to subsecs. (3) and (4) of sec. 29.245, Stats., because of significant differences in statutory content.

The North Carolina statute provided, in relevant part, that:

> Any person who, ... [during the night] deliberately flashes or displays an artificial light from or attached to a motor-driven conveyance ... so as to cast the beam thereof beyond the surface of a roadway or in any field, woodland or forest in an area frequented or inhabited by wild game animals shall be guilty of a misdemeanor. Every person occupying such vehicle or conveyance at the time of such violation shall be deemed prima facie guilty of such violation as a principal.

253 S.E.2d at 639.

The word, "deliberately," in the above statute encompasses a wide range of behavior, including the actions of a person who "deliberately" turns on his or her car headlights, so as not to drive without light on a highway in a game-inhabited area. The person need not possess any weapon or intend to hunt wild game, and the person need not be seeking animals in particular. The prudent driver *intends* to illuminate *any* obstacle on or about to be on the roadway. In fact, North Carolina and Wisconsin traffic laws require the use of headlights during hours of darkness. Sec. 347.06, Stats.; 253 S.E.2d at 640. In its efforts to protect wild animals from being hunted unfairly, the North Carolina Legislature put in jeopardy the innocent motorist who sought only to travel legally and safely through a rural area at night. The court found the law "lacking any rational, real, or substantial relation to the public health, morals, order, safety or general welfare." 253 S.E.2d at 641.

Wisconsin's definition of "shining" is more specific: the rays of light must be cast onto a field, forest, or other area "frequented by wild animals." More important, the light must be projected "*for the purpose* of illuminating, locating or attempting to illuminate or locate wild animals."[3] The prohibited conduct is narrowed even further in subsecs. (3) and (4) by the requirement that the person be "hunting" or be in possession of a firearm, bow and arrow, or cross-

[3] Although that purpose may be presumed on proof of the basic facts stated in subsec. (2), I believe that presumption may be rebutted by such simple testimony as "my purpose was not to locate wild animals."

bow. While the person can violate the statute merely by *possessing* a light while hunting or carrying the specified weapons, the state must prove that the light was possessed "with intent to use [it] for shining" deer, bear, or other wild animals. It would thus be impossible for a non-hunter who was found to possess both a gun and a light to be held in violation of subsecs. (3) or (4) without additional evidence of intent. That evidence might be testimony that the car was zig-zagging slowly on a remote rural road, or that the warden had earlier observed rays of light being projected from the car window into adjoining fields or forests.

The Wisconsin Legislature could reasonably assume that Wisconsin wildlife, particularly deer and bear, would be at an unfair disadvantage against hunters using lights to locate and immobilize the animals. The Legislature could also reasonably assume that enforcement of such other controls as shorter seasons and bag limits would not be sufficient to protect the wildlife resource, because of the efficacy of shining in locating and killing wild animals. I therefore conclude that subsecs. (3) and (4) of sec. 29.245, Stats., are a valid exercise of the police power insofar as they prohibit the use, or possession with intent to use, of lights for shining wild animals, by persons hunting or in possession of weapons capable of killing such animals.

III

Is subsec. (5) of sec. 29.245, Stats., a valid exercise of the police power?

I have several major concerns about the constitutionality of subsec. (5). Since the paragraph applies to people utterly without the means to kill or injure game, the rational relationship between the paragraph and the state's police power to protect wild animals is not immediately apparent. Also, the statute appears to apply to almost any motorist driving after 10 p.m. in the fall, whose headlights shine into a field or forest as the car negotiates a curve in the road. It is conceivable that a public highway could be included in the "field, forest, *or other area* frequented by wild game" in the definition of shining. The prudent citizen, including a law-abiding hunter in route to a favorite hunting spot, might indeed wonder whether he or she must completely forego rural autumn travel after 10 p.m., or risk a civil forfeiture of up to $1,000, or even criminal penalties if there is a

gun in the car. The law-abiding person might be legitimately concerned as to the quantum of evidence required to establish intent to locate or illuminate wild animals, and how much evidence will suffice to rebut the presumption of shining stated in subsec. (2) of the statute.

For reasons I will discuss below, I am unable to conclude that the statute is unconstitutional beyond a reasonable doubt and that there is *no* rational relationship whatsoever between subsec. (5) and a valid police power objective. However, indiscreet application of the subsection by DNR personnel or the courts may give certain defendants standing to attack the subsection as unconstitutionally vague under the standards of *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972) and *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972). In both cases the Supreme Court reiterated that a statute is void for vagueness when it either fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or it encourages arbitrary and erratic arrests and convictions. Such an attack, by a defendant with standing, would probably be successful. I would, therefore, recommend that the DNR seek amendment to clarify the statute, or else enact rules, authorized by sec. 29.245(5)(b)4., Stats., clarifying activities which are *not* prohibited by sec. 29.245, Stats.

If a statute is reasonably subject to a limiting interpretation, I must adopt that interpretation, rather than find the statute unconstitutional on its face. Despite the broad language of the shining definition, I cannot believe that the Legislature intended to penalize the motorist in transit, whose car headlights happen to pass over a field or forest. I therefore apply the statutory construction rule of *ejusdem generis* to the definition of "shining" is sec. 29.245(1)(d), Stats., and to the presumption in sec. 29.245(2), Stats. This means that the words "or other area" are interpreted to mean an area *of the same kind* as the two preceding nouns, field or forest. The "other area" might thus be a marsh, but not a highway which happens to be frequented by wild animals.

That does not solve the problem of the motorist driving on a curve. I believe this problem can be solved by construing the words "illuminating, locating or attempting to illuminate or locate" in subsec. (1)(d) narrowly, to exclude the motorist in transit who is trying to illuminate and locate any obstacle on or about to be on the high-

way. Thus, the person proceeding directly and at a reasonable rate of speed down a highway or road could *not* be charged with a shining violation; the person zigzagging slowly, or parked and waiting for animals to come into the headlight beams, *would* provide the needed additional evidence that the car lights were being used for shining.

What is the rational relationship between the prohibition on shining, without weapons, and protection of the state's wildlife? The Ohio Supreme Court, upholding a shining statute just slightly narrower than sec. 29.245, Stats., in *State v. Saurman,* 64 Ohio St. 2d 137, 413 N.E.2d 1197 (1980), found that the prohibition of *all* shining from vehicles resulted in simplified and more effective enforcement by conservation wardens, who no longer had to search suspicious vehicles for weapons, matching weapon and light to one of several occupants. Improved enforcement then led directly to improved protection of wild animals. 413 N.E.2d at 1200.

The same rationale applies to shining from vehicles in Wisconsin. Employes of the DNR Division of Enforcement advise my office that the number of deer taken illegally in the state is substantial, perhaps even approaching the number taken legally. A significant number of the illegal killings involve the use of a light. The DNR expends considerable resources, I am advised, to prevent killing of deer with the aid of lights. With a limited number of wardens per county, enforcement is difficult. Before enactment of sec. 29.245, Stats., an individual warden might have had to deal with as many as 100 vehicles shining animals on any single evening. His or her job was further complicated by high speed "getaways," in which some shiners would dispose of their weapons before obeying the warden's instruction to stop. Checking every suspicious vehicle for weapons became impossible during periods of widespread shining violations. DNR also advises that shiners would at times use two vehicles, one with a light and one with a weapon.

In evaluating the facial constitutionality of the law, I must assume that the Legislature weighed similar reasons when it passed sec. 29.245, Stats. Elimination of the need to prove possession of a weapon has resulted in improved enforcement of the ban on animal shining, particularly deer shining, which then results in greater protection of the state's wildlife resource.

The right of citizens to be free from arbitrary arrest and prosecution cannot be compromised just for the convenience of law enforcement officers. However, after excluding motorists in transit from coverage of the statute, and after carefully evaluating the structure of subsec. (5) in relation to pedestrians using lights, I believe the statute does *not* unreasonably curtail legal activities.

The hours of prohibition in subsec. (5) protect against infringement on the legitimate activities of farmers, campers and nature lovers enjoying the evening air. Shining lights into forests and fields is only prohibited after 10 p.m. and before 7 a.m. Seasoned hunters advise me that shining after 10 p.m., in the fall months, even by unarmed pedestrians, is almost always part of the hunting process. Hunters-to-be may go out before a hunting expedition to find out where the deer are *this* year, and why they were not in a familiar location during a previous season. Thus, the presumed fact—animal shining—may well follow "more likely than not" from the proved fact, as required by *Barnes v. United States,* 412 U.S. 837, 843 (1973), and *Leary v. United States,* 395 U.S. 6, 44-45 (1969).

It is true that sec. 29.245(5), Stats., prohibits the legitimate late night viewing of wild animals by persons who simply like to look at deer, bear and raccoons and would never use the lights to aid in killing the animals. As observed by the Ohio court in *Saurman,* "it is also a fact that laws must be enacted to prevent the excesses of a few, even though such laws have the effect of denying certain otherwise lawful activity of the majority." 413 N.E.2d at 1200-01. By proscribing only late night shining, after September 15 (when most campers have retired their gear for the winter), the Legislature has minimized its curtailment of innocent activity.

In conclusion, I am compelled to find subsec. (5) facially valid, along with the rest of the statute, by the presumption of constitutionality of statutes. I am concerned about the breadth of language used in the statute, but will assume that sensible enforcement will avoid a successful vagueness challenge to the constitutionality of the statute.

BCL:MVB

Fire Departments; Milwaukee Board Of Fire And Police Commissioners; Police; The Milwaukee Board of Fire and Police Commissioners does not have original rule-making authority under sec. 62.50(23), Stats. The board can suspend rules prescribed by the chiefs of the fire and police departments and can enact rules to replace the suspended rules. OAG 15-82

February 1, 1982.

ED JACKAMONIS, *Speaker*
State Assembly

The Committee on Assembly Organization has asked for my opinion concerning the division of authority between the Milwaukee Board of Fire and Police Commissioners (board) and the chiefs of the police and fire departments. Section 62.50(1m), Stats., provides:

> The board shall conduct at least once each year a policy review of all aspects of the operations of the police and fire departments of the city. The board shall consider but not limit its review to procedures relating to discipline, promotion, work rules and any other procedure relating to the conduct of employes of the police and fire department.

Section 62.50(23), Stats., provides in pertinent part:

> The chief shall be responsible for the efficiency and general good conduct of the department under his or her control. The chief of each department shall prescribe rules for the government of the members of the department. Any rule prescribed by a chief shall be subject to review and suspension by the board. The board may prescribe a rule to replace any rule the board suspends. A chief may not suspend any rule prescribed by the board. The board may prescribe a procedure for the prescription of rules by a chief or by the board and for the review and suspension of rules by the board. Such procedure may include, without limitation because of enumeration, a provision that a rule not take effect until the rule is reviewed and approved by the board.

Section 62.50(1m), Stats., does not specifically grant the board rule-making authority. That subsection only requires the board to

conduct an annual review of all aspects of the operation of the police and fire departments.

Section 62.50(23), Stats., is more specific. To the extent that statute is unambiguous, we must determine the intention of the Legislature by giving the language its ordinary and accepted meaning. *Milwaukee v. Lindner*, 98 Wis. 2d 624, 632, 297 N.W.2d 828, 832 (1980). Section 62.50(23), Stats., unambiguously provides:

> 1. The chief must prescribe rules for the government of the members of the department.
>
> 2. The board may review and suspend any rule prescribed by the chief.
>
> 3. The board can enact a rule to replace any rule which has been suspended.
>
> 4. The chief cannot suspend any rule enacted by the board.
>
> 5. The board may establish a procedure which must be followed by the chief or by the board in enacting rules.
>
> 6. The board may establish procedures for reviewing and suspending its own rules. This procedure can include a provision that a rule not take effect until it is reviewed and approved by the board.

Although sec. 62.50(23), Stats., clearly authorizes the chief to promulgate rules and clearly authorizes the board to suspend those rules and substitute its own rules, it does not expressly give the board the authority to initiate its own rules.

> [A]n 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. ... [A]ny reasonable doubt of the existence of an implied power of an administrative agency should be resolved against the exercise of such authority.

State (Dept. of Admin.) v. ILHR Dept., 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977). Because there is at least a reasonable doubt whether the statute gives the board original rule-making authority, I must conclude that it does not confer such authority.

This conclusion is reinforced by the fact that sec. 62.50(3), Stats., explicitly grants the board authority to adopt rules governing the

selection and appointment of members of the police and fire department. The Legislature's express provision of original rule-making authority in sec. 62.50(3), Stats., and its failure to provide that authority in sec. 62.50(23), Stats., is a significant indication that a different intention existed. *Strigenz v. Dentistry Examining Board,* 99 Wis. 2d 445, 447, 299 N.W.2d 589 (Ct. App. 1980).

Although it is not necessary to examine the legislative history of sec. 62.50(23), Stats., to resolve any ambiguity, that legislative history supports the conclusion that sec. 62.50(23), Stats., does not grant the board original rule-making authority. *State ex rel. Warrington v. Shawano Cty. Cir. Ct.,* 100 Wis. 2d 726, 734, 303 N.W.2d 590, 594 (1981). The records of the Legislative Reference Bureau reveal that the sentence quoted above was added to sec. 62.50(23), Stats., by ch. 307, sec. 1, Laws of 1979. That section of the Laws of 1979 was created by a substitute amendment to 1979 Senate Bill 252.

The original version of 1979 SB 252 provided: "The board may prescribe its own rules regulating the police and fire departments." It also specifically provided that the chief would propose rules which would be subject to review and suspension by the board. Consideration of original 1979 SB 252 was indefinitely postponed and the substitute amendment which resulted in ch. 307, sec. 1, Laws of 1979 was passed. The Legislature contemplated giving the board original rule-making authority but decided not to do so.

Section 62.50(23), Stats., therefore, requires the chief to initiate rules subject to procedures established by the board. The board, however, can suspend any rule and replace the chief's rule with its own. Although a "rule" is not defined in the statute, our supreme court has said that the phrase "prescribe rules for the government of" the members of the department includes "all those disciplinary regulations which experience has shown to be valuable and to promote obedience and efficiency." *Kasik v. Janssen,* 158 Wis. 606, 610, 149 N.W. 398 (1914). "Rule" generally means "a regulation, standard, statement of policy ... of general application ... issued by an agency to implement, interpret or make specific legislation enforced or administered by such agency or to govern the organization or procedure of such agency." Sec. 227.01(9), Stats.

The rules of the department, therefore, state the policy of the department. For the purposes of secs. 62.50(1m) and 62.50(23),

Stats., the two are indistinguishable. The board can prescribe the policy of the departments because it can alter the rules promulgated by the chiefs. The board is the final arbiter of departmental policy. Of course, any rule adopted by the board must be consistent with all relevant statutes, ordinances and valid collective bargaining agreements.

A list of specific questions concerning the interrelationship of the board and the chiefs accompanied your opinion request. To the extent those questions require detailed analysis of specific rules and procedures they are more appropriately answered by the city's corporation counsel.

BCL:AML

Open Meetings; Reapportionment; The December 2, 1981, meeting of the Senate Special Committee on Reapportionment was probably held in violation of Wisconsin's Open Meetings of Governmental Bodies law. OAG 17-82

February 12, 1982.

FRED A. RISSER, *President*
WILLIAM A. BABLITCH, *Majority Leader*
State Senate

This is in response to both Senator Bablitch's December 3, 1981, request for advice, and the December 16, 1981, request for a formal opinion by the Senate Committee on Organization. The question in both requests is whether the December 2 meeting of all six members of the Senate Special Committee on Reapportionment comes within Wisconsin's Open Meetings of Governmental Bodies law.

It is my opinion that, although the members of the Committee contend they had no intent to violate the law, and, although the issues present very close questions of law, a violation probably did occur.

The open meetings law creates a strong presumption in favor of the "fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Section 19.81(4), Stats., directs that this law shall be "liberally

construed to achieve the purposes set forth" and that the "rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof."

In considering an interpretation of this law, for the purposes of advice pursuant to sec. 19.98, Stats., or for a formal opinion, a liberal construction to effectuate the purposes of the law is required. However, when considering the same set of facts for the purpose of bringing an enforcement action pursuant to sec. 19.96, Stats., a strict construction in favor of the accused is mandated. Section 19.83, Stats., provides:

> Every meeting of a governmental body shall be preceded by public notice as provided in s. 19.84, and shall be held in open session. At any meeting of a governmental body, *all discussion* shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session except as provided in s. 19.85.

1981 Senate Resolution 7[1] created the Special Committee on Reapportionment. The resolution is not very comprehensive concerning the Committee's authority, power or duties and the only words of limitation are directed to the duration of existence of the Committee.

The facts leading and pertaining to the December 2 meeting are set forth in an attachment to a joint communication to me from Senators Bablitch and Chilsen, and concurred in by all members present, dated December 9, 1981. I base this opinion solely on the facts as stated in that communication.

---

[1] *Resolved by the senate, That:*

SECTION 1. *SPECIAL COMMITTEE ON REAPPORTIONMENT.* By the adoption of this resolution there is created a senate special committee on reapportionment. The committee shall consist of 3 majority party senators including the committee chair and 3 minority party senators appointed as are the members of standing committees of the senate. One of the minority party members shall act as liaison with the governor. One of the committee's majority party members shall serve as the senate's delegate to the assembly's reapportionment committee. Proposals may be referred to, and reported by, the special committee on reapportionment in the same manner as senate standing committees. The special committee on reapportionment shall function until the redistricting of congressional, senate and assembly districts has been accomplished or until the final adjournment of this legislature, whichever occurs first.

Senator Bablitch is the Senate Majority Leader and chairman of the Committee. The Senate Minority Leader, Senator Chilsen, is also a member of the Committee. For some time, two other members of the Committee were working on partisan reapportionment plans, Senator Engeleiter for the Republicans and Senator Berger for the Democrats. Senators Berger and Engeleiter were to attempt to resolve differences in their respective plans and arrive at a bipartisan plan which would then be put in bill form and submitted to the senate for its consideration. Senators Bablitch and Chilsen shared with each other their concern that Senators Berger and Engeleiter were not making progress and that the reason for this was either political or personal intransigence on the part of both senators. Senators Bablitch and Chilsen felt that a meeting would be helpful in getting Senators Berger and Engeleiter together to formulate a bipartisan plan. The December 2 meeting was convened for that purpose.

A critical issue is whether there was a meeting as defined in sec. 19.82(2), Stats., which provides:

> "Meeting" means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter.

The submitted statement of facts states:

> There was never any intention prior to the gathering to attempt to debate any matter of policy, to reach agreement on differences, to make any decisions on any bill or part thereof, to take any votes, or to resolve substantive differences. During the course of the meeting, there was in fact no attempt to debate any matter of policy, to reach agreement or differences, to make any decisions on any bill or part thereof, to take any votes, or to resolve substantive differences. Everything was entirely preliminary in nature to the work of the Committee.

> One point should be made about the legislative process: individuals draft bills, Committees do not. Committees do not have "authority" to draft bills; individuals do. The "authority" of a Committee in this area is to take bills that are drafted by an individual, or individuals, and, by affirmative majority vote of the Committee, introduce them under the name of the committee. When individuals draft bills, they may be members of the same committee but they are nevertheless acting as individuals. (The putting together of substitute amendments to an already introduced bill is an entirely different matter.)

The argument that legislative committees themselves do not have the power or authority to draft legislation, and since no bill had been introduced or referred to the Committee, the Special Committee could not have met for the purpose of exercising its responsibilities, authority, power or duties, is not persuasive.

I do not consider the fact that the Committee was not considering or debating a formally introduced bill as a factor which would remove the meetings from the definition of a meeting in sec. 19.82(2), Stats. The Legislature creates committees to perform functions that the Legislature itself does not wish to involve itself with as a body. The legislative process is not limited solely to debating and voting on bills, and includes many activities directed to the final product—legislation. Legislators act within their authority when they adopt floor plans, conduct investigations, hold caucuses, etc.

At least one Senate Rule and several Joint Rules of the Legislature currently in effect suggest that committees, and not solely individual legislators, may have legislation drafted and introduced.

Senate Rule 30 provides that the name of a committee introducing a bill shall be entered on the bill jacket. Joint Rule 51 authorizes a committee chairperson, on behalf of the committee, to make use of the Legislative Reference Bureau drafting services. Joint Rule 83 provides that during any scheduled committee work period, "the chairperson of any special committee may on behalf of that special committee and within the special committee's scope," deposit legislation for introduction. Joint Rule 84 provides that unless otherwise ordered, special committees shall continue throughout the entire session and may, pursuant to due notice, meet, conduct studies, investi-

gation and reviews, and request technical assistance from the legislative service agencies.

These rules seem to provide ample evidence that the purpose of the December 2 meeting falls within the responsibilities, authority, power or duties of the special committee.

It has been suggested that my opinion to Chairman of the Wisconsin Employment Relations Commission Slavney, 68 Op. Att'y Gen. 171 (1979), and *State ex rel. Lynch v. Conta,* 71 Wis. 2d 662, 239 N.W.2d 313 (1976), should serve as precedent that the meeting under discussion was not a meeting within the purview of sec. 19.82(2), Stats.

The *Conta* decision cannot be considered as precedent for the proposition that no meeting occurred here. *Conta* held that a meeting held by a less than a majority of the members of a governmental body was not a meeting within the law. But the supreme court did make the following relevant statements:

> If every member of a governmental body is present at a conference and any of the broad activity that composes governmental activity as defined in sec. 66.77(3), Stats., is undertaken, a question of evasion is posed; the members are exposing themselves to the jeopardy of a prosecution. A chance gathering would not justify governmental activity being intentionally conducted, unless an emergency or other difficulties (other than that engendered by open session compliance) made such action necessary. A planned conference of the whole offers no such exigent excuse. Likewise, when a majority and thus a quorum gather, it is a rare occasion which can justify any action without open session compliance and therefore not be considered an evasion of the law. Quorum gatherings should be presumed to be in violation of the law, due to a quorum's ability to thereafter call, compose and control by vote a formal meeting of a governmental body.
>
> . . . .
>
> When the members of a governmental body gather in sufficient numbers to compose a quorum, and then intentionally expose themselves to the decision-making process on business of their parent body—by the receipt of evidence, advisory testimony, and the views of each other—an evasion of the law is

> evidenced. Some occurrence at the session may forge an open or silent agreement. ... The possibility that a decision could be *influenced* dictates that compliance with the law be met.

71 Wis. 2d at 685-86.

The general question posed in the Slavney opinion related to a collegial body's exercise of its quasi-judicial function, a function which is a properly recognized exemption to the open-session requirement. That opinion dealt with a general situation wherein it was a practice among commissioners to delegate to a single commissioner the responsibility to research a question for later discussion and decision by the full body. During the course of the research, the researching commissioner might engage in "student-like" brainstorming or "thinking-out" of a position with another commissioner.

It was stated in the Slavney opinion that the "clear intent of the law is to distinguish between informal and occasional 'brainstorming' which are not 'meetings' and discussions which actually lead to a conclusion which are 'meetings.' Discussions in such depth, detail, or scope as to render the later formal meeting a charade with a predetermined outcome are prohibited." 68 Op. Att'y Gen. at 174.

It was also recognized in that opinion that the described circumstances might constitute a "meeting" in some instances and not in others:

> The determination depends on the nature, scope, and details of the matters discussed as well as the intent of the Commissioners. Discussions or brainstorming of a tentative nature preliminary to focusing on a specific outcome and which are not intended to evade the law are, in my opinion, not covered by the law. While this test may be difficult to apply in practice, it is suggested by the law itself, and is not unlike the various tests which are applied by the courts to determine, for example, whether police suspicion has so focused on a suspect that he need be given *Miranda* warnings or whether there is probable cause to believe that evidence may be found in a particular place or on a particular person. The general standard can be stated; the specific application turns on the facts. Here a court would look to the intent of the Commissioners and the actual nature and detail of the discussions as the court did in *Conta*

> with the burden, because a quorum is rebuttably presumed to constitute a meeting, resting with the Commissioners to show lack of intent to evade the law and lack of a final action or determination. The character of later debate and discussion is certainly an item of circumstantial evidence which would be considered by a court in reviewing your actions."

68 Op. Att'y Gen. at 175-76.

Unlike the general question posed by the Slavney opinion, we are here dealing with a specific, detailed factual question. The facts, as presented, may be superficially similar to the WERC "brainstorming" but are, I believe, distinguishable. In this instance, there was a planned meeting at which all six members of the Committee were present. The purpose was to resolve real differences between the two members delegated the responsibility for drafting legislation. It does not matter whether those differences were derived from personal or political motivation. The resolution of those differences would undoubtedly have a direct influence on the Committee's ultimately reaching a decision. Such a meeting does not appear to be as far removed from the "crucial decision/policy making functions" as the "brainstorming" by WERC Commissioners.

Further, as mentioned above, the statutory definition of a "meeting" states that when one-half or more members convene, a "meeting" is rebuttably presumed. Thus, since all six members of the Special Committee were present on December 2, the burden rests with the Special Committee to establish that a "meeting" was not held. Although the legal issue may be a close one, the facts as presented do not, for the purposes of this opinion, appear to be strong enough to overcome the strong presumption of openness which our law favors.

It also has been suggested that by virtue of sec. 19.87(2), Stats., and 1981 Senate Resolution 10 that there was no violation of the law. Section 19.87(2), Stats., provides: "No provision of this subchapter which conflicts with a rule of the senate or assembly or joint rule of the legislature shall apply to a meeting conducted in compliance with such rule." 1981 Senate Resolution 10 provides:

> *Resolved by the senate, That:*
>
> SECTION 1. *REAPPORTIONMENT COMMITTEE; PARTISAN CAUCUSES.* The members of the special com-

> mittee on reapportionment may, at any time, hold partisan caucuses on matters within the purview of the special committee. Such caucuses shall be exempt from the provisions of subchapter IV of chapter 19 of the statutes. It is the sense of the senate that the authorization granted by this resolution to the special committee on reapportionment is a rule of the senate within the meaning of section 19.87(2) of the statutes.

Apparently the argument is, since each partisan faction of the committee lawfully could have met in closed session, they can meet in a combined or joint caucus. I regard this argument as one that would lead to a subterfuge of the law. 1981 Senate Resolution 10, by express language, applies only to "partisan caucuses." It contemplates separate meetings limited to committee members who are members of the same political party. The word "partisan" is a word of limitation. The resolution does not provide an exemption or exception for meetings of the committee attended by members from both political parties or for caucuses by the entire committee.

Finally, I appreciate the concern of many members of the Legislature that allowing members of the news media to attend and report meetings of the type held by the Committee on December 2 would have a chilling effect on the meeting. But this could be said of many meetings of all governmental bodies, the Legislature, county boards, city councils, town boards or committees of the same. Nevertheless, this is an inconvenience — a price if you will — of democracy where openness and accountability to the electorate is a cornerstone of our representative form of government.

BCL:WHW

Fox Valley Vocational, Technical And Adult Education District; Vocational And Adult Education; Neither the Fox Valley Vocational, Technical and Adult Education District nor the East Central Regional Planning Commission has the authority to act as fiscal agent for the Northeast Criminal Justice Coordinating Council. OAG 18-82

February 12, 1982.

RICHARD RASMUSSEN, *Acting Executive Director*
Wisconsin Council On Criminal Justice

Your predecessor asked my opinion as to whether either the Fox Valley Vocational, Technical and Adult Education District (hereinafter "Fox Valley") or the East Central Regional Planning Commission (hereinafter "East Central") is eligible to receive grant funds and funds from other sources, and to administer these funds as fiscal agent for the Northeast Criminal Justice Coordinating Council (NCJCC).

These questions arise because after October 1, 1981, the regional criminal justice councils decided to separate from the Wisconsin Council on Criminal Justice (WCCJ) and to continue their activities as coordinating councils. This change of status requires that each coordinating council acquire a fiscal agent. Fox Valley and East Central both have submitted applications to act as fiscal agent for the NCJCC. The WCCJ unanimously has approved the application of Fox Valley.

Fox Valley

In my opinion, Fox Valley does not have the authority to act as a fiscal agent for the NCJCC. I base this opinion on an analysis of the relevant sections of ch. 38, Stats., which governs the authority of vocational, technical and adult education (hereinafter "VTAE") districts. In this respect, sec. 38.001, Stats., provides:

> Mission. The [state] board [of vocational, technical and adult education] shall be responsible for the initiation, development, maintenance and supervision of programs with specific occupational orientations below the baccalaureate level, including terminal associate degrees, training of apprentices and adult education below the professional level.

This mission is more fully explained in sec. 38.02, Stats:

> Establishment. There is established under this chapter a system of vocational, technical and adult education to foster and maintain instruction in courses approved by the board in part-time and full-time day or evening classes. Every person at least the age specified in s. 118.15(1)(b) who can profit thereby is

eligible to receive instruction under this chapter and rules established by the board.

The specific powers of VTAE district boards are defined in sec. 38.14, Stats., as recently amended by ch. 20, Laws of 1981. Section 38.14(3), Stats., is the part of the statute relevant to your question. That section was repealed and recreated by ch. 20, sec. 678m., Laws of 1981, as follows:*

CONTRACTS FOR SERVICES. (a) The district board may enter into contracts to provide services to public educational institutions and local governmental bodies ~~if the contracts provide for the payment of at least 50% of the instructional function costs of the services~~.

(b) The district board may enter into contracts to provide services to private educational institutions, industries and businesses ~~if the contracts provide for the payment of full direct costs of the services. Full direct costs include instructional, institutional resources and student services function costs~~.

(c) No district board may contract with a foreign government or any business which is not operating in this state.

(d) The district board shall establish and file with the board policies governing contracting under this subsection. The district board shall submit to the board copies of all contracts entered into under this subsection within 30 days of their approval by the district board.

Prior to amendment, sec. 38.14(3), Stats. (1979), merely had provided that a "district board may contract with public educational institutions and other district boards for *instructional services.*" In my view, the recent amendments did not alter or expand the meaning of the term "services." I believe that the term "services" as used in this section must be construed consistently with and must be limited to the instructional mission of the state VTAE system. If the Legislature had intended that a broader meaning be given to this term, it would have amended secs. 38.01 and 38.02, as well as sec. 38.14, Stats.

---

* The lined-out portions of the amended statute, quoted above, were vetoed by the Governor.

The materials accompanying your opinion request indicate that Fox Valley would not be performing an educational function, but would be acting merely as a fiscal agent for the purpose of receiving and disbursing NCJCC funds. In my opinion, Fox Valley has neither express nor reasonably implied authority to perform this service. It is well established that governmental entities have only those powers which are expressly authorized or reasonably implied. *Clark v. Blochowiak*, 241 Wis. 236, 239, 5 N.W.2d 772 (1942); *Racine Fire and Police Comm. v. Stanfield*, 70 Wis. 2d 395, 399, 234 N.W.2d 307 (1975). Any reasonable doubt of the existence of implied authority must be resolved against the exercise of such authority. *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358, 190 N.W.2d 529 (1971).

The Legislature has given the VTAE districts the authority to provide vocational and technical education for those who can profit thereby. Sec. 38.03, Stats. Instructional services consistent with this authority may be provided to public educational institutions, to local government bodies and to private educational institutions, industries and businesses. Sec. 38.14(3), Stats. No authority exists for VTAE districts to provide the services of a fiscal agent to such other entities.

It is my opinion, therefore, that Fox Valley does not have the authority to act as fiscal agent for the NCJCC.

East Central

The creation of regional planning commissions is authorized by sec. 66.945(2), Stats. A commission has "all powers necessary to enable it to perform its functions and promote regional planning." Sec. 66.945(8)(a), Stats. One function is to "act as a co-ordinating agency for programs and activities of ... local [government] units and [other public and private] agencies as they relate to its objectives." *Id.* A commission also has authority to accept grants but only "for the purpose of accomplishing the objectives of the regional planning commission." Sec. 66.945(13), Stats.

The "objectives" of a regional planning commission are "to make plans for the physical, social and economic development of the region." Sec. 66.945(8)(a), Stats. The functions of a regional planning commission and its acceptance of grants are limited by sec. 66.945(8)(a) and (13), Stats., to those which promote regional planning. In my view, sec. 66.945, Stats., provides neither express nor

reasonably implied authority for a regional planning commission to act as a fiscal intermediary for criminal justice coordinating councils.

In addition, the authority of a regional planning commission is confined to its geographic territory. Sec. 66.945(2m), (3) and (8)(a), Stats. It does not appear that East Central encompasses all twenty-eight counties comprising the NCJCC.

Therefore, it is my opinion that East Central is not authorized to act as fiscal agent for the NCJCC.

BCL:JWC

Loans; Mortgage Subsidy Bond Tax Act Of 1980; Mortgages; Redevelopment Authority; Certain local governments and public agencies may issue obligations to provide mortgage loans on owner-occupied residences. However, compliance with the Mortgage Subsidy Bond Tax Act of 1980 is necessary to allow exemption of the interest from federal taxation. OAG 21-82

February 16, 1982.

CHANDLER L. MCKELVEY, *Secretary*
Department of Development

You have asked whether local governments or local public authorities in Wisconsin have statutory authority to issue tax-exempt debt obligations to provide mortgage loans for the purchase, rehabilitation or improvement of owner-occupied residences, and if so, under what conditions.

As you pointed out in your letter to me, the Mortgage Subsidy Bond Tax Act of 1980 (Pub. L. No. 96-499; herein, the Act) placed a variety of substantive and procedural controls on the use of tax-exempt bonds for financing owner-occupied residences. The Act limits the amount of mortgage subsidy bonds a state can sell in a calendar year. Each state may allocate the bonding "ceiling" between housing authorities and other issuers within the state.

Section 7m of ch. 20, Laws of 1981, requires the Wisconsin Building Commission to approve the issuance of bonds under chs. 66, 67 and 234, Stats., which finance owner-occupied residences. Necessarily, the Building Commission must consider the impact of the federal

act in considering any particular bond issue. The Building Commission has requested your Department's assistance in exercising its powers.

Since only tax-exempt bonds are included in the ceiling imposed by the Act on Wisconsin, your Department and the Building Commission must first consider the Act (or the opinion of qualified bond counsel) as to whether a proposed issue is tax-exempt or not. Since various provisions of the Act interact with the statutory authority to issue bonds, I will briefly discuss the Act before discussing which local units of government or public authorities have the statutory authority to issue such bonds.

I

The Mortgage Subsidy Bond Tax Act of 1980 was Congress' response to a surge in housing bonding.[1] Prior to the enactment of the Act on December 5, 1980, bonds whose proceeds were used to provide or finance residential real property for family units were not considered to be arbitrage bonds, and were therefore tax-exempt.[2]

The Act created a new definition, that of "mortgage subsidy bond," and declared that such bonds, with two exceptions, were not described in subsecs. (a)(1) or (2) of section 103 (of the Internal Revenue Code). I.R.C. § 103A(a), (b). Description of an obligation in I.R.C. § 103(a)(1) or (2) is necessary to exempt the interest on such obligation from federal taxation. The two exceptions are "qualified mortgage bonds" and "qualified veterans' mortgage bonds." I.R.C. § 103A(b)(2)(A), (B).

A "qualified mortgage bond" is one issued before December 31, 1983, as a part of a qualified mortgage issue. I.R.C. § 103A(c)(1)(A), (B). A "qualified mortgage issue" is one in which (1) all proceeds (exclusive of issuance costs and reserves) are used to finance owner-

---

[1] In 1977, for example, 5.3% of the proceeds of tax-exempt bonds issued by state and local governments was used for housing purposes. Two years later, the percentage was 28.9%; in 1980, the percentage was 34.4%.

[2] Arbitrage bonds are defined generally in Treas. Reg. § 1.103-13(a)(1) as "obligations issued by a State or local government, the proceeds of which are reasonably expected to be used to acquire other obligations where the yield on such acquired obligations will be materially higher than the yield on the governmental obligations during the term of such governmental issue." The interest on arbitrage bonds is taxable. I.R.C. § 103(c)(1).

occupied residences and (2) the requirements of I.R.C. § 103A(d) through (j), inclusive, are met.[3] I.R.C. § 103A(c)(2)(A).

A "qualified veterans' mortgage bond" is a registered general obligation bond which is part of an issue, substantially all of the proceeds of which are to be used to provide residences for veterans, but not to refinance existing mortgages. I.R.C. § 103A(c)(3).

Therefore, your Department should ascertain (or rely on an opinion from bond counsel) whether a proposed issue consists of either qualified mortgage bonds or qualified veterans' mortgage bonds in determining whether the proposed issue should be included in the ceiling amount imposed by the Act.

II

Certain local governments and local public authorities do have statutory authority to issue bonds for the purchase, rehabilitation or improvement of owner-occupied residences, subject to the restrictions in the authorized statutes.

Chapter 66 (Municipal Law) and ch. 67 (Municipal Borrowing and Municipal Bonds), Stats., contain grants of bonding power to public agencies or authorities and to municipalities. Section 67.03(1), Stats., sets municipalities apart from agencies and authorities and imposes restraints on the bonding power so granted: "Except as provided in s. 67.01(8), municipalities may borrow money and issue municipal obligations therefor only for the purposes and by the procedures specified in this chapter."

Chapter 2, Stats., divided the state into seventy-two counties; sec. 67.04(1), Stats., enumerates the purposes for which counties can bor-

---

[3] Briefly, the requirements of I.R.C. § 103A(d) through (j) are as follows:

(d) limits residences to single-family residences;

(e) restricts purchase money mortgages generally to first time buyers. Home improvement or rehabilitation loan mortgages are exempt;

(f) limits acquisition costs of residences;

(g) sets ceilings on the amounts of bonds issuable annually;

(h) gives target areas preference within the first year of a program;

(i) sets stricter arbitrage limitations; and

(j) requires that the bonds must be registered, prohibits refinancing and allows mortgages to be assumed under certain considerations.

row. The only purpose that even compares with the provision of mortgage loans is subsec. (r). Section 67.04(1)(r), Stats., provides that a county may issue bonds:

> To provide funds for acquiring land by purchase or condemnation and constructing thereon or upon lands otherwise acquired by the county, various types of housing to be sold or rented, upon such terms as the county board may authorize, to honorably discharged members of the armed services of the United States who served in any of its wars and who at the time of induction into such service were residents of such county.

Assume, *arguendo,* that a given county, by appropriate procedure, adopted a bonding resolution, issued bonds and acquired veterans' housing with the proceeds. Subsequently, the county authorized the sale of dwellings to veterans by deed, taking a mortgage back. To the extent that five percent[4] or more of the bond proceeds were so used, the bond issue becomes a mortgage subsidy bond issue. I.R.C. § 103A(b)(1). To avoid that definition and its consequences, the county asserts that the bond issue is a veterans' mortgage bond issue. However, to be a qualified veterans' mortgage bond issue, and avoid classification as a mortgage subsidy bond (I.R.C. § 103A(b)(2)(B)), the issue must be secured by the general obligation of a state. I.R.C. § 103A(c)(3)(B).

Since the county's bonds are not secured by the general obligation of the State of Wisconsin, they cannot be "qualified veterans' mortgage bonds," which are tax-exempt. I therefore conclude that while a county may issue bonds to provide housing (by sale or rental) to veterans, such bonds will not be tax-exempt and will not be includable in the state's ceiling amount set by I.R.C. § 103A(g).

Chapter 60, Stats., allowed the creation of towns. Section 67.04(5), Stats., enumerates the purposes for which towns can borrow.

---

[4] In defining a mortgage subsidy bond in I.R.C. § 103A(b)(1), Congress declared that phrase to mean a bond which is "part of an issue a significant portion of the proceeds of which are to be used directly or indirectly for mortgages on owner-occupied residences." Congress considered the term "significant portion" to normally mean five percent. H.R. Rep. No. 1167, 96th Cong., 2nd Session (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 5526, 5814.

Section 67.04(5)(t), Stats., provides that a town may issue bonds "[t]o finance the cost of low-interest mortgage loans under s. 66.38." Section 66.38(1)(d), Stats., defines a municipality (for purposes of sec. 66.38, Stats.) as "any city, town or village in a county with a population greater than 500,000" (*i.e.*, in Milwaukee County). Milwaukee County contains no towns. Therefore, I conclude that no town in Wisconsin may issue bonds to be used for mortgage loans for owner-occupied residences.

Chapter 66, Stats., allows the incorporation of villages and cities in Wisconsin. Section 67.04(4), Stats., enumerates the purposes for which villages may issue bonds. Section 67.04(2), Stats., enumerates the purposes for which cities may issue bonds. Sections 67.04(4)(e) and 67.04(2)(zq), Stats., are identical and allow villages and cities to issue bonds "[t]o finance the cost of low-interest mortgage loans under s. 66.38."

I therefore conclude, subject to sec. 66.38, Stats., that only the villages of Bayside, Brown Deer, Fox Point, Greendale, Hales Corners, River Hills, Shorewood, West Milwaukee and Whitefish Bay; and that only the cities of Cudahy, Franklin, Glendale, Greenfield, Milwaukee, Oak Creek, St. Francis, South Milwaukee, Wauwatosa and West Allis presently have direct authority to issue bonds to be used for mortgage loans for owner-occupied residences.

If the bonds so issued meet all requirements of the federal act, then the interest payable on such bonds will be exempt from federal taxation. The amount of bonds issued must be included in the state ceiling amount. I.R.C. § 103A(g).

With one exception, the authorities possessing analogous bonding authority are created by ch. 66, Stats. The exception is sec. 59.075, Stats., which allows the creation of county housing authorities. Section 59.075(1), Stats., makes secs. 66.40 to 66.404, Stats., applicable to counties.

Sections 66.40 to 66.404, Stats., are referred to as the "Housing Authorities Law." To bring a housing authority into existence, a city council, by resolution, declares a need for an authority to function in the city. Upon the adoption of said resolution, sec. 66.40(4)(a), Stats., provides that "a public body corporate and politic shall then exist in the city and be known as the 'housing authority'

of the city. Such authority shall then be authorized to transact business and exercise any powers herein granted to it."

The powers granted to a city by secs. 66.40 to 66.404, Stats., extend to villages, pursuant to sec. 61.73, Stats., which provides in part:

> The provisions of ss. 66.40 to 66.425 shall apply to villages, and the powers and duties conferred and imposed by these sections upon mayors, councils and specified city officials are hereby conferred upon presidents, village boards and village officials performing duties similar to the duties of such specified city officials respectively.

Let us assume either a county housing authority (under sec. 59.075, Stats.), a village housing authority (under sec. 61.73, Stats.) or a city housing authority (under secs. 66.40 to 66.404, Stats.) intends to issue bonds and use the proceeds indirectly to furnish mortgage loans for owner-occupied residences since no direct specific statutory authority exists. One of the few workable sequences appears to be as follows. An eligible borrower selects a residence which the authority buys (or had bought) with bond proceeds. The authority then sells it to the eligible borrower, taking back a purchase money mortgage.

Bonding authority is found in sec. 66.40(13)(a), Stats.: "An authority shall have power to issue bonds from time to time in its discretion, for any of its corporate purposes." Authority to sell acquired real estate is found in sec. 66.40(9)(j), Stats.: "[An authority shall have power] [t]o contract for sale and sell any part or all of the interest in real estate acquired and to execute such contracts of sale and conveyances as the authority may deem desirable." A mortgage is a conveyance. Sec. 706.01(3), Stats.

It would appear that all counties, villages and city housing authorities in Wisconsin would be statutorily authorized to issue bonds for housing loans using this procedure.[5] Because of the holding in *Jolly v. Greendale Housing Authority*, 259 Wis. 407, 49 N.W.2d 191 (1951), I cannot give you an unqualified opinion to that effect if this indirect approach is used.

---

[5] This opinion should not be construed as either approving or disapproving the described procedure.

In *Jolly*, the Greendale Housing Authority agreed to sell Mr. Ward its housing authority bonds, the proceeds of which were to be used to purchase a tract of land upon which were existing houses. Mr. Jolly sued and alleged there was no shortage of dwellings in Greendale at rents which low income persons could afford and that the authority did not intend to destroy the homes for slum clearance. Therefore, he argued, the authority exceeded its stated powers. The supreme court agreed and reversed the trial court's decision sustaining a demurrer to the complaint.

The supreme court reviewed the purpose of sec. 66.40, Stats., the Housing Authority Law. The court held "the act [sec. 66.40, Stats.] does not grant unlimited authority to engage in the housing business regardless of the nature, character or purpose of the venture. It is only when the purpose of the law is to be effectuated that the Authority may proceed." *Jolly*, 259 Wis. at 409.

A determination of whether this use of housing authority bonding power effectuates the purpose of the law is needed but is beyond the scope of this opinion. I suggest you require any authority which proposes to use this method to furnish an opinion from bond counsel that such proposed bond issue effectuates the purpose of the law (sec. 66.40, Stats.). In the alternative, you may ask me for my opinion when the need arises.

The remaining authorities created by ch. 66, Stats., are redevelopment authorities and community development authorities.

Redevelopment authorities are granted bonding power by secs. 66.431(5)(a)4.a. and 66.431(5)(c), Stats. Power to acquire and dispose of real estate is granted by sec. 66.431(5)(a)3., Stats.

If a community development authority is created by a city pursuant to sec. 66.4325(1), Stats., the creation thereof operates to terminate the operations of a housing authority and/or a redevelopment authority. Sec. 66.4325(1)(a), Stats. Under sec. 66.4325(4), Stats., the community development authority has all powers set out in secs. 66.40 and 66.431, Stats.

Section 66.436, Stats., provides that villages shall have all of the powers of cities under secs. 66.43, 66.431 and 66.4325, Stats.

Let us assume that a village or city redevelopment authority or community development authority uses the procedure just

described, intending to use bond proceeds for home mortgages. Because of the *Jolly* holding, such use must effectuate the purposes of the law (sec. 66.431, Stats.). Section 66.431(10), Stats., requires the authority to:

> [P]repare a plan which shall be submitted to the local legislative body for approval which shall assure that decent, safe and sanitary dwellings substantially equal in number to the number of substandard dwellings to be removed in carrying out the redevelopment are available or will be provided at rents or prices within the financial reach of the income groups displaced.

Therefore, bond proceeds could be used for residential mortgages only to the extent that such mortgage loans are made in connection with the furnishing of a replacement dwelling at a price within the financial reach of the displaced owner. However, the federal act will limit the use of the bond proceeds for such a use to not more than five percent of the issue.[6] If more than five percent of the proceeds are so used, the authority will run afoul of the requirement in I.R.C. § 103A(e) which requires that a purchasing mortgagor not have had an interest in a principal residence during the three-year period prior to executing the mortgage. The three-year restriction will not apply if the *new* house is in a targeted area. However, if the mortgage loans are less than five percent of the issue, the bonds are not mortgage subsidy bonds and the amounts need not be included in the ceiling amount set forth in I.R.C. § 103A(g).

Finally, one redevelopment authority possesses specific statutory authority to use bond proceeds for mortgage loans. That authority is the Redevelopment Authority of Milwaukee.

The authority is granted by ch. 20, sec. 1023(g), Laws of 1981, which creates sec. 66.431(5m), Stats. Subsection (a) thereof provides:

> Subject to par. (b), a redevelopment authority in a 1st class city may issue bonds to finance mortgage loans on owner-occupied dwellings located in an abandoned highway corridor. Bonds issued under this paragraph may be sold at a private sale at a price determined by the redevelopment authority. No bonds

---

[6] *See* footnote 4.

may be issued under this paragraph on or after July 1, 1984, except bonds issued to refund outstanding bonds.

Paragraph (b) requires common council approval.

Once the bond proceeds are received, sec. 66.431(5m)(c), Stats., allows the redevelopment authority to:

1. Issue mortgage loans for the rehabilitation, purchase or construction of any owner-occupied dwelling in an abandoned highway corridor in the city.

2. Issue loans to any lending institution within the city which agrees to make mortgage loans for the rehabilitation, purchase or construction of any owner-occupied dwelling in an abandoned highway corridor in the city.

3. Purchase loans agreed to be made under subd. 2.

I therefore conclude, pursuant to sec. 66.431(5m), Stats., that the Redevelopment Authority of Milwaukee has authority to issue bonds to be used for mortgage loans for owner-occupied residences. To the extent that the Redevelopment Authority of Milwaukee complies with all provisions of the federal act, the interest will be exempt from federal taxation. The amount issued must be included in the state's ceiling amount under I.R.C. § 103A(g).

BCL:DJS

Indians; Taxation; Land recently purchased and held in trust for Indian tribes or tribe members under the superintendence of the federal government has the same reservation status as land reserved for the use of Indian tribes or tribe members by treaty or legislation. OAG 24-82

March 10, 1982.

DANIEL G. SMITH, *Administrator*
Income, Sales, Inheritance and Excise Tax Division
Department of Revenue

You requested my opinion as to what lands are includable as Indian "reservations" for purposes of 68 Op. Att'y Gen. 151 (1979), and for other tax administration purposes. In 68 Op. Att'y Gen. 151

(1979), I noted that the United States Supreme Court has made clear that a general exemption from state taxes extends to Indian tribes and Indian persons within reservation boundaries. Where the burden of the tax sought to be imposed is on an Indian person or Indian tribe located within reservation boundaries, such tax cannot be lawfully imposed.

On November 24, 1976, the Department of Revenue issued guidelines relating to the taxation of Indians in Wisconsin. In that memorandum, "reservation" is defined to mean "all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge - Munsee reservations and Winnebago Indian Communities." For the reasons that follow, it is my opinion that the definition utilized by your Department since November 24, 1976, is legally correct. You note, however, that from time to time additional land outside treaty defined reservations has been acquired by the federal government for the use of an Indian tribe. Your principal concern now is the status of such lands.

You are correct in noting that many reservations were established pursuant to treaties negotiated with the tribes. Other reservations, however, were established by executive order or pursuant to special federal legislation.

In return for ceding their vast landholdings to the United States, many tribes were allowed to "reserve" a smaller portion of their lands for their permanent residence. These "reserved lands" were the foundation of the American reservation system. The federal government stopped making treaties with the Indians in 1871 — reservations were established after this date only by executive order or legislation. Regardless of how land came to be reserved for Indian use by the federal government, the legal status of such reserved land is the same. (*See, e.g., Donnelly v. United States*, 228 U.S. 243, 269 (1913)).

As the Court stated in *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902), "in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes." In com-

menting further on the origin of reservations, the Court quoted with approval from *Spalding v. Chandler*, 160 U.S. 394, 403-04 (1896):

> It is not necessary to determine how the reservation of the particular tract subsequently known as the "Indian Reserve" came to be made. It is clearly inferable from the evidence contained in the record that at the time of the making of the treaty of June 16, 1820, the Chippewa tribe of Indians were in the actual occupation and use of this Indian reserve as an encampment for the pursuit of fishing. ...
>
> But whether the Indians simply continued to encamp where they had been accustomed to prior to making of the treaty of 1820, whether a selection of the tract afterwards known as the Indian reserve was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States government, or whether the selection was made by the government and acquiesced in by the Indians, is immaterial. ... If the reservation was free from objection by the government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer.

In *United States v. Pelican*, 232 U.S. 442 (1914), the Court considered whether the allotment of land to individual tribe members which originally had been reserved for the tribe's use removed that land from reservation status. The Court concluded, *Pelican*, at 449-50:

> In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the Government. ... The same considerations, in substance, apply to the allotted lands .... The allottees were permitted to enjoy a more secure tenure and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they

> became other than Indian country through the distribution into separate holdings, the government retaining control.
>
> ... Nor does the territorial jurisdiction of the United States depend upon the size of the particular areas which are held for Federal purposes. ... It must be remembered that the fundamental consideration is the protection of a dependent people.

The controlling consideration, therefore, is whether the land has been validly set apart for the use of the Indians under the superintendence of the government. *See, United States v. McGowan,* 302 U.S. 535, 538 (1938); and *United States v. John,* 437 U.S. 634 (1978).

In *McGowan,* the Court considered whether the Reno Indian Colony, composed of several hundred Indians residing on a tract of 28.38 acres of land owned by the United States, had the same "Indian country" status as other reservations. The Court concluded, *McGowan,* at 538-39:

> Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as "reservations." Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a "reservation" or "colony."

It also appears to make no difference whether the land in question is held in trust by the United States for the use of an Indian tribe or an individual tribe member, as with allotments, or whether the tribe holds the fee title to the land. In *United States v. Sandoval,* 231 U.S. 28 (1913), the Court considered whether land owned in fee by various Pueblos in New Mexico was Indian country. The Court found controlling the unique relationship between the United States and the Pueblos that was essentially the same as the relationship between the United States and other Indian tribes residing on land held in trust by the United States. The Court also noted that the Pueblo lands were essentially the same in character as the lands owned in fee by the five civilized tribes which the courts earlier held subject to congressional legislation enacted in the exercise of the government's guardianship over these tribes and their affairs. *Sandoval,* at 48.

Felix S. Cohen, *Handbook of Federal Indian Law* (1941), summarizes the evolution of the use of the terms "Indian country" and "Indian reservation." He notes that in early federal legislation, the terms "Indian country" and "Indian territory" were used synonymously. As new states were carved out of what had been generally referred to at one time as the Indian territory with some of the land within their borders reserved for Indian use, the concept of Indian reservations was developed. Cohen notes that the court and Congress considered these reserved lands to be in the same status as Indian country and Indian territory. (*See generally*, at 6 and 206.)

In 68 Op. Att'y Gen. 151 (1979), several Supreme Court decisions involving state authority to impose taxes on Indian tribes within reservation boundaries were reviewed. In the leading case on cigarette taxes involving sales by Indians within reservation boundaries, *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the Court made clear that for purposes of taxation jurisdiction, all lands located within the exterior boundaries of an Indian reservation would be treated the same. The Court did not distinguish between land located within the reservation which remained in trust status, either for the tribe or individual tribe members, and land that had been alienated and is now owned in fee by Indians or non-Indians. The court refused to distinguish between fee and trust lands because it considered "checkerboard jurisdiction" within reservation boundaries to be unworkable.

Referring to Montana's argument that the General Allotment Act of 1887, 24 Stats. 388, enhanced the state's taxing power over fee lands within a reservation, the Court said:

> If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for *all* jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size. A similar claim was made by the State in *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), to which we responded:
>
> "[The] argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement

> officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government." *Id.*, at 358 ....

Moe, 425 U.S. at 478.

With this overview of the legal principles that define Indian reservations in mind, your specific questions will be considered. You note that "Indian land" may be grouped into the following four categories:

1. Land held in trust by the United States of America for the tribe.

2. Land held in trust by the United States of America for individual Indians.

3. Land owned by the tribe in fee simple.

4. Land owned by individual Indians in fee simple.

You cite three specific examples. First, land purchased by the St. Croix Tribal Council in the Town of Swiss (Danbury), Burnett County, which has been deeded to the United States of America to be held in trust for the St. Croix Band of Lake Superior Chippewa. Second, land recently purchased by the United States of America in the Town of Delton, Sauk County, in trust for the Winnebago Tribe. And finally, the transfer on May 18, 1973, of five acres in Monroe County to the United States of America in trust for a member of the Winnebago Tribe. You note that "[i]n each of the three examples cited above, untaxed cigarettes are being or have been sold. In the Danbury example, Indians are operating a General Store and advertising that sales are not subject to Wisconsin sales tax." You ask:

1. Are the above examples of real estate "Indian reservations" for purposes of applying OAG 56-79?

Neither the St. Croix nor the Winnebago occupy a reservation in the traditional sense of a compact block of lands specifically reserved for tribal use with clearly marked exterior boundaries. The St. Croix

Band's territory is comprised of a combination of dependent Indian communities and noncontiguous tracts of land held in trust by the United States of America for the St. Croix Band which are located in several counties in the northwest part of Wisconsin. The Winnebago Tribe's territory is also comprised of a combination of dependent Indian communities, some of which are located on tracts of land held in trust for the Winnebago Tribe by the United States of America, and individual Indian allotments throughout southern Wisconsin.

Although the lands in your examples were only recently purchased and placed into trust with the federal government, it is clear that the Secretary of the Interior has the authority to purchase lands or accept lands into trust for the use of Indian tribes at any time. The primary statutory authority is the 1934 Indian Reorganization Act (48 Stat. 984, 25 U.S.C. sec. 461, *et seq.)*. This Act provided a statutory basis for the reestablishment of Indian reservations and the reorganization of Indian tribes as governmental entities. Specifically, it gave the Secretary of the Interior authority to purchase lands for the purpose of providing an expanded land base for Indian tribes on existing reservations (25 U.S.C. sec. 465), and to proclaim new Indian reservations where none existed previously (25 U.S.C. sec. 467).

As indicated, the controlling consideration is whether land purchased by the Secretary of the Interior or accepted into trust by the Secretary of Interior, pursuant to the Indian Reorganization Act or other legal authority, has been validly set apart for the use of the Indians as such, under the superintendence of the United States Government. *See John,* 437 U.S. at 649.

It is my opinion that since the lands that you refer to in the Town of Swiss (St. Croix Band) and the Town of Delton (Winnebago Tribe) were placed into trust for the use of the respective tribes and are no doubt under the general superintendence of the Department of Interior, Bureau of Indian Affairs, those lands qualify as "reservation land."

It is less clear, however, whether the parcel of land in Monroe County, which was transferred into trust for the benefit of an individual Winnebago Indian, constitutes reservation land as the term has been defined and utilized in the more recent United States Supreme Court decisions referred to herein and in 68 Op. Att'y Gen.

151 (1979). There is, however, ample precedent to conclude that, where the federal government secures land, by whatever means, for the use of an individual tribe member, and that land remains under the superintendence of the government, it constitutes reservation land with substantially the same jurisdictional status as any other reservation land in the state. That jurisdictional status may be modified, if certain state interests have vested in recently purchased parcels located outside established reservations. The critical element would be available evidence of the federal government's intention to divest or not divest the state of its vested interests. Another factor would be the extent of federal superintendence over the land and activities conducted on it. Because of such factors, the tribe member may or may not, depending on the intent of the government at the time the land was placed into trust status, have the same rights to utilize the land as are attached to lands that were reserved for Indian tribes in treaties or as a result of special legislative enactments. Thus, the tribe member may or may not have acquired hunting and fishing rights on such land free of state regulation. *See, e.g., State v. Shepard,* 239 Wis. 345, 300 N.W. 905 (1941) and *Sac & Fox Tribe of Mississippi in Iowa v. Licklider,* 576 F.2d 145 (8th Cir. 1978). Such land, however, would clearly be treated the same as trust land located within reservation boundaries for some purposes. For example, the land itself would not be taxable by state and local units of government.

The determination of whether such land must be treated the same as other reservation land for a specific jurisdictional purpose depends in significant part on the intent of the federal government when the land was placed into trust and on the extent of federal superintendence over the land and activities conducted thereon. Since such determination involves questions of fact, it must await resolution in an appropriate case where all facts can be considered. Based on the information you have provided, it is not possible to determine whether such land in fact qualifies as reservation land.

You also ask:

2. For purposes of administering Wisconsin's cigarette tax laws, does the Department of Revenue have different jurisdiction on an Indian reservation than it does on:

a. Land held in trust by the United States of America for the tribe?

b. Land held in trust by the United States of America for individual Indians?

c. Land owned by the tribe in fee simple?

d. Land owned by individual Indians in fee simple?

In my opinion, the Department of Revenue has the same jurisdiction on Indian reservations established by treaty as it does on land held in trust (*i.e.*, reserved) by the United States for the use of Indian tribes regardless of how or when that land was acquired. As indicated, it is less clear what the jurisdictional relationship is with respect to land held in trust for individual Indians if such lands have only recently been acquired and are located outside exterior boundaries of reservations that were established by treaty, executive order, or special legislative enactments.

Unfortunately, I do not have enough information about the reservation of the Monroe County parcel to decide whether the state can tax cigarette sales to non-Indians on that parcel. I would be glad to consider the question again if you can provide additional facts about the land, its reservation by the federal government, and activities on it.

Recent Supreme Court cases such as *Mattz v. Arnett*, 412 U.S. 481 (1973) and *Seymour v. Superintendent*, 368 U.S. 351 (1962), clearly establish the principle that once a reservation has been established, all land, regardless of tenure, remains part of that reservation unless specifically removed therefrom by clear congressional action. Therefore, *land owned in fee* by the tribe or individual tribe members retains its reservation status if located within existing reservation boundaries or if the federal government has recognized it as such. If such land, however, is located outside recognized reservation boundaries, that land would not be considered reservation land and the Department would have jurisdiction over such land to the same extent it enjoys jurisdiction over any other fee land located within the state.

You ask:

3. For purposes of administering Wisconsin's sales tax laws, does the Department of Revenue have different jurisdiction on an Indian reservation than it does on:

   a. Land held in trust by the United States of America for the tribe?

   b. Land held in trust by the United States of America for individual Indians?

   c. Land owned by the tribe in fee simple?

   d. Land owned by individual Indians in fee simple?

Again, depending on where the land in question is located, the determining consideration is its status as reservation land or nonreservation land. The Department's jurisdiction is affected accordingly. In the Department's November 24, 1976 guidelines, jurisdiction to collect sales and use tax against Indians on and off reservations is summarized. In view of the Supreme Court's decision in *Moe*, it is my opinion that the Department's summary is correct. That is, sales and deliveries to Indians on reservations are exempt but sales to non-Indians on reservations are subject to the state sales and use tax.

You ask:

4. Do *Mescalero Apache Tribe v. Jones*, 411 US 145 (1973), and *Matheson v. Kinnear*, 393 F. Supp. 1025 (1975), permit the Department of Revenue to require Indians doing business on land as described in a, b, c or d, above, to collect and pay Wisconsin's cigarette tax and sales tax on:

   a. Sales made to Indians who are tribal members?

   b. Sales made to Indians who are not members of that tribe?

   c. Sales made to non-Indians?

For the reasons already stated, such sales made to tribe members are not subject to the cigarette and sales tax, provided the sale or the delivery occurs on reservation land. Such sales made to Indians who

are not members of that tribe or to non-Indians would be subject to the state sales and use tax. *See Moe.* All sales made on nonreservation land would, of course, be subject to all such taxes.

BCL:JDN

Migrant Workers; "Sharecropping" or other agreements attempting to establish the migrant worker as an independent contractor violate the Wisconsin Migrant Law, secs. 103.90-103.97, Stats. OAG 26-82

March 10, 1982.

LOWELL B. JACKSON, *Secretary*
Department of Industry, Labor and Human Relations

You ask whether a "sharecropping agreement" between an employer and a migrant worker violates the Wisconsin Migrant Law, secs. 103.90-103.97, Stats. You indicate that some employers have offered sharecropping agreements to migrant workers under which the workers are paid in crops harvested rather than in cash.

It is assumed that the grower furnishes the land and supplies and keeps general supervision over the land where the crop is being grown. Such a worker is called a "cropper." "A cropper is as much a servant as if his wages were fixed and payable in money." 21A Am. Jur. 2d *Crops* § 35 at 64 *et seq.*, and 95 A.L.R.3d 1013.

The Wisconsin Supreme Court has followed the general rule that, absent an intent by the parties to establish a landlord-tenant relationship, an agreement that an owner share a crop with one who has either cultivated or harvested the crop establishes an employer-employe relationship. *Kelly v. Rummerfield,* 117 Wis. 620, 94 N.W. 649 (1903); *Atwood v. Freund,* 219 Wis. 358, 263 N.W. 180 (1935). Since the sharecropping agreement establishes an employer-employe relationship, the migrant is not an independent contractor and the agreement is subject to the provisions of secs. 103.915 and 103.93(1), Stats.

It is probable that other attempts will also be made to establish the migrant worker in the role of an independent contractor. However, it is my opinion that both the sharecropper agreement or any

other method of paying compensation to the migrant worker in anything but cash, check or draft for the work performed are proscribed by the provisions of the Wisconsin Migrant Law, ch. 17, Laws of 1977. This law created secs. 103.90 through 103.97, Stats., which comprehensively regulate, *inter alia*, the wages, hours and conditions of employment of migrant workers. The intent of the Legislature in enacting the Wisconsin Migrant Law is clearly stated in ch. 17.

> SECTION 1. Intent. It is declared to be the intent of this act to improve the status of migrant workers in this state. This goal is to be accomplished by creating a council on migrant labor in the department of industry, labor and human relations and by providing standards for: wages, hours and working conditions of migrant workers; certification, maintenance and inspection of migrant labor camps; recruitment and hiring of migrant workers; and guaranteeing the right of free access to migrant labor camps to ensure that migrant workers and their families are not isolated from the rest of the community or from services to which they are legally entitled.

Section 103.90(2), Stats., defines "employer" as "a person engaged in planting, cultivating, harvesting, handling, drying, packing, packaging, processing, freezing, grading or storing fruits and vegetables; in nursery work; in sod farming or in Christmas tree cultivation or harvesting who employs a migrant worker." Section 103.90(4), Stats., defines a "migrant worker" as follows:

> [A]ny person who temporarily leaves a principal place of residence outside this state and comes to this state for not more than 10 months in a year to accept seasonal employment in the planting, cultivating, harvesting, handling, drying, packing, packaging, processing, freezing, grading or storing of fruits and vegetables; in nursery work; in sod farming or in Christmas tree cultivation or harvesting.

Section 103.915, Stats., requires that the employer and migrant worker enter into a "work agreement." In my opinion, the extensive provisions of this section are incompatible with a sharecropping contract or a contract whose terms otherwise purport to make the migrant worker an independent contractor. For example, sec. 103.915(4)(b), Stats., requires that the work agreement guarantee a minimum of twenty hours of work in one work week and subsec.

(4)(c) provides that the guaranteed wage together with other terms and conditions of employment be not less favorable than those provided by the employer for local workers for similar work. In addition, sec. 103.915(4)(a), Stats., provides that the work agreement must contain a statement regarding "applicable wage rates." Finally, sec. 103.93(1), Stats., provides that "[w]ages shall be paid in U.S. currency or by check or draft." Clearly, the migrant law contemplates that provision be made for the payment of wages by cash, check or draft, and that the employer make contributions to and deductions from wages for the benefit of the employe as required by state and federal law.

The employers who offer sharecropping contracts or who are otherwise attempting to give migrant workers the status of independent contractors apparently seek to avoid not only the requirements of the Wisconsin Migrant Law, but numerous other state and federal laws regulating the employer-employe relationship. Such laws include liability under social security, unemployment compensation and workers compensation laws, as well as state and federal wage and hour laws. It is my opinion that such contracts are invalid because they constitute a violation of sec. 103.915, Stats. Their use may be proscribed by departmental order and violations may be punished by forfeiture under sec. 103.97, Stats.

In reaching this conclusion, I have considered the possible contention that this opinion leads to an unconstitutional interpretation of the Wisconsin Migrant Law as constituting an impairment of the obligation of a contract or the unconstitutional taking of property without due process. United States Constitution art. II, sec. 10, cl. 1 and Wis. Const. art. I, sec. 12, prohibit laws impairing the obligation of contracts, and the Fourteenth Amendment to the United States Constitution and Wis. Const. art. I, sec. 1, prohibit state action resulting in the taking of property without due process of law.

I understand that the contracts in question were made after June 6, 1977, the effective date of the Wisconsin Migrant Law. Therefore this is not a case where a law has come into effect to disrupt an existing contractual obligation. Rather, it is a situation in which an attempt is being made to enter into a contract which is unlawful because of an existing law. In *Hudson Water Co. v. McCarter,* 209 U.S. 349, 357 (1908), a case involving a similar situation, Justice Holmes stated: "One whose rights, such as they are, are subject to

state restriction, cannot remove them from the power of the State by making a contract about them."

The authority of the state to impose restrictions on constitutional rights is derived from its residual police power. *Manigault v. Springs*, 199 U.S. 473, 480 (1905); *Nebbia v. New York*, 291 U.S. 502 (1933); *Chicago & N.W. Ry. v. La Follette*, 43 Wis. 2d 631, 169 N.W.2d 441 (1969) and *State ex rel. Bldg. Owners v. Adamany*, 64 Wis. 2d 280, 219 N.W.2d 274 (1974). In the latter case the court stated: "We have thus accepted the proposition that the obligation of contract is not an absolute right, but is one that may be obliged to yield to the compelling interest of the public—the exercise of the police power." *Id.* at 292.

Whether it is contended that either due process or the prohibition against impairment of the obligation of contracts has been violated, or both, legislation is valid if it constitutes a proper exercise of police power. In order that legislation not be unconstitutional, however, it must be reasonable, and must not be capricious or arbitrary. In addition, it must have a real and substantial relation to the object of the legislation. *Nebbia*, 291 U.S. at 524-25, cited in *Chicago*, 43 Wis. 2d at 644. Numerous types and areas of business are subject to state laws restricting not only the use of private property but also interfering with the right of private contract. *Nebbia*, 291 U.S. at 526-30 n. 20-35.

It is clear that the economic and social conditions of the migrant worker are a matter of national concern. The Wisconsin Migrant Law is aimed at improving the status of the migrant worker and the remedies afforded bear a reasonable relationship to this goal. Therefore, it is my opinion that the Wisconsin Migrant Law constitutes a constitutional exercise of state police power and prohibits sharecropping agreements.

BCL:JWC

Constitutionality; Federal Aid; Funds; Borrowing money from the federal government to replenish Wisconsin's unemployment compensation fund, under the arrangements prescribed by federal law, does not contravene either Wis. Const. art. VIII, sec. 3 or 4. OAG 28-82

March 17, 1982.

LOWELL B. JACKSON, *Secretary*
Department of Industry, Labor and Human Relations

You have asked for my opinion concerning the constitutionality of borrowing money after April 1, 1982, from the federal government in order to replenish Wisconsin's nearly depleted unemployment reserve fund, which is on deposit with the United States Treasury Department. Based upon the analysis which follows, it is my opinion that borrowing the federal funds, under the arrangements prescribed by federal statute, is not prohibited by the Wisconsin Constitution.

In order to answer your question, it is necessary to examine and understand the statutory provisions that govern the borrowing and repayment of these federal funds. The arrangements for borrowing and repaying the federal funds are prescribed by federal law. 42 U.S.C. § 1321 (1974), as amended by the Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, sec. 2407, 95 Stat. 879 (1981). Money is to be advanced to the state's unemployment reserve fund from the federal unemployment account, if the Governor applies for an advance and submits an estimate of the amount needed to pay unemployment benefits. 42 U.S.C. § 1321(a)(1) and (b). The money advanced is to be repaid in one of three ways. 42 U.S.C. § 1321(a)(1).

First, the Governor at any time may transfer funds from the state's unemployment account to the federal unemployment account. 42 U.S.C. § 1322.

An alternative method for repaying the money is for the federal government to reduce the employers' offset credit. 42 U.S.C. § 1101(d)(1). Because Wisconsin's unemployment compensation law is certified and approved by the Secretary of Labor, 26 U.S.C. § 3304, Wisconsin employers enjoy an offset credit applied to their federal unemployment taxes. 26 U.S.C. § 3302. This method of repayment provides that the additional federal revenues generated by reduction of the employers' offset credit will be used to repay the federal advances. 42 U.S.C. § 1101(d)(1). That is, Wisconsin employers who, for example, enjoy an offset credit of 2.7 percent applied against their federal unemployment taxes, would have an offset credit of only 2.4 percent. 26 U.S.C. § 3302(c). The other .3 percent would be applied to repay the money advanced by the Secre-

tary of the Treasury. In succeeding years, if the funds still are not repaid in full, the offset credit would be reduced, for example, by .6 percent, and then by .9 percent, and so forth until the funds are repaid in full. *Id.*

The final method of repayment involves money in the federal employment security administration account, which, if certain circumstances exist, must be transferred to the unemployment account of each state. 42 U.S.C. § 1103. Money which otherwise would be transferred from the employment security administration account to the state's unemployment account must be diverted to repay any outstanding advances. 42 U.S.C. § 1103(b)(2).

The money advanced to the state's unemployment reserve fund will accrue interest. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, sec. 2407, 95 Stat. 879 (1981). This recent amendment provides that "[e]xcept as otherwise provided in this subsection, each State shall pay interest on any advance made to such State." *Id.*, sec. 2407(b)(1). Interest will not accrue with respect to any advance if: (1) such advance is repaid in full on or before September 30 of the calendar year in which the advance was made; and (2) no other advance was made to the state during such calendar year and after the date on which the repayment of the advance was made. *Id.*, sec. 2407(b)(2). Under this amendment, the state is free to pay the interest from any source, except the unemployment fund. *Id.*, sec. 2407(b)(5). The interest payments are due on the first day following the fiscal year in which the advances were made. *Id.*, sec. 2407(b)(3)(A).

The Legislature, as you know, has provided for payment of this interest from money the Department of Industry, Labor and Human Relations receives as interest and penalties on delinquent payments, ch. 36, sec. 1, Laws of 1981, but I understand that this money will not be sufficient to pay for all the interest due on the anticipated advances. Also, in this regard, you have informed me that the Unemployment Compensation Advisory Council recently recommended an amendment to ch. 108, Stats., which would authorize the Department to levy an assessment on employers for payment of any interest that may accrue on the advances of federal money.[1] My

[1] The proposed amendment provides as follows:

opinion herein assumes enactment of a bill substantially equivalent to the Advisory Council's proposed amendment.

The precise question that needs to be answered is whether the borrowing of federal money, under the statutory arrangements described above, is barred by either Wis. Const. art. VIII, sec. 3 or 4. I will address this question in two parts: (1) are the advances of federal funds, *i.e.*, the principal, without the payment of any interest, barred by these sections of the Wisconsin Constitution? and (2) if not, then does the payment of interest on these advances violate these constitutional provisions?

Wisconsin Constitution art. VIII, sec. 3, provides that "[e]xcept as provided in s. 7(2)(a), the credit of the state shall never be given, or loaned, in aid of any individual, association or corporation." The giving or loaning of the state's credit prohibited by this section "occurs only when such giving or loaning results in the creation by the state of a legally enforceable obligation on its part to pay to one party an obligation incurred or to be incurred in favor of that party by another party." *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 197, 277 N.W. 278, 280 N.W. 698 (1938). It is firmly established that there is no loaning of the state's credit, in violation of sec. 3, unless the state becomes legally obligated for a debt. *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 431-32, 208 N.W.2d 780 (1973); *State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57, 73, 148 N.W.2d 683 (1967); *State ex rel. La Follette v. Reuter*, 33 Wis. 2d 384, 398, 147 N.W.2d 304 (1967).

Wisconsin Constitution, art. VIII, sec. 4, provides that "[t]he state shall never contract any public debt except in the cases and manner herein provided." A debt within the meaning of this section only

---

SECTION 108.19(1m) and (1n) of the statutes are created to read:

(1m) The department shall, from time to time, determine any interest due on advances from the federal unemployment account under Title XII of the social security act to the unemployment reserve fund. Each employer subject to this chapter shall promptly pay an assessment, at the rate determined by the department, to the interest account of the unemployment administration fund created in s. 108.20, upon receipt by the employer of written notice of the department's determination. The amount of an employer's assessment shall be the product of the rate multiplied by the gross wages paid by the employer for a period of time determined by the department.

(1n) The department shall publish as a class 1 notice under ch. 985 within 10 days such determinations as specified in sub. (1m).

exists if there is a legally enforceable obligation on the part of the state. *Wisconsin Solid Waste Recycling Auth. v. Earl,* 70 Wis. 2d 464, 482, 235 N.W.2d 648 (1975); *Nusbaum,* 59 Wis. 2d at 428; *Reuter,* 33 Wis. 2d at 399.

It is my opinion that borrowing the funds from the federal government, under the arrangements prescribed by federal statute, would not contravene either Wis. Const. art. VIII, sec. 3 or 4. For there to be a violation of either section, there must be a legally enforceable obligation on the part of the state. *Nusbaum,* 59 Wis. 2d at 431-32; *Reuter,* 33 Wis. 2d at 399. None of the three alternative methods of repayment render the state legally obligated to repay the funds advanced to the unemployment reserve fund. The first method provides that the Governor may transfer funds from the state's unemployment account to the federal unemployment account. 42 U.S.C. § 1322. The Governor, however, is not legally required to make such a transfer. It is strictly optional or a matter of his discretion. Since no state debt can be created where payment of state funds[2] is to be made solely at the state's option, *Nusbaum,* 59 Wis. 2d at 430; *State ex rel. Thomson v. Giessel,* 271 Wis. 15, 43-44, 72 N.W.2d 577 (1955); *Perrigo v. City of Milwaukee,* 92 Wis. 236, 241, 65 N.W. 1025 (1896), this optional method of repayment does not conflict with either Wis. Const. art. VIII, sec. 3 or 4.

The second alternative is that the money will be repaid by the federal government reducing the employers' offset credits against their federal unemployment taxes. 42 U.S.C. § 1101(d)(1). The additional revenues generated by this reduction in the offset credit will be used to repay the funds borrowed. *Id.* This method of repayment yields federal, not state, money, similar to ordinary federal tax revenues. Because the money borrowed will be repaid with federal rather than state funds, no state debt is created. Under this method of repayment, it is the employers, not the state, who will bear the burden, through a reduction in their offset credit, of repaying the money borrowed.

---

[2] It should be noted that the unemployment reserve fund is made up entirely of employer contributions. Sec. 108.16, Stats. So, even if the Governor was required to repay the advances from this fund, a state debt still would not be created, because the burden of repaying the advances falls on employers, and not on the state or state funds.

Finally, money which otherwise would be transferred from the employment security administration account to the state's unemployment account is to be used to repay any outstanding advances. 42 U.S.C. § 1103(b)(2). The employment security administration account consists of money appropriated from the United States Treasury. 42 U.S.C. § 1101(a) and (b). Because this alternative uses federal, not state, money to repay the advances, there can be no infringement of either Wis. Const. art. VIII, sec. 3 or 4.

Under the arrangements prescribed by federal statute, the state is not legally obligated to repay the advances of federal money. The money may be repaid from the unemployment reserve fund, which is made up entirely of employer contributions, but this is optional. If the Governor elects not to repay the advances with money from the unemployment reserve account, the advances will be repaid with federal funds, either through a reduction in the employers' offset credit or by diverting money from the employment security administration account. Since repayment of the advances with state funds is not required, there is no infringement of either Wis. Const. art. VIII, sec. 3 or 4.

More difficult to resolve, under Wis. Const. art. VIII, secs. 3 and 4, is the issue of interest due on the advances of federal money. The state is liable for payment of this interest, unless the money advanced is repaid by September 30 of the same calendar year and no subsequent advances are made. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, sec. 2407, 95 Stat. 879 (1981). To determine whether such a liability for interest is barred by Wis. Const. art. VIII, sec. 3 or 4, requires an examination of the purpose of these constitutional sections and the definition of debt within the meaning of these provisions.

The purpose of the constitutional prohibition against incurring state debt is to require state government to carry on its operations on a cash basis rather than on credit. *Cf. Earles v. Wells,* 94 Wis. 285, 298, 68 N.W. 964 (1896); *Graham v. Board of Examiners of State,* 116 Mont. 584, 155 P.2d 956, 960 (1945); Morris, *Evading Debt Limitations With Public Building Authorities: The Costly Subversion of State Constitutions,* 68 Yale L.J. 234 (1958-59). So long as the state's current expenses are kept within the limits of the funds and assets in the treasury and the current revenues collected or in the process of immediate collection, the state is deemed to be doing business on a

cash basis and not on credit. *Cf. Earles,* 94 Wis. at 298-99. This is true even though there may be some unpaid liabilities for a short period of time. *Id.*

The definition of "debt"[3] is a functional one that derives directly from the purpose served by the constitutional provisions restricting state debt. It is defined to include "all absolute obligations to pay money, or its equivalent, from funds to be provided, *as distinguished from money presently available or in process of collection and so treatable as in hand"* (emphasis added). *State ex rel. Owen v. Donald,* 160 Wis. 21, 59, 151 N.W. 331 (1915), citing to *Earles,* 94 Wis. at 298; and *Doon Township v. Cummins,* 142 U.S. 366, 376 (1892); *Nusbaum,* 59 Wis. 2d at 428. In the constitutional sense, then, a debt is an absolute obligation which will be satisfied or discharged out of future appropriations. *Id.* Conversely, an obligation which will be satisfied out of money that is presently available, *i.e.,* in the state treasury, or money that is in the process of being collected,[4] *e.g.,* through taxation, is not a debt in the constitutional sense. *Id.; Rice v. City of Milwaukee,* 100 Wis. 516, 519-20, 76 N.W. 341 (1898); *Earles,* 94 Wis. at 298; *Smith v. Town of Dedham,* 144 Mass. 177, 10 N.E. 782, 787 (1887); *In re Incurring of State Debts,* 19 R.I. 610, 37 A. 14, 15 (1896). Such an obligation is not an unconstitutional debt, because the state or municipality is regarded as doing business on a cash basis, and not on credit. *Rice,* 100 Wis. at 519-20.

It is my opinion that the state's obligation to pay interest on the advances, while perhaps a debt in the ordinary sense, does not create an unconstitutional debt barred by Wis. Const. art. VIII, sec. 3 or 4. The amendment to ch. 108, Stats., proposed by the Unemployment Compensation Advisory Council, assuming it is enacted into law, along with ch. 36, sec. 1, Laws of 1981, will appropriate sufficient revenues to satisfy the state's interest payments. It appears that these revenues will either be collected or in the process of being col-

---

[3] The terms "debt" and "indebtedness" in Wis. Const. art. XI, sec. 3, and art. VIII, sec. 4 have the same meaning in regard to both state and municipal debts. *Reuter,* 33 Wis. 2d at 405. Accordingly, the Wisconsin Supreme Court's holdings construing the meaning of "debt" by a municipality in art. XI, sec. 3, apply to the definition of "debt" by the state in art. VIII, sec. 4.

[4] Money that is in the process of being collected is treated as being constructively in the state treasury and thus available to be appropriated. *McFarland v. Barron,* 83 S.D. 639, 164 N.W.2d 607, 609 (1969); *In re State Warrants,* 6 S.D. 518, 62 N.W. 101, 104 (1895).

lected when the interest payment comes due on the first day following the fiscal year in which the advances were made.[5] Although the state is legally obligated to pay the interest, this obligation is not a debt in the constitutional sense, because it will be satisfied with revenues that are either presently available or in the process of collection. *Donald,* 160 Wis. at 59; *Rice,* 100 Wis. at 519-20; *Earles,* 94 Wis. at 298. In this regard, the state will be carrying on its operations on a cash basis, and not on credit, in accordance with the mandate of the Wisconsin Constitution.

BCL:NS

Health And Social Services, Department Of; Probation And Parole; The Department of Health and Social Services may not grant jail credit where it is not provided for by statute; credit is not to be granted to parolee for period of time spent in custody on new charge and conviction in foreign jurisdiction; credit is not to be granted for period of time revoked parolee spends in detention facility other than correctional facility nor for period of time revoked probationer spent in county jail on work-release as condition of probation. OAG 29-82

March 23, 1982.

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

You have requested my opinion on several questions relating to crediting of time served for revoked probationers and parolees. You first ask whether the Department of Health and Social Services (Department) may promulgate a rule granting more credit toward a sentence than is apparently provided for by statute.

In my opinion the Department may not promulgate a rule granting more credit than is provided by statute when the provisions of that statute are clear and unambiguous. The rule as to the powers of

[5] Money is already appropriated for payment of the interest by ch. 36, sec. 1, Laws of 1981. In addition, the Advisory Council's proposed amendment would require employers to promptly pay an assessment for the interest when notified to do so by the Department of Industry, Labor and Human Relations.

an administrative agency have been succinctly summarized as follows:

> [An administrative agency's] powers are limited by the statutes conferring such power expressly or by fair implication. Every administrative agency must conform precisely to the statutes from which it derives power. *Schmidt v. Local Affairs & Development Department* (1968), 39 Wis. 2d 46, 56, 57, 158 N.W.2d 306.

Mid-Plains Telephone v. Public Service Commission, 56 Wis. 2d 780, 786, 202 N.W.2d 907 (1973).

Your second and third inquiries seek an opinion on whether parolees who have been out of this jurisdiction, either by reason of having absconded or under an interstate compact agreement, must be given credit on their Wisconsin sentences when they serve time in a foreign jurisdiction because of a new conviction there, are returned to Wisconsin, and their parole is revoked. You further distinguish the hypothetical situation by inquiring as to whether the lodging of a detainer or issuance of a warrant affects the answer to the question posed above.

In my opinion, none of the variations on the basic theme, as described in the foregoing paragraph, affect the answer. A Wisconsin parolee who serves time in a foreign jurisdiction by reason of a new conviction entered against him in that jurisdiction, and whose parole is subsequently revoked after returning to Wisconsin, does not receive credit on his Wisconsin sentence for that period of incarceration in the foreign jurisdiction resulting from the new charge, regardless of the legality of his presence in the foreign jurisdiction, and regardless of whether Wisconsin has initiated formal apprehension proceedings by way of warrant or detainer.

The starting point for analysis of the question posed is sec. 57.072(2), Stats.: "The sentence of a revoked parolee resumes running on the day a final revocation order is entered by the department, subject to sentence credit for the period of custody in a jail, correctional institution or any other detention facility pending revocation according to the terms of s. 973.155."

Under the assumptions of your question the parolee is not in custody on the Wisconsin charge, but on the new charge brought in the

other jurisdiction. The lodging of a detainer with that jurisdiction's institution does not transform that detention into "custody ... pending revocation" as contemplated by sec. 57.072(2), Stats. This conclusion is reinforced by the case law regarding the right to parole revocation hearings.

Parole authorities may, if they so choose, lodge a detainer with the institution where the parolee is serving a sentence on an unrelated charge. The law is clear that the parolee is not entitled to a due process revocation hearing until the parole violation warrant is actually executed after he completes his sentence on the unrelated charge. *Moody v. Daggett*, 429 U.S. 78 (1976). In essence, the *Moody* Court held there is no loss of liberty in connection with revocation proceedings for the prisoner who is detained on an unrelated charge until the parole violation warrant is executed and the violator is taken into "custody under that warrant." 429 U.S. at 87. The Wisconsin Court of Appeals has had occasion to analyze the *Moody* decision. It did so as follows:

> In its rationale, the [*Moody*] court emphasized that Moody suffered no present deprivation of protected liberty sufficient to invoke due process, *because he was in custody not on the revocation warrant, but rather, on other convictions.* The custody during the period between issuance of the warrant and petition for release was held not to be unlawful *because it resulted from convictions of other crimes.*

State ex rel. Alvarez v. Lotter, 91 Wis. 2d 329, 333, 283 N.W.2d 408 (Ct. App. 1979) (emphasis and bracketed material added).

In denying habeas corpus relief, the *Alvarez* court concluded:

> Alvarez has not shown that his custody in Florida was *a result of Wisconsin revocation proceedings, rather than a result of the Florida charges.* Alvarez did not establish at the hearing on the petition that the Wisconsin detainer had any greater practical effect on his incarceration than the detainer in *Moody*, 429 U.S. 78. Alvarez failed to present facts from which it could be concluded that his loss of liberty in Florida was *a result of pending revocation proceedings.*

Alvarez, 91 Wis. 2d at 334-35 (emphasis added).

The language of sec. 57.072(2), Stats., specifically allows sentence credit to a revoked parolee only for time spent in custody "pending revocation." The *Moody* line of cases holds that time spent in custody on an unrelated charge but with a parole revocation detainer lodged at the institution is not considered custody "pending revocation proceedings" sufficient to trigger due process safeguards. Analogizing to the hypothetical posed here, it is reasonable to conclude that the mere lodging of a detainer does not amount to "custody pending revocation" sufficient to trigger the sentence credit provision of sec. 57.072(2), Stats.

It follows, from the conclusion reached pursuant to the foregoing analysis, that the decision of the Department not to issue a warrant or lodge a detainer, but merely to revoke parole upon the parolee's release and return to this jurisdiction, will not trigger the sentence credit provision of sec. 57.072(2), Stats. If the detainer was not sufficient to render his detention in the other jurisdiction "custody pending revocation," then certainly a mere request of the other jurisdiction's officials to notify Wisconsin of the parolee's release will not do so.

Varying the foregoing hypothetical by assuming the person is out of the state under an interstate compact agreement does not alter the conclusion prompted by the basic analysis. Again, referring to *Moody* and its Wisconsin progeny, whether the parolee is in the foreign state lawfully or unlawfully, the parolee is serving time not because of a revocation warrant but because of the unrelated conviction. Therefore, if this state chooses to lodge a detainer or merely decides to wait until his release and return to this state to revoke him, the parolee will not be entitled to any sentence credit for the time served in the foreign jurisdiction on the unrelated charge.

One of two variations on the basic set of circumstances which might dictate a different result is where a parolee is picked up in the foreign jurisdiction on a parole violation warrant issued in Wisconsin but, prior to being returned to this state, is charged in the foreign jurisdiction with a new criminal violation. The intervening period between arrest on a parole violation warrant and the issuance of charges by the foreign jurisdiction would be the result of the Wisconsin revocation proceeding, and thus subject to the credit provisions of sec. 57.07(8), Stats. Similarly, the period of custody between the completion of the parolee's custodial period in the foreign jurisdic-

tion and the time he is picked up by Wisconsin authorities to be returned to this state would be credited.

Nothing in sec. 973.155, Stats., alters or modifies the foregoing conclusions. Section 973.155, Stats., provides credit for all designated periods spent in custody for a particular course of conduct. Section 57.07(2), Stats., defines that period of time as it relates to parolees—that is, for the period of time spent in custody pending revocation.

You further ask whether the Department has the authority, pursuant to sec. 973.155, Stats., to grant credit for detention in a facility other than a correctional facility to an offender who has been paroled, assigned to such a facility, violates parole and is revoked. It is understood that this does not refer to a probationer or to incarceration awaiting revocation.

In the circumstance you posit, sentence has already been imposed. Therefore, sec. 973.155(1)(a), Stats., does not apply, since it is limited to:

> [C]onfinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:
>
> 1. While the offender is awaiting trial;
>
> 2. While the offender is being tried; and
>
> 3. While the offender is awaiting imposition of sentence after trial.

Neither is this a situation covered by sec. 973.155(1)(b), Stats., since custody pending revocation is not involved. Thus, in my opinion, the Department does not have authority, pursuant to sec. 973.155, Stats., to grant credit for a period of detention in a facility other than a detention facility.

Finally, you ask whether the Department has the authority, after revoking probation, to grant credit to the sentence imposed for the period of time the revoked probationer may have spent in the county jail with work release privileges as a condition of probation. My answer to this question is that the Department does not have such authority.

One previously litigated case has some bearing on the response to this question, *State v. Wills*, 69 Wis. 2d 489, 230 N.W.2d 827 (1975). Although it was decided prior to the enactment of sec. 973.155, Stats., the rationale it contains with respect to the nature of a probationer's confinement as a condition of probation with work release privileges appears to continue to control. In this case, the defendant was convicted of certain violations and sentenced with execution of the sentences stayed and defendant placed on probation. One of the conditions of probation was that defendant spend nonworking hours in the county jail during the first year of probation. A subsequent conviction resulted in revocation of probation. Defendant filed a motion for correction of sentence seeking, as a portion of his prayer for relief, sentence credit for the period of time spent incarcerated under the condition of probation prior to revocation of probation. The court's holding, insofar as is applicable here, was that such period was "a condition of probation, not part of a sentence of imprisonment, and not time spent in custody prior to conviction." *Wills*, at 493-94.

As noted, this case was decided prior to the enactment of sec. 973.155, Stats. The Legislature is presumed to have knowledge of prior case law in enacting new statutes. *Glinski v. Sheldon*, 88 Wis. 2d 509, 519-20, 276 N.W.2d 815 (1979). Yet, in enumerating the periods of time for which a person is to receive credit, those periods determined by the court to be unlike a sentence were not included. Specifically, the fact situation in the new statute most similar to the hypothetical posed by the Department is found in sec. 973.155(1)(a)3., Stats., which provides that a defendant is entitled to sentence credit "[while] the offender is awaiting imposition of a sentence after trial." A probationer who spends nonworking hours in a county jail under sec. 973.09(4), Stats., is fulfilling a condition of his probation. He is not in custody awaiting imposition of a sentence.

Section 57.072(3), Stats., is similarly inapplicable. It provides sentence credit for "the period of custody in a jail, correctional institution or any other detention facility pending revocation and commencement of sentence according to the terms of s. 973.155." Certainly the probationer in custody during nonworking hours is not in custody pending revocation proceedings. Thus, it would appear that the Legislature has not seen fit to provide for credit to a sentence as hypothesized by the Department. Since, as noted in my answer to

your first question, the Department does not have the authority to grant credit in the absence of statutory authority to do so, I conclude that the Department may not credit revoked probationers with time spent in jail on work release as a condition of probation.

BCL:PM-H

Physicians And Surgeons; There is no violation of the "fee splitting" statute, sec. 448.08(1), Stats., where a physician, through a service corporation owned by the physician, bills the patient for his own services, and that of physical therapist employed by the corporation, provided the billing states an accurate dollar figure for the respective services.

A medical professional service corporation is not in violation of sec. 180.99(2), Stats., when physical therapists are on the staff of the corporation. OAG 31-82

April 14, 1982.

WALTER L. WASHBURN, M.D., *Secretary*
Medical Examining Board
Department of Regulation and Licensing

You have requested my opinion in regard to two issues relating to the practice of physical therapy which arise under the fee splitting statute, sec. 448.08(1), Stats., and the professional service corporation statute, sec. 180.99(2), Stats.

You state that there are a number of instances in the State of Wisconsin where a physical therapist has a salaried relationship with a service corporation in which the "field of endeavor" within the meaning of sec. 180.99(2), Stats., is the practice of medicine and/or surgery. The service corporation, made up of licensed physicians, pays the salary of the physical therapist and refers patients to the physical therapist for therapy in accordance with the physicians' directions. The patient is then billed by the service corporation and the fees are ultimately collected by and paid to the service corporation. You further indicate that in this way the fees for the therapy are split between the therapist's salary and the corporation's income.

You question whether this arrangement violates the fee splitting provisions of sec. 448.08(1), Stats., which read as follows:

> FEE SPLITTING. Except as otherwise provided in this section, no person licensed or certified under this chapter may give or receive, directly or indirectly, to or from any person, firm or corporation any fee, commission, rebate or other form of compensation or anything of value for sending, referring or otherwise inducing a person to communicate with a licensee in a professional capacity, or for any professional services not actually rendered personally or *at his or her direction.*

The original "fee splitting" statute was enacted by ch. 570, Laws of 1913, and became sec. 4431b of the statutes. The Attorney General described the purpose of this law in 3 Op. Att'y Gen. 218, 219 (1914) as follows:

> The object of this law, as I understand it, was to prevent the practice, which was alleged to have grown up in this state, of physicians and surgeons in the larger cities, paying fees or commissions to the country physicians and surgeons for inducing or advising patients to submit to operations or treatments by such city physicians and surgeons. Such fees or commissions were not for any services rendered to the patient, but purely a service rendered to the other physicians or surgeons in the way of sending them this business.

That construction of the law was strengthened by ch. 469, Laws of 1915, and subsequent opinions of the Attorney General at 6 Op. Att'y Gen. 306 (1917) and 24 Op. Att'y Gen. 580 (1935). In 6 Op. Att'y Gen. 306 (1917), the question raised concerned a proposal being promoted by the "Wisconsin Committee for Medical Preparedness" which related to physicians enlisting for service in World War I. The committee was asking physicians to sign a statement including the following paragraph:

> Recognizing the patriotism of those members of the Medical Profession who volunteer for the service of the U. S. Government, I agree to remit to my County Secretary one third of such fees as I receive for attendance on patients of doctors ordered into active service for the Government, these remittances to be held in trust for the volunteer or turned over to his family.

The question was whether such an agreement violated the "fee splitting" statute.

In finding no fee splitting after reviewing the earlier 1914 opinion, the Attorney General pointed out that the statute required an element of advice or inducement, and of fee splitting as compensation for such advice or inducement, before an offense of "fee splitting" would be present. It is to be noted that the present statute, sec. 448.08(1), Stats., still contains the inducement requirement. In other words, it was then illegal and is still illegal for a physician to share in a fee charged for services of another physician merely because the sharing physician has referred or induced a patient to communicate with another physician who provided the professional services. Since ch. 383, Laws of 1975, the fee splitting statute is applied to any persons licensed under ch. 448, Stats., which includes physical therapists.

In construing sec. 448.08(1), Stats., we must remember that the statute provides for a criminal penalty of $10,000.00 or imprisonment for not more than nine months or both and therefore the statute must be strictly construed. *State v. Wilson,* 77 Wis. 2d 15, 252 N.W.2d 64 (1977) and *Chapman v. Zakzaska,* 273 Wis. 64, 76 N.W.2d 537 (1956).

The statute prohibits two things. First, it prohibits the receiving of any fee for sending, referring or otherwise inducing a person to communicate with another licensee. Secondly, it prohibits any licensee under the chapter from receiving any fee "for any professional services not actually rendered personally or at his or her direction." Thus, where the physician participates with or directs the physical therapist in rendering treatment, both the physical therapist and the physician may receive compensation for the services rendered.

Ordinarily, after the physician has referred a patient to a physical therapist pursuant to sec. 448.04(1)(e), Stats., the physician would not provide further direction in the carrying out of the physical therapy treatment and, therefore, the physician could not make a separate charge for that treatment. However, this does not mean that where the physical therapist is employed by a medical professional service corporation, the billings for the services of the physical therapist could not include amounts for salary, fringe benefits, and oper-

ating expenses in connection with the operation of the corporation. There would also be no violation of the fee splitting statute, sec. 448.08(1), Stats., where the physician, through a service corporation owned by that physician, bills the patient for his own services and for the services of the employed physical therapist.

Section 448.08(2), Stats., requires that anyone licensed under ch. 448, Stats., who renders any medical service

> to any patient, physician or corporation, or to any other institution or organization of any kind, including a hospital, for which a charge is made to such patient receiving such service ... shall, ... render an individual statement or account of the charges therefor directly to such patient, distinct and separate from any statement or account by any physician or other person ....

In my opinion this separate billing requirement is satisfied under the above circumstances where the billing identifies the physician and physical therapist providing the services and states an accurate dollar figure for the respective services.

In your second question you ask whether a medical professional service corporation created under sec. 180.99(2), Stats., is in violation of that statute when physical therapists are on the staff of that medical professional service corporation. You say the issue arises because the "field of endeavor" for the service corporation is listed as the "practice of medicine and/or surgery." Although there is no definition in the statutes of "field of endeavor," it does not appear that the Legislature intended to prohibit a medical service corporation formed for "practice of medicine and/or surgery" from employing nurses, physical therapists, podiatrists or other licensed individuals whose professions are supportive of the practice of medicine and surgery. Indeed, the last sentence of sec. 180.99(8), Stats., and the last sentence of sec. 180.99(9), Stats., would support a construction that the Legislature intended that the term "field of endeavor" be liberally construed and that the terms "officers, employees or agents" used in sec. 180.99(2), Stats., include physical therapists employed by such corporation.

Accordingly, it is my opinion that the employment of physical therapists under the circumstances set out in your opinion request would not violate sec. 180.99, Stats.

BCL:LLD

Foster Homes; Health And Social Services, Department Of; Licenses And Permits; Religion; A facility owned and operated by a religious organization is subject to licensure and regulation under ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code, unless the facility is a convent, monastery or similar place where residents are all members of a religious hierarchy living in seclusion and operating under a set of religious vows or rules. The Department of Health and Social Services can constitutionally license and regulate Community Based Residential Facilities (CBRFs) operated by religious organizations not exempt under sec. 50.01(1), Stats., or sec. 50.03(9), Stats. Application of CBRF licensure and regulatory requirements to certain facilities operated by the Salvation Army discussed. OAG 32-82

April 15, 1982.

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

You ask two basic questions concerning the licensure of Community Based Residential Facilities (CBRFs) which are owned and operated by religious organizations. You also ask whether certain facilities owned and operated by the Salvation Army are subject to licensure and regulation under ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code. Your two basic questions may be stated as follows:

> 1. When are facilities owned and operated by religious organizations exempt from licensure and regulation under ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code because service is provided only to a religiously-oriented clientele?

It is my opinion that licensure is required unless the facility is a convent, monastery or similar place where residents are all members of a religious hierarchy living in seclusion and operating under a set of religious vows or rules.

> 2. Can the Department of Health & Social Services constitutionally require facilities operated by religious organizations

not exempt under sec. 50.01(1), Stats., or sec. 50.03(9), Stats., to be licensed and regulated under ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code?

In my opinion, the answer is yes.

I

SCOPE OF STATUTORY EXEMPTION

Under sec. 50.01(1), Stats., "[t]he reception and care or treatment of a person in a convent or facility owned or operated exclusively by and for members of a religious order shall not constitute the premises to be a 'community-based residential facility.'"

Terms such as "convent" and "members of a religious order" are to be construed according to "common and approved usage." Sec. 990.01, Stats.; *Midtown Church of Christ v. City of Racine*, 83 Wis. 2d 72, 76, 264 N.W.2d 281 (1978).

A "convent" is defined as "an association or community of recluses devoted to a religious life under a superior : a body of monks, friars or nuns constituting one local community — now usu. restricted to a convent of nuns ...." *Webster's Third New International Dictionary* 498 (1976). In *Midtown*, the court noted that the same dictionary at 1587 defines "order" as "a religious body, typically an aggregate of separate communities living under a distinctive rule, discipline, or constitution : a monastic brotherhood or society ...." 83 Wis. 2d at 76. "Monastic," in turn, is defined as, "secluded from temporal concerns and devoted to religion." *Webster's Third New International Dictionary* 1457 (1976). Under statutes such as sec. 50.01(1), Stats., the term "members of a religious order" is not broad enough to encompass all employes or members of a particular religious organization. *See Eighth Street Baptist Church, Inc. v. United States*, 295 F. Supp. 1400 (D. Kan. 1969), *aff'd on other grounds*, 431 F.2d 1193 (10th Cir. 1970); *Midtown*.

Because of the similarities in their respective dictionary definitions, the terms "convent" and "facility owned and operated exclusively by and for members of a religious order," should be construed *in pari materia*. I therefore conclude that the statutory exemption is limited to convents, monasteries and similar facilities where members of a religious hierarchy live in seclusion, operating under a set of

religious vows or rules. When such an exemption is not available, licensure is required under sec. 50.03(1), Stats.

II

CONSTITUTIONAL ISSUES

The first amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This provision applies to the states by virtue of the due process clause of the fourteenth amendment. *Cantwell v. State of Connecticut,* 310 U.S. 296, 303 (1940). Wisconsin Constitution art. I, § 18 provides:

> The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship ....

These federal and state constitutional provisions carry the same impact. Both provisions "'"are intended and operate to serve the same dual purpose of prohibiting the 'establishment' of religion and protecting the 'free exercise' of religion."'" *State ex rel. Wis. Health Fac. Auth. v. Lindner,* 91 Wis. 2d 145, 163, 280 N.W.2d 773 (1979).

A constitutional analysis requires that every presumption be indulged to sustain a statute or rule when it is attacked. *Wis. Bingo Sup. & Equip. Co. v. Bingo Control Bd.,* 88 Wis. 2d 293, 301, 276 N.W.2d 716, 719 (1979).

A. Free Exercise Of Religious Beliefs.

Chapter 50, Stats., exempts care provided by facilities to residents who are religiously opposed to conventional medical treatment and entirely exempts those facilities in which members of a religious hierarchy have sincere religious beliefs in being cloistered from society. These two exemptions eliminate the possibility of free exercise issues in such situations.

The free exercise of religion is not violated if (1) the statute does not deny the free exercise of religious belief or, if so, (2) a state inter-

est of sufficient magnitude overrides the legitimate private interest invoking the protection of the free exercise clause. *Wisconsin v. Yoder,* 406 U.S. 205, 214 (1972).

1. Infringement On The Exercise Of Religious Beliefs.

The Supreme Court has held that an indirect financial or regulatory burden does not infringe upon the free exercise of religion. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown,* 366 U.S. 599, 606 (1961).

Similar considerations apply with regard to licensure and regulation. A free exercise claim can succeed in such a context only if it is established that the statute suppresses the exercise of sincere religious beliefs or the dissemination of religious views, as opposed to regulating the manner in which secular activities are conducted. *Compare Murdock v. Pennsylvania,* 319 U.S. 105 (1941); *Follett v. Town of McCormick S.C.,* 321 U.S. 573 (1944); *with Cox v. State of New Hampshire,* 312 U.S. 569 (1941); *Washburn v. Ellquist,* 242 Wis. 609, 9 N.W.2d 121, *reh. denied* 10 N.W.2d 292 (1943); *State v. King Colony Ranch,* 137 Mont. 145, 350 P.2d 841, *cert. denied* 364 U.S. 817 (1960). Courts employing this dichotomy have held that the free exercise clause is not implicated in the licensure and regulation of facilities such as day care centers. *Roloff Evangelistic Enterprises v. State,* 556 S.W.2d 856 (Tex. Civ. App. 1977), *writ ref. n.r.e., appeal dismissed,* 439 U.S. 803, *reh. denied* 439 U.S. 998 (1978). *Also see State v. Fayetteville Street Christian School,* 42 N.C. App. 665, 258 S.E.2d 459, 464 (1979), *vacated and remanded on other grounds* 299 N.C. 351, 261 S.E.2d 908, *on reh.,* 299 N.C. 731, 265 S.E.2d 387 (1980). Unless different considerations apply to CBRFs, no free exercise claim can arise in the context of ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code.

The requirements of ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code, are secular in nature and, except in unusual circumstances, do not appear to have any effect whatsoever on the exercise or dissemination of religious beliefs. Chapter 50, Stats., contains relatively few requirements that are applicable to CBRFs. Sections 50.03(5m) and 50.05, Stats., permit the Department to remove residents or to place

a monitor in a facility when there is an emergency or when the facility is operating without a valid license. Chapter HSS 3 Wis. Adm. Code contains more detailed requirements. Subchapter II of chapter HSS 3 Wis. Adm. Code sets certain requirements for the administrative management of CBRFs. Certain assurance of responsibility is required. Section HSS 3.11 Wis. Adm. Code. Personnel records and written personnel policies are required. Section HSS 3.13 Wis. Adm. Code. A written statement of the programs to be offered and the individuals to be served is mandated. Section HSS 3.12 Wis. Adm. Code. There must be an admission agreement, written records concerning residents and written notice to certain parties when there are significant changes in the condition of residents. Sections HSS 3.14-3.16 Wis. Adm. Code. Certain types of services must be offered and there must be an individual service plan for each resident. Sections HSS 3.21-3.23, 3.61 Wis. Adm. Code. The individual rights of residents must be explained to them and a written complaint procedure must be instituted. Section HSS 3.31 Wis. Adm. Code. Finally, there are detailed construction, sanitation and health requirements, which are commonly called "health-safety code" requirements. *See* sections HSS 3.23(4), (5), 3.24, 3.49-3.57, 3.62-3.65 Wis. Adm. Code. Any of these administrative code provisions may be waived under the conditions specified in section HSS 3.08(7) Wis. Adm. Code.

In order to trigger the free exercise protections of the state and federal constitutions, it must either be shown that these licensure and regulatory provisions prohibit the exercise of sincere religious beliefs or place a direct financial or regulatory burden upon a practice mandated by a particular religion. It *might* be possible for a religious organization to make such a preliminary showing if the tenets of that organization mandate the operation of CBRFs *and* (1) the religious tenets of the organization prohibit the provision of some kinds of care mandated by ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code, (2) the religious tenets of the organization require the provision of the kinds of care mandated by ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code in some other manner than that specified in those chapters or (3) the religious tenets of the organization require the provision of the kinds of care mandated by ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code but prohibit licensure by the state.

When no statutory exemption is available to such an organization, the state's interest in regulating CBRFs would have to be examined.

2. State's Interest In Regulating CBRFs.

A number of courts have held that a state has a compelling interest in licensing and regulating day care facilities for minors. *Fayetteville Street Christian School,* 258 S.E.2d at 463; *State, Etc. v. Heart Ministries, Inc.,* 227 Kan. 244, 607 P.2d 1102, *appeal dismissed,* 449 U.S. 802 (1980). In *Heart Ministries, Inc.,* the Supreme Court of Kansas distinguished *Wisconsin v. Yoder,* 406 U.S. 205 (1972), a case in which it was held to be contrary to the sincere religious beliefs of the Amish to attend high school:

> The compelling interest of the State, as *parens patriae,* is the protection of its children from hunger, cold, cruelty, neglect, degradation, and inhumanity in all its forms. To fulfill this responsibility, the legislature has elected to impose licensing and inspection requirements. To these requirements the defendants' free exercise rights must bow; the balance weighs heavily in favor of those unfortunate children whom the State must protect.

607 P.2d at 1112.

The purpose of the CBRF regulatory scheme is contained in sec. 50.02(2)(a), Stats., which provides:

> The department, by rule, shall develop, establish and enforce regulations and standards for the care, treatment, health, safety, rights, welfare and comfort of residents in community-based residential facilities and nursing homes and for the construction, general hygiene, maintenance and operation of those facilities which, in the light of advancing knowledge, will promote safe and adequate accommodation, care and treatment of residents in those facilities; and promulgate and enforce rules consistent with this section.

Such public health and safety considerations override any claim that the licensing process itself infringes upon any religious belief or practice. *Cf., Johnson v. Motor Vehicle Division,* 197 Colo. 455, 593 P.2d 1363 (1979). *Compare Roloff,* 556 S.W.2d at 856-57. It is also

generally held that even when the motivation for operating a facility is religious, the facility still must be in compliance with all zoning, building code and health regulations. *See, e.g., Damascas Community Church v. Clackamas Cty.*, 45 Or. App. 1065, 610 P.2d 273 (1980). I therefore conclude that the "health-safety code" provisions contained in chapter HSS 3 Wis. Adm. Code may constitutionally be applied to any facility operated by a religious organization.

In this state, CBRFs serve individuals "unable to live independently in the community." Section HSS 3.04(2)(a) Wis. Adm. Code. The CBRF regulations afford protection to adults and children for reasons similar to those advanced by the State of Kansas for promulgating its day care regulations. Like most minors, adult residents of CBRFs are unable to provide for certain of their own needs. The state has just as compelling an interest in the protection of needy adults as it does in the protection of needy children. That interest is sufficient to override any interest a religious organization may have in being exempt from regulation.

There is an additional reason why the state's interest in regulating these facilities outweighs any constitutional claim for exemption. A number of religious organizations operate nursing homes and/or CBRFs. The rehabilitation of individuals with identifiable, treatable, physical or social handicaps is, in the common understanding, a secular activity. Ordinarily, a religious organization which purports to ritualize such secular activities enjoys no special constitutional protection as against those religions that do not purport to do so. *See Heffron v. International Society for Krishna Consciousness, Inc.*, 451 U.S. 904 (1981); *Heart Ministries, Inc.; Gospel Army v. City of Los Angeles*, 27 Cal. 2d 232, 163 P.2d 704, 711, *appeal dismissed*, 331 U.S. 543 (1945).

The requirements concerning CBRFs which are contained in subch. 1 of ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code, do not violate the free exercise clause of the first amendment or the corresponding provisions contained in Wis. Const. art. I, § 18.

B. Establishment Of Religion.

The United States Supreme Court has, in recent years, moved away from a mechanistic "no-aid-to-religion" approach to the establishment clause and has promulgated a three-part test to deter-

mine the constitutionality of statutes which benefit particular religious groups. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Ed. and Religious Lib. v. Nyquist*, 413 U.S. 756, 772-73 (1973). Under the modern test, the statute must serve a secular legislative purpose, must have a "primary effect" that neither advances nor inhibits religion and must avoid excessive entanglement by the state with religion. *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970). The Wisconsin Supreme Court has applied similar tests to Wis. Const. art. I, § 18. *State ex rel. Wis. Health Fac. Auth. v. Lindner*, 91 Wis. 2d 145, 152, 280 N.W.2d 773, 777 (1979).

In *Walz*, the Supreme Court upheld property tax exemptions for real estate owned by entities operated exclusively for religious purposes, using the following language:

> The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion, it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that fosters its "moral or mental improvement" should not be inhibited in their activities by property taxation.
>
> . . . .
>
> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them.
>
> . . . .
>
> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches, but simply abstains from demanding that the church support the state.

397 U.S. at 672, 674-75.

The same considerations apply to exemptions from licensure and regulation afforded to religious groups. Such exemptions, in and of themselves, do not advance religion. Just as the State of Wisconsin may tax or choose to exempt the property on which CBRFs operated by religious organizations is located, the State of Wisconsin may choose to regulate or exempt CBRFs operated by religious organizations. Under the rationale of *Walz*, almost any regulatory exemption

avoids excessive entanglement with, and does not inhibit, religion by reducing church-state interaction to a minimum. When a statutory exemption from regulation is afforded to a religious organization, the major consideration is whether the exemption serves a secular purpose.

Exemptions from regulation and/or licensure are potentially available to any religious organization under secs. 50.01(1) and 50.03(9), Stats. Section 50.01(1), Stats., provides in part: "The reception and care or treatment of a person in a convent or facility owned or operated exclusively by and for members of a religious order shall not constitute the premises to be a 'community-based residential facility.'"

Section 50.03(9), Stats., provides:

> Nothing in this section shall be so construed as to give authority to supervise or regulate or control the remedial care or treatment of individual patients who are adherents of a church or religious denomination which subscribes to the act of healing by prayer and the principles of which are opposed to medical treatment and who are residents in any facility operated by a member or members, or by an association or corporation composed of members of such church or religious denomination, if the facility admits only adherents of such church or denomination and is so designated; *nor shall the existence of any of the above conditions alone militate against the licensing of such a home or institution. Such facility shall comply with all rules and regulations relating to sanitation and safety of the premises and be subject to inspection thereof.* Nothing in this subsection shall modify or repeal any laws, rules and regulations governing the control of communicable diseases.

As the emphasized language indicates, sec. 50.03(9), Stats., does not provide a total exemption from regulation or licensure. Instead, the statute exempts from regulation only "the remedial care or treatment of individual patients who ... subscribe to the act of healing by prayer and ... are opposed to medical treatment ...." Among other things, ch. 50, Stats., seeks to protect the individual rights of residents in those facilities which are subject to licensure. Sec. 50.09, Stats. Residents retain the right to meet with religious groups and participate in religious activities, *i.e.*, to practice their religion, unless

medically contraindicated. Sec. 50.09(1)(h), Stats. In a facility where all of the residents believe in healing by prayer as opposed to conventional medical treatment, the religious beliefs of residents will necessarily come in conflict with the dictates of conventional medical practice. Section 50.03(9), Stats., strikes a balance in favor of the preservation of such religious beliefs, unless they would lead to the spread of communicable disease. Even though the statute provides a partial exemption only for care provided to those holding certain religious beliefs, that exemption is carefully tailored so that only the process of healing by prayer is exempt from regulation. The failure to provide such an exemption would present a complex free exercise problem as to whether a state's interest in preserving public health may override a sincere religious belief in refusing medical treatment. Similar considerations underlie the exemption contained in sec. 50.01(1), Stats. That statute avoids the necessity of making a determination as to when the state's interest in preserving public health overrides a sincere religious belief in being cloistered from society. Both secs. 50.01(1) and 50.03(9), Stats., serve a secular legislative purpose by protecting the free exercise of sincere religious beliefs.

Neither sec. 50.01(1), Stats., nor sec. 50.03(9), Stats., violates the establishment clause. The regulatory scheme of licensure and regulation contained in subch. I of ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code, does not violate the free exercise clause. That regulatory scheme of licensure and regulation also does not contravene Wis. Const. art. I, § 18. I therefore conclude that the answer to your second question is yes.

III

APPLICATION OF CBRF REGULATIONS TO FACILITIES OPERATED BY THE SALVATION ARMY

A. Availability Of Exemption.

The Salvation Army is a religious organization. *See McClure v. Salvation Army,* 323 F. Supp. 1100 (N.D. Ga. 1971), *aff'd,* 460 F.2d 553 (5th Cir. 1972), *cert. denied,* 409 U.S. 896, *reh. denied,* 409 U.S. 1050. The function of the Salvation Army, which was founded by General William Booth in 1865, has been broadly described as "to evangelize the masses." In Wisconsin, the Salvation Army may incorporate as "a charitable, educational, missionary, philanthropic,

beneficial and religious organization." Sec. 187.16(1), Stats. This statute recognizes the broad range of the Salvation Army's functions: "The corps is also called upon to do many things outside of its preaching ministry. There is a regular program for the visitation of homes. Food is provided to the needy and referrals of the sick are made to doctors and hospitals and other charitable functions." *McClure*, 323 F. Supp. at 1101.

Salvation Army soldiers constitute the laity of that organization, while Salvation Army officers comprise the religious hierarchy of the organization. *McClure*, 323 F. Supp. at 1102. Accordingly, the statutory exemption contained in sec. 51.01, Stats., is available to any facility operated exclusively by and for officers living apart from society pursuant to the tenets of the Salvation Army.

B. Applicability Of CBRF Regulations To Adult Rehabilitation Centers.

One of your specific concerns is whether the Salvation Army's adult rehabilitation centers are subject to licensure and regulation as CBRFs. Those facilities which are not equivalent to convents or monasteries are subject to licensure or regulation if they are "place[s] where 3 or more unrelated adults reside in which care, treatment or services above the level of room and board but not including nursing care are provided to persons residing in the facility as a primary function of the facility." Sec. 50.01(1), Stats.

Under section HSS 3.04(2)(b) Wis. Adm. Code, any facility which serves three or more adults and is operated by a corporation meets the numerical criteria of sec. 50.01, Stats.

A facility must also provide "care, treatment or services above the level of room and board." Examples are provided in section HSS 3.04(2)(a) Wis. Adm. Code:

1. Information and referral.
2. Leisure time services.
3. Vocational services.
4. Transitional services.
5. Supportive home care services.
6. Prescribed personal care services.

7. Health monitoring and arrangement for health-related services.
8. Counseling services.

Publications prepared by the Salvation Army indicate that such services are provided at the centers. A summary sheet prepared by the Salvation Army Men's Social Services Department (U.S.A.) indicates that centers provide "in-residence treatment, diagnostic services, work therapy, residential care, after care, information and referral services ... within a Christian atmosphere and philosophy." The summary sheet goes on to state that the services offered by such centers include "therapeutic community, individual and group counseling; work therapy; recreational therapy; social rehabilitation; in-service education in substance abuse; Christian Services and counseling; medical assistance; referral or detoxification services."

The centers are operated pursuant to a handbook, *The Salvation Army Men's Social Service Handbook of Standards, Principles and Policies* (hereinafter, "*Handbook*"), which is subject to continual revision. The service program in effect at the centers is comprised of five major approaches. The spiritual approach consists of such items as chapel services, devotions, Bible classes, vesper services, religious films and spiritual counseling (*Handbook*, 9:5:1-9:5:5). The leisure time approach attempts to channel the activities of residents in a "positive" fashion through organized and undirected activities (*Handbook*, 9:11:1-9:11:5). The medical approach consists of trying to satisfy all of the medical needs of center residents (*Handbook*, 9:13:1-9:13:7). The group approach consists of all group activities (*Handbook*, 9:9:1). While some of these activities, such as Bible classes are "spiritual," the vast majority are not. These other activities include such things as orientation meetings, Alcoholics Anonymous, fellowship clubs, group therapy and psychotherapy and discussion groups (*Handbook*, 9:9:1). The casework approach is distinct from the spiritual approach but encompasses, to some degree, all of the other approaches. As part of this approach, a caseworker is assigned and attempts both to serve and to track the progress of the resident (*Handbook*, 9:7:1-9:7:7). The caseworker attempts to use casework techniques whenever possible. Casework activities include intake, follow-up, interviewing and counseling, case planning and case recording (*Handbook*, 9:7:2). The summary sheet and *Handbook* indicate that, with the possible exception of prescribed personal care

services, the centers offer all of the services enumerated in section HSS 3.04(2)(a) Wis. Adm. Code. *See, e.g.*, section HSS 3.05(17), (31), (34) Wis. Adm. Code.

Section 50.01(1), Stats., also requires that such services be provided "as a primary function of the facility." This occurs whenever "[t]he facility provides the service to a resident who has health, safety, or personal welfare related needs which make the resident unable to live in a residential setting in which the service is not provided." Section HSS 3.04(2)(c)1. Wis. Adm. Code. In order for a facility to be exempt from regulation, the individuals residing within it must be capable of arranging for all of their health, safety and personal welfare needs. The centers, however, admit only homeless and unattached adult males with identifiable, treatable social handicaps (*Handbook*, 1:1:4). The typical center resident is undersocialized, a 5 heavy drinker and a very dependent person (*Handbook*, 7:3:1-7:3:4; 9:1:1). Services are also provided to the mildly drug addicted, the emotionally unstable, vagrants and individuals released from mental or correctional institutions (*Handbook*, 7:5:2). Such individuals generally cannot arrange for the services offered by the centers. That is why they seek admission. A primary function of the centers is the provision of supportive services to these individuals. *Also see Handbook*, 1:1:4.

The centers meet all three criteria contained in sec. 51.01, Stats. Section 51.03, Stats., and chapter H 3 Wis. Adm. Code therefore require that they be licensed as CBRFs.

C. Constitutional Issues With Respect To Adult Rehabilitation Centers.*

1. Free Exercise Of Religious Beliefs.

When the Salvation Army was founded, the concept of performing social work did not even exist. General Booth later determined

*In information provided to this office, you emphasize that the Salvation Army formerly operated a child welfare institution which was licensed and funded by the state pursuant to secs. 46.032, 48.66 and 48.67, Stats. You also indicate that, although the application was later withdrawn, the Salvation Army has requested CBRF licensure for a facility which serves ambulatory or semi-ambulatory aged and mentally impaired individuals. While such actions do not constitute a waiver of a constitutional claim for exemption from regulation, they might be considered by a court as diminish-

that "attention *to other than spiritual needs* ... was necessary *to make his evangelism effective" (Handbook* 1:1:1) (emphasis supplied). The concept of the adult rehabilitation center did not evolve until long after the development of the social work concept (*Handbook* 1:1:1-1:1:3). The *Handbook* recognizes the distinction between social work and evangelism, referring to the operation of adult rehabilitation centers as "socio-spiritual service" (*Handbook* 3:1:2).

This "social-spiritual" service has one overriding goal:

> If one of the prime objectives of the treatment program is to retain the beneficiary on a temporary basis only, carrying through treatment until he has successfully conquered his handicaps, then the carrying out of an organized process, called "graduation," is the logical culmination.
>
> . . . .
>
> ... [T]he term "graduation," ... applie[s] to the man who moves from the beneficiary status to the employee status. This may involve leaving the center to an outside job, or may, according to the needs of the center and also the needs and desires of the man, mean a continuation in the center as an employee.

(*Handbook*, 9:15:1). Such a goal does not require that each and every resident become a soldier in the Salvation Army; tolerance of the religious views of residents is required (*Handbook*, 7:9:2-7:9:3). The requirements concerning CBRFs which are contained in ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code, do not attempt to regulate the spiritual aspect of the Salvation Army's "socio-spiritual service."

There is no indication that the Salvation Army must operate CBRFs. Even if such evidence did exist, the historical background concerning the establishment of the centers does not suggest that compliance with detailed health-safety code requirements and various administrative and record-keeping requirements is contrary to the sincere religious beliefs of the Salvation Army. Since there is no evidence that it is contrary to the religious beliefs of the Salvation

---

ing the weight or credibility of a claim that CBRF regulation infringes upon the exercise of sincere religious beliefs by the Salvation Army.

Army to comply with CBRF regulations, the protective provisions contained in the free exercise clause of the first amendment and Wis. Const. art. I, § 18, are not triggered. Even if such provisions could be invoked, I have already concluded that the state has a compelling interest in regulating all CBRFs. No special characteristics of the centers require alteration of that analysis.

2. Establishment Of Religion.

The Supreme Court has recently indicated that a challenge to a regulation on establishment clause grounds poses difficult questions of standing. *See Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 102 S. Ct. 752 (1982).

The only provisions of ch. 50, Stats., which even arguably require an establishment clause analysis are sec. 50.01(1), Stats., which exempts convents, monasteries and similar facilities, and sec. 50.03(9), Stats., which exempts care provided to individuals opposed to conventional medical treatment. There is no indication that the two statutory exemptions are underinclusive, *i.e.*, that nonexempt care or treatment is provided by the Salvation Army in circumstances similar to those where the statutory exemptions can be claimed by other religious organizations. Consequently, it is doubtful if the Salvation Army has standing to challenge these exemptions. I have already concluded that the licensing and regulation of CBRFs under ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code is constitutional. Therefore, even if the standing barrier could be overcome and an establishment clause claim successfully asserted, the result would be the elimination of the two statutory exemptions rather than the creation of a blanket exemption for all CBRFs operated by religious organizations. *Cf. State ex rel. Briggs & Stratton v. Noll*, 100 Wis. 2d 650, 658-59, 302 N.W.2d 487 (1981).

I therefore conclude that adult rehabilitation centers operated by the Salvation Army are subject to licensure and regulation under ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code.

BCL:FTC

Insurance; The Wisconsin Auto Insurance Plan and Rejected Risk Plan do not constitute unconstitutional delegations of authority and are otherwise constitutional. The boards of these plans are private, independent, ongoing concerns, not state agencies, and members of these boards are not public officers. Questions regarding the plans and boards discussed. OAG 37-82

May 7, 1982.

SUSAN MITCHELL, *Commissioner*
Office of The Commissioner of Insurance

You request my opinion concerning several questions involving two insurance risk-sharing plans continued by sec. 619.01(6), Stats., the Wisconsin Auto Insurance Plan and the Wisconsin Rejected Risk Plan.

The two plans which are the subject of this opinion are relevantly identical. Each plan provides insurance for those risks rejected by insurers in the marketplace; the Auto Insurance Plan provides auto insurance, and the Rejected Risk Plan provides workers' compensation insurance. Each plan is governed by a board which operates the plan and makes policy decisions relating thereto. And each plan requires all insurers and agents conducting the type of insurance encompassed by the plan to participate in the plan.

Because these two plans are substantially identical, my answers to your questions will be the same as to each plan.

Your first question is:

> Are the plans an unconstitutional delegation of authority under Article 4 of the Wisconsin Constitution or otherwise in violation of any other article of the Constitution?

My answer to both parts of this question is no.

Wisconsin Constitution art. IV, § 1, provides that: "The legislative power shall be vested in a senate and assembly." Legislative delegations of authority, under this constitutional command, are proper when "the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the board or

agency acts within that legislative purpose." *In Matter of Guardianship of Klisurich,* 98 Wis. 2d 274, 280, 296 N.W.2d 742 (1980).

The purpose of the delegating statute, sec. 619.01, Stats., is readily ascertainable; the statute furthers the public interest by providing insurance protection for those unable to obtain it in the marketplace. *See* comment to ch. 144, sec. 22, Laws of 1969. Further, an examination of the statutes creating these plans (Auto Plan — sec. 204.51, Stats. (1967); Rejected Risk Plan — sec. 205.15, Stats. (1967)), reveals that procedural safeguards were established to assure the attainment of the legislative purpose. Accordingly, it is my opinion that these plans are constitutionally valid delegations of authority.*

In addition, it is my opinion that these plans do not violate the due process and equal protection clauses of U.S. Const. amend. XIV and Wis. Const. art. I, § 1.

The insurance industry is properly subject to regulation by the state under the police power, bound up as the industry is in the public interest. *Ministers Life & Casualty Union v. Haase,* 30 Wis. 2d 339, 349, 141 N.W.2d 287 (1966). A police power statute challenged on either due process or equal protection grounds will be sustained if there is any "reasonable basis" for its enactment. *State v. Amoco Oil Co.,* 97 Wis. 2d 226, 259, 293 N.W.2d 487 (1980); *State v. Jackman,* 60 Wis. 2d 700, 705-06, 211 N.W.2d 480 (1973). There can be no serious doubt that the assigned-risk pool is a reasonable method by which to provide for the public welfare concerning insurance. Therefore, there is a "reasonable basis" for these plans, and they are constitutional.

Your second question is:

> Must the Boards of the Plans comply with Chapter 19, Wis. Stats., regarding public records and open meetings?

My answer to both parts of this question is no.

---

*This analysis holds true whether these boards are state agencies or are private concerns, an issue dealt with later in this opinion. Wisconsin courts have often upheld delegations of authority to private, independent, ongoing concerns for valid, public purposes. *See, e.g., Townsend v. Wisconsin Desert Horse Asso.,* 42 Wis. 2d 414, 423, 167 N.W.2d 425 (1969); *State ex rel. Warren v. Nusbaum,* 59 Wis. 2d 391, 208 N.W.2d 780 (1973); *State ex rel. Thomson v. Giessel,* 265 Wis. 185, 60 N.W.2d 873 (1953).

Section 19.81(2), Stats., provides that the open meetings law applies to "all state and local governmental bodies ...." The term "governmental body" is defined in sec. 19.82(1), Stats., to include, in relevant part, "a state or local agency, [or] board ...."

Note that each plan may assess member insurers to cover whatever operating costs and losses that may accrue to the plan. Neither plan receives money from the Legislature, and the ability of the plans to incur financial liability has in no way been limited by the Legislature. All moneys and property are acquired by the plans and are subject to the sole authority of the plan (not the state) as to the holding, use and disposal thereof. Liabilities incurred by the plans are their own liabilities and not liabilities of the state.

Considering these factors as a whole, and reading them in light of *Lister v. Board of Regents,* 72 Wis. 2d 282, 240 N.W.2d 610 (1976), *Majerus v. Milwaukee County,* 39 Wis. 2d 311, 159 N.W.2d 86 (1968), and *Sullivan v. Board of Regents of Normal Schools,* 209 Wis. 242, 244 N.W. 563 (1932), I conclude that the plans are private, independent, ongoing concerns and are not state boards or state agencies. Therefore, they are not "governmental bodies" as defined in sec. 19.82(1), Stats., and are not subject to the open meetings law.

The requirements of sec. 19.21(1), Stats., dealing with public records, fall on public *officers.* The crucial inquiry then is whether members of these boards are public officers.

The leading cases in Wisconsin concerning the question of who is a public officer are *Burton v. State Appeal Board,* 38 Wis. 2d 294, 156 N.W. 386 (1968), and *Martin v. Smith,* 239 Wis. 314, 1 N.W.2d 163 (1941). These cases make clear that, to be a public officer, a position must be one of "public [not private] employment." *Burton,* 38 Wis. 2d at 300; *Martin,* 239 Wis. at 332.

The plans themselves are private, independent, ongoing concerns and not state public agencies, as I have concluded above. Consonant with the plans' private status, membership on the governing boards represents private rather than public employment. As the board members hold private positions, I conclude that they are not public officers, and therefore that they need not comply with sec. 19.21, Stats.

Your third question is:

> Are the actions of the Boards subject to the provision of Chapter 227, Wis. Stats.?

The answer to this question is no.

Chapter 227, Stats., applies by its terms to certain agencies of the state. These agencies, delineated in sec. 227.01(1), Stats., include "any board, commission, committee, department or officer in the state government, except the governor or any military or judicial officer of this state."

As noted above, the boards are *not* state boards. Therefore, they are not agencies under sec. 227.01(1), Stats., so that ch. 227, Stats., does not apply to actions of the boards.

Your fourth question is:

> May the Boards hire and fire personnel without regard to Chapter 230, Wis. Stats.?

The answer to this question is yes.

Chapter 230, Stats., applies to state agencies. Section 230.03(3), Stats., defines the term in relevant part to refer to "state board[s] ... created by the constitution or statutes ...."

As noted above, the governing boards of the plans are not state boards. They are neither created by constitution or statute. Therefore, ch. 230, Stats., does not apply to the Boards' decisions to hire and fire personnel.

Your fifth question is:

> Are the plans subject to budgeting and appropriation procedures set forth in Chapters 16 and 20, Wis. Stats.?

The answer to both parts of this question is no.

As to ch. 16, Stats., it is clear from sec. 16.001(1), Stats., that this chapter applies only to "state agencies." The boards of the plans are *not* state agencies and therefore the ch. 16, Stats., procedures do not apply to them.

As to ch. 20, Stats., sec. 20.001(1), Stats., defines which agencies are subject to ch. 20, Stats. This office has previously indicated, in an unpublished opinion (OAG 47-80), that these agencies include only

those agencies delineated under sec. 15.02, Stats., *i.e.*, the constitutional offices, departments and independent agencies in the state's executive branch.

The governing boards of the plans, because of their private, independent status, do not fit into any of these designations. Therefore, I conclude that these boards are likewise not subject to the requirements of ch. 20, Stats.

Your sixth and seventh questions will be considered together. They are:

> Are members of the Boards and Committees of the Plans state officers within the meaning of sections 895.45 and 895.46, Wis. Stats., when such members act within their official capacity?
>
> Are members of the Boards and the Committees of the Plans immune from civil liability for damages when acting within the scope of their office?

The answer to both these questions is no.

Section 893.82, Stats. (formerly sec. 895.45, Stats.), bars suit against a state officer, employe or agent concerning any act committed in discharge of his or her office unless the claimant serves notice of his or her claim to the Attorney General within a specified time. Section 895.46, Stats., provides, among other things, for the state and its political subdivisions to pay judgments rendered against public officers or employes for acts committed while carrying out their duties, when such officers and employes were acting within the scope of their employment.

As noted above, board members (and, likewise, for the same reasons noted above, committee members) are members of private, independent, ongoing concerns. I, therefore, conclude that board and committee members are not state or public officers (or employes or agents) and do not enjoy the protection of secs. 893.82 and 895.46, Stats.

In answer to your second question, it must be noted that the immunity from civil liability to which you refer is available to public officers and public employes, not to employes of private, independent, ongoing concerns. *Scarpaci v. Milwaukee County,* 96 Wis. 2d 663, 693, 292 N.W.2d 816 (1980); *Yotvat v. Roth,* 95 Wis. 2d 357,

365, 290 N.W.2d 524 (Ct. App. 1980). Since board and committee members come under the latter category, and not the former, immunity from civil liability does not extend to their acts as board or committee members.

BCL:JDJ:ewjf

Automobiles And Motor Vehicles; Municipalities; Ordinances; Local governments can prohibit first acts of operating after revocation or suspension, but second offense will not be a crime. OAG 41-82

June 23, 1982.

E. MICHAEL MCCANN, *District Attorney*
Milwaukee County

Your April 15, 1982, letter asks two questions:

1) Can a local government enact an ordinance in conformity with sec. 343.44(2)(a)1., Stats.?

2) Is a conviction under such an ordinance a prior conviction for purposes of sec. 343.44(2)(b)-(e), Stats.?

To your first question, my answer is yes. To your second question, my answer is no.

Two statutes define the power of local governments to enact traffic ordinances, secs. 349.03 and 349.06, Stats. Section 349.03, Stats., expresses the general state policy of uniformly applying the Vehicle Code (Title XXXII of the statutes) throughout the state and prohibits the enactment of local traffic ordinances which are inconsistent with or contrary to the Code or not expressly authorized by statute.

Section 349.06, Stats., authorizes local governments to enact "any traffic regulation [with the exception of regulations providing for the suspension or revocation of motor vehicle operators' licenses] which is in strict conformity with [the] ... provisions of chs. 341 to 348 and 350 for which the penalty ... thereof is a forfeiture."

Section 343.44, Stats., prohibiting driving after revocation or suspension, was recently amended. Ch. 20, sec. 1569h, Laws of 1981. As stated in your letter, second and subsequent violations of sec. 343.44,

Stats., are now crimes; first violations are either forfeitures or crimes depending on the reason for the revocation. Under sec. 349.06, Stats., local governments may enact ordinances prohibiting those acts of operating after revocation or suspension which are forfeitures under the statute; they may not enact ordinances prohibiting those acts which are crimes.

The treatment of operating after revocation or suspension, *i.e.*, first offense civil; subsequent offenses criminal, is entirely consistent with the present treatment of reckless driving (sec. 346.62, Stats.) and drunk driving (sec. 346.63, Stats.), *see* sec. 346.65, Stats., and with prior treatments of several other offenses. Hough, *Wisconsin's Uniform Traffic Court Procedure,* 45 Wis. Bar. Bull., No. 4 at 14-15 (1972); *see State v. Peterson,* 104 Wis. 2d 616, 621-22, 312 N.W.2d 784 (1981). Both Mr. Hough and the author of *Municipalities Must Revise Local Traffic Ordinances,* 67 *The Municipality* at 157-58 (1972), agree that local governments can enact ordinances prohibiting first offenses under these statutes. This view is consistent with the Legislative Reference Bureau's analysis of 1971 Senate Bill 161, subsequently enacted as ch. 278, Laws of 1971, which decriminalized first offenses under several statutes.

My conclusion that local governments can adopt first offense operating after revocation or suspension ordinances is not affected by ch. 193, sec. 18(m), Laws of 1977. As noted in your letter, this nonstatutory provision authorized the enactment of local first-offense drunk-driving ordinances providing for maximum forfeitures of $500 "to be retained entirely by the local unit of government."

In my opinion, this provision was not necessary to empower the enactment of first-offense drunk-driving ordinances; that authority was contained in the general enabling legislation, secs. 349.03 and 349.06, Stats., discussed earlier in this opinion.

My conclusion is also not affected by language in secs. 349.03 and 349.06, Stats., relating to the suspension or revocation of operator's licenses. Section 349.03(2), Stats., forbids the enactment by local governments of traffic regulations "providing for suspension or revocation of motor vehicle operator's licenses ...." Section 349.06(1), Stats., authorizes the enactment by local governments of traffic regulations in conformity with the Vehicle Code for which the penalty

for violation thereof is a forfeiture except for regulations dealing with "the suspension or revocation of motor vehicle operator's licenses ...."

The above-quoted language does not preclude the enactment of ordinances, violation of which may result in suspension or revocation of an operator's license. The statutes expressly empower the courts and the Department of Transportation to suspend or revoke operator's licenses for violations of local ordinances as well as for violations of the statutes. Secs. 343.30(1) and 343.31(1), Stats. In addition, the power to suspend or revoke for violations of ordinances is expressly conferred upon municipal courts as well as the circuit court. Sec. 345.20(2)(b), Stats. What the above-quoted language does preclude is the enactment of local ordinances which by their own terms call for the suspension or revocation of operator's licenses.

With respect to your second question, I have concluded that convictions under a local ordinance are not prior convictions for purposes of sec. 343.44(2)(b)-(e), Stats.

These subsections prescribe the penalties for violations of "this section," namely sec. 343.44, Stats. Unlike the penalty provisions for drunk-driving, sec. 346.65, Stats., sec. 343.44(2), Stats., does not refer to local ordinances adopted in conformity with the statute. Therefore, the criminal penalties for second or subsequent acts of operating after revocation or suspension do not apply where the prior conviction is for an ordinance violation; they apply only where the prior conviction is for a statutory violation. *Cf. Bayside v. Bruner*, 33 Wis. 2d 533, 536-37, n. 1, 148 N.W.2d 5 (1967) (the criminal penalties for second or subsequent acts of drunk driving, under sec. 346.63, Stats. (1965), apply only where the prior conviction is for a statutory violation); *accord*, Hough, 45 Wis. Bar. Bull. at 14-15.

If the Legislature had intended ordinance violations to be first offenses for purposes of applying criminal penalties, it would have expressly mentioned convictions for local ordinances as it did in the drunk-driving statute.

If this result seems anomalous to you, be reminded that for some time this has been the treatment for reckless driving, *see* sec. 346.65(1), Stats., and until 1977 was the treatment of drunk-driving as well. *See* ch. 193, sec. 15, Laws of 1977.

While not directly addressed in your letter, one further matter merits discussion. My opinion that local governments may enact ordinances prohibiting those first acts of operating after revocation or suspension which are forfeitures under the statute, and that convictions under such ordinances do not count as prior offenses for purposes of triggering the criminal penalties of sec. 343.44(2), Stats., does not mean that persons can be prosecuted under a local ordinance regardless of how many times they have operated after revocation or suspension. It is only one's first act of driving after revocation or suspension which is within the scope of a local government's regulatory authority. Second and subsequent acts of operating after revocation or suspension would have to be charged under the statute. *Cf. City of Lodi v. Hine,* 107 Wis. 2d 118, 318 N.W.2d 383 (1982) (second and subsequent drunk-driving must be prosecuted under the statute).

Local ordinances prohibiting operating after revocation or suspension should clearly and expressly state that they apply only to one's first act of driving after revocation or suspension. To the extent that they might purport to prohibit second or subsequent acts, they would be void as contrary to secs. 349.03 and 349.06, Stats., since the penalty for second or subsequent violations of the statute is criminal, not a forfeiture.

This raises the question of how to charge a person suspected of driving after revocation or suspension whose only prior conviction is under an ordinance. The person cannot be charged with a criminal violation because the prior conviction was not for a violation of the statute. The person cannot be charged with an ordinance violation because local governments can prohibit only first acts of driving after revocation or suspension. In my opinion, the proper charge is as a first offender under the statute.

While a person whose prior offense was a statutory violation is subject to criminal penalties if he or she subsequently operates after revocation or suspension, and yet a person whose prior offense was an ordinance violation is not so subject may not strike one as "uniform" traffic procedure, it is for the Legislature to address the problem.

BCL:EM

Criminal Law; Fish And Game; A criminal prosecution pursuant to sec. 29.995, Stats., for a repeated violation of fish and game laws must be commenced by complaint as provided in sec. 968.02, Stats. Such a prosecution must be conducted in accordance with the same statutory and constitutional requirements applicable to other criminal prosecutions. OAG 43-82

July 20, 1982.

CARROLL D. BESADNY, *Secretary*
Department of Natural Resources

Game wardens employed by the Department of Natural Resources are authorized to enforce state laws relating to conservation which include the fish and game laws set out in ch. 29, Stats. The penalty for an initial violation of many of the provisions of ch. 29, Stats., is a forfeiture which may be imposed in a civil lawsuit. Sections 23.50 through 23.85, Stats., set out a procedure for the initiation and prosecution of a civil action based upon such a violation. A violation of ch. 29, Stats., which would ordinarily result in a civil forfeiture may, however, be prosecuted as a criminal matter in particular circumstances in that sec. 29.995, Stats., imposes a criminal penalty upon one who repeatedly violates fish and game laws.

You have requested my opinion with respect to the applicability of constitutional and procedural protections afforded to one accused of a crime when an otherwise civil forfeiture violation becomes a criminal violation by virtue of sec. 29.995, Stats. Specifically you ask:

1. May a citation issued pursuant to sec. 23.62, Stats., serve as a pleading in a criminal prosecution?

2. At what point do the protections afforded the accused in a criminal case have application to a prosecution based upon sec. 29.995, Stats.?

3. Do the answers to the above questions change if, at the time a citation is issued, the officer is aware that the person may have previously violated the law so as to be subject to prosecution under sec. 29.995, Stats.?

A citation issued pursuant to sec. 23.62, Stats., cannot be used to initiate a criminal prosecution. A crime is defined at sec. 939.12, Stats., as conduct which is prohibited by law and punishable by a fine or imprisonment or both. Section 29.995, Stats., declares certain repeated violations of conservation laws to be punishable in that manner and thus criminal violations. Section 23.50(4), Stats., explicitly states that the criminal procedure of ch. 968, Stats., rather than the civil forfeiture procedure of ch. 23, Stats., is to be used for a criminal prosecution. "Where a fine or imprisonment, or both, is imposed by a statute enumerated in sub. (1), the procedure in ch. 968 shall apply." Chapter 968, Stats., is part of the criminal procedure code and governs the commencement of all criminal prosecutions. Every criminal prosecution against a natural person must be commenced by the filing of a complaint or an indictment, sec. 967.05(1), Stats. A criminal complaint is to be issued by a district attorney or by a judge, sec. 968.02, Stats. By contrast, a conservation citation may be issued by an enforcing officer as provided in sec. 23.62(1), Stats.

In the decision of *State v. White*, 97 Wis. 2d 193, 295 N.W.2d 346 (1980), the Wisconsin Supreme Court considered the argument that a uniform traffic citation, similar to the citation here in question, could serve as the basis for a criminal prosecution. That argument, rejected by the court, was founded upon sec. 345.11, Stats. (1977), which arguably required use of the uniform traffic citation to initiate prosecution for criminal moving traffic violations. Here there clearly is no basis for that argument in that the citation procedure of ch. 23, Stats., is expressly declared to have no application in a criminal proceeding.

Every criminal complaint must set out the essential facts demonstrating probable cause, a standard defined in the decision of *State ex rel. Evanow v. Seraphim*, 40 Wis. 2d 223, 230, 161 N.W.2d 369 (1968), in the form of five questions:

> What is the charge? Who is charged? When and Where is the offense alleged to have taken place? Why is this particular person being charged? ... Who says so?

A citation which does not include the fact of the previous game law violation and which does not disclose sec. 29.995, Stats., to be a basis of the prosecution certainly would be insufficient as to the first question above. It is also entirely possible that a court might find that a

particular uniform citation fails to answer satisfactorily the fourth question. *White*, 97 Wis. 2d at 205.

The initiation and prosecution of criminal violations are governed by the Wisconsin criminal procedure code which provides constitutional and procedural protections to every person accused of a crime. Chs. 967 through 979, Stats. There exists no valid legal proceeding to which the penalty provisions of sec. 29.995, Stats., could apply until the prosecution is commenced in the manner specified at sec. 967.05, Stats. At the point such a prosecution is commenced it must then proceed according to the criminal procedure code and the person accused is entitled to the same constitutional and procedural protections available to other criminal defendants. Moreover, certain rights and protections guaranteed by the United States Constitution, the Wisconsin Constitution and the criminal procedure code relate to the investigatory process and have application before the formal commencement of a criminal proceeding. Basically, the person who may later be accused of a violation subject to sec. 29.995, Stats., is entitled to the same protections and rights as is an individual who may be accused of committing any other crime.

One obvious area of difficulty, noted as an example in your request for this opinion, arises when a warden conducts an interrogation of a person before or during the issuance of a civil forfeiture citation pursuant to sec. 23.62, Stats. The United States Supreme Court has ruled that no statement made to a law enforcement officer in the course of a custodial interrogation and in the absence of counsel may be offered at trial as part of the prosecution case-in-chief unless the defendant is first given specific warnings and thereafter waives the rights prescribed in those warnings, *Miranda v. Arizona*, 384 U.S. 436 (1966). "Custodial interrogation" was defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. A law enforcement officer need not give a *Miranda* warning to everyone who is interviewed as part of a general on-the-scene effort to learn what has occurred. *State v. Kraimer*, 99 Wis. 2d 306, 329, 298 N.W.2d 568 (1980). If, however, during a noncustodial interrogation the officer begins to suspect that the person being interviewed committed a crime and decides, for that reason, that the person will not be permitted to leave, it becomes at that point a custodial interroga-

tion and *Miranda* warnings are required. *State v. Fillyaw,* 104 Wis. 2d 700, 722, 312 N.W.2d 795 (1981).

The question presented is whether interrogation before or during the issuance of a citation constitutes "custodial interrogation." I believe that there is a substantial basis to conclude that the issuance of a citation constitutes the assertion of custodial control over an accused person. Moreover, it is also possible that in a particular circumstance, a court may conclude that interrogation by a warden prior to actual issuance of a citation was custodial, thus necessitating that *Miranda* warnings be given, particularly interrogation that continued after the warden believed that there was already probable cause to issue a citation.

Wisconsin law permits a game warden to undertake temporary questioning of a person when the officer reasonably suspects that the individual is involved in a game violation, sec. 23.58, Stats. At the point that the warden has probable cause to believe that an individual is violating or has violated the game laws, he or she may issue a citation, sec. 23.62, Stats. Section 23.63, Stats., indicates clearly that after a citation has been issued, it is then necessary to arrange "the release" of the defendant.

> After the enforcing officer has issued a citation, the officer:
>
> (1) May release the defendant;
>
> (2) Shall release the defendant when he or she:
>
> (a) Makes a deposit under s. 23.66; or
>
> (b) Makes a deposit and stipulation of no contest under s. 23.67.
>
> (3) Shall proceed under s. 23.57, if the defendant is not released.

At the point that the citation is issued, the person to whom it has been issued is in custody pending a release or arrest pursuant to the above statute. Clearly, any interrogation after the issuance of a citation would be custodial interrogation and a *Miranda* warning would be necessary in order to be able to use in a criminal prosecution a statement obtained. An interrogation pursuant to sec. 23.58, Stats., noncustodial at the outset, may shift to being custodial in nature, depending upon the intent of the interrogating officer and the factual circumstances of the interrogation. It is not possible to fix a

crystalline point at which a noncustodial interrogation becomes custodial in nature other than to indicate simply that when the person subject to the interrogation is no longer free to leave, based upon indication of a game law violation, the interrogation is at that point arguably custodial.

The fact that a warden does not realize at the point that a citation is issued that the accused is liable for prosecution under sec. 29.995, Stats., does not change the applicability of the *Miranda* doctrine. A warden may well not know at the point a citation is issued that the accused person has been convicted of a prior game law violation so as to justify a criminal prosecution. A criminal prosecution is, however, certainly a possibility whenever a citation is issued and presumably there will be only few instances in which a warden is certain that the repeater statute cannot apply. A warden issuing a citation is in a situation very similar to that of an agent of the Internal Revenue Service whose investigation may lead either to civil or to criminal action. The fact that an IRS agent did not know that his interrogation would lead to a criminal charge was held not to excuse the failure to offer a *Miranda* warning prior to interrogation of a suspect in custody. *Mathis v. United States*, 391 U.S. 1, 4 (1968). The requirement of the *Miranda* doctrine is founded upon the constitutional right of the accused and thus does not depend upon subjective knowledge of the warden.

The application of the *Miranda* doctrine in the enforcement of game laws may cause administrative difficulty and I wish, therefore, to make clear the limited and specific effect of a failure to offer the *Miranda* warning prior to a custodial interrogation. The failure to give the *Miranda* warning means that a statement taken in the course of that interrogation may later be excluded in a criminal trial. The failure to give the warning does not invalidate an otherwise proper arrest nor does it require exclusion of evidence other than the defendant's statement. *Michigan v. Tucker*, 417 U.S. 433 (1974). Indeed, it is even possible that an excluded statement may be admitted after the defense portion of a trial to impeach the testimony of the defendant. *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Hass*, 420 U.S. 714 (1975). The failure to give a *Miranda* warning prior to a custodial interrogation may limit drastically the value of

any statement obtained in that interrogation but it need not otherwise jeopardize a subsequent criminal prosecution.

BCL:DTF

Burial; Funeral Directors And Embalmers; A manufacturer's plan, involving the utilization of funeral directors on a fee basis in the sale of movable concrete burial vaults to consumers for future use and for delivery to a cemetery to be later designated, constitutes use of personal property under a prearranged funeral plan. Accordingly, provision for deposit of funds in account in seller's name would be contrary to sec. 445.125, Stats., which requires trust account. OAG 45-82

August 2, 1982.

DAVID L. RUSCH, *Chairman*
Funeral Directors & Embalmers Examining Board

You have requested my opinion as to whether a plan for sale of movable concrete burial vaults to consumers for future use, as hereafter described, would be contrary to the provisions of secs. 445.12(6) and 445.125(1), Stats.

You state that a Wisconsin manufacturer:

> [P]roposes to sell its product with the aid of licensed funeral directors. The funeral director would inform the consumer of the availability for purchase of the manufacturer's burial vaults at the time a consumer contacted the funeral director for future funeral arrangements. The funeral director would discuss with the consumer the various vaults available from the manufacturer. If the consumer decided upon the purchase of a burial vault, the consumer would execute the Certificate of Sale and the funeral director would then forward the contract to the manufacturer for its signature, along with the consumer's payment. The funeral director would not be a party to the contract. The purchase of a burial vault would not be a part of any [separate] prearranged funeral plan which might be entered into between the funeral director and the consumer. The funeral director would receive a fee for this service from the vault manufacturer, at the time of need for the vault.

The contract or certificate of sale of burial receptacle states that:

_____ is the Owner with full right, title, and interest to a burial receptacle manufactured by Seller and known as _____, for use at Owner's agent's request.

Seller does hereby further acknowledge receipt of the sum of _____ as and for payment of above mentioned burial receptacle.

This certificate is subject to the following terms and conditions:

1. Owner may rescind this purchase by giving written notice of intent to rescind to Seller within one week of date hereof. Upon failure to give said notice, this certificate shall be binding on all parties.

2. Owner understands and agrees that burial receptacle placement shall be subject to any cemetery charges, permit fees, transportation charges, etc., which shall be paid by Owner at time of placement. Delivery is f.o.b. (freight on board) Seller's plant subject to Seller's normal transportation charge at time of placement to designation of Owner's choice.

3. Owner shall be entitled to all normal warranties that are offered with the burial receptacle.

4. Owner agrees, upon resale of receptacle, to notify Seller of the name and address of the new Owner and to pay a $15.00 transfer fee.

5. Owner's act of making payment shall constitute acceptance of all the terms and conditions hereunder. All sale proceeds are to be deposited in a federally insured account or government securities under title of Lake Shore Burial Vault Pre-Need account until actual performance of services by Seller.

6. Owner or Owner's agent has a right at any time prior to placement to get full credit for a receptacle covered hereunder on a higher priced burial receptacle of this Seller; however, no refund will be made except under #7.

7. In the event of Owner's death and burial outside Seller's service area, Owner's estate or agent shall have a right to a return of One Hundred (100%) percent of purchase price plus accrued interest at a rate of Six (6%) percent per year provided a copy of the death certificate is delivered to Seller.

8. All convenants and conditions herein contained shall extend to and be binding upon the heirs, legal representative and successors and assigns of the Owner and Seller herein.

9. Seller reserves right to provide a substitute burial receptacle of similar quality, standard and price available at the time of placement.

10. Seller shall not be held liable for failure to perform by war, strike, or act of God rendering service impossible.

11. The Seller reserves the right to decide any conditions or situations which may occur, which are not expressly covered herein.

In my opinion, a funeral director who participates in the plan would not be in violation of sec. 445.12(6), Stats., which provides:

> No licensed funeral director, licensed embalmer, or operator of a funeral establishment shall operate a mortuary or funeral establishment located within the confines of, or connected with, any cemetery. No licensed funeral director or licensed embalmer or his or her employe shall, directly or indirectly, receive or accept any commission, fee, remuneration or benefit of any kind from any cemetery, mausoleum or crematory or from any proprietor or agent thereof in connection with the sale or transfer of any cemetery lot, entombment vault, burial

privilege or cremation, nor act, directly or indirectly, as a broker or jobber of any cemetery property or interest therein.

The stated facts do not indicate any connection between the vault manufacturer or funeral director and any cemetery, mausoleum or crematory, nor do the facts show that the funeral director is acting as a broker or jobber of any cemetery property or right to burial therein.

It is my opinion, however, that the plan would violate sec. 445.125(1), Stats., and participation therein by the vault manufacturer and funeral director would subject such persons to fines or imprisonment under sec. 445.15(1), Stats. Section 445.125(1), (2), Stats., as amended by ch. 64, Laws of 1981, provides in part:

(1)(a) Whenever *any person, referred to in this section as the depositor, makes an agreement with a funeral director,* cemetery organization *or any other person referred to in this section as the beneficiary, for the final disposition of the body of a person referred to in this section as the potential decedent, wherein the use of personal property under a prearranged funeral plan* or the furnishing of services of a funeral director or embalmer in connection therewith *is not immediately required, all payments made under the agreement shall be and remain trust funds,* including interest and dividends if any, *until occurrence of the death of the potential decedent,* unless the funds are sooner released *upon demand* to the *depositor,* after written notice to the beneficiary.

(b) Notwithstanding § 701.12 (1), such agreements may be made irrevocable as to the first $1,500 of the funds paid under the agreement by each depositor.

(c) *Any interest or dividends accruing to a trust fund under par. (b) may be made irrevocable.*

(d) *Any depositor who made an irrevocable agreement under par. (b) may designate a different beneficiary at any time prior to death, after written notice to the current beneficiary.*

(e) Nothing in this section shall prevent the sale and delivery of cemetary lots, graves, crypts, niches, columbaria or grave or lot markers or monuments before their use is required.

(2) *All such trust funds shall be deposited with a bank or trust company* ... savings and loan association ... credit union within the state ... and shall be held in a *separate account in* the *name of the depositor,* in trust for the beneficiary until the trust fund is released under either of the conditions provided in sub. (1). In the event of the death of the depositor before the death of the potential decedent, title to such funds shall vest in the potential decedent, and the funds shall be used for the personal property and services to be furnished under the contract for the funeral of the potential decedent. The depositor shall be furnished with a copy of the receipts, certificates or other appropriate documentary evidence showing that the funds have been deposited or invested in accordance with this section. The depositor or the beneficiary shall furnish the bank, trust company, savings and loan association or credit union with a copy of the contract. Upon receipt of a certified copy of the certificate of death of the potential decedent, together with the written statement of the beneficiary that the agreement was complied with, the bank, trust company, savings and loan association or credit union shall release such trust funds to the beneficiary.

While the statute excepts sale and delivery of personalty in the nature of "grave or lot markers or monuments before their use is required," it makes no reference to caskets and movable concrete burial vaults. In my opinion, a person can purchase and take delivery of a casket or concrete burial vault, without the necessity of establishment of a trust fund, where the property and services connected therewith are not part of a prearranged funeral plan. The simple sale and contemporary delivery to the buyer of a casket or vault does not, by itself, constitute an agreement for final disposition of a body. However, where there is a prearranged funeral plan for the final disposition of the body of a decedent, involving the future delivery and use of personal property such as a casket or movable burial vault, as here, the statute requires that payments made "shall be and remain trust funds including the interest thereon until the death of the person whose funeral is so provided for or the funds are sooner released upon the demand of the person making the pay-

ments ...." *Grant County Service Bureau v. Treweek,* 19 Wis. 2d 548, 551, 120 N.W.2d 634, 637 (1963). The court continued:

> Regardless of the somewhat misleading and confusing language of the statute, it is apparent the intent of the legislature was to secure the performance of the funeral services and burial contracted for by creating a trust of the payments made. Funeral directors before performing the contract might go out of business, die or be unable to perform the contract for other reasons. The enactment of the legislature recognizes the validity of prearranged and prepaid funerals and the public interest in securing the performance of such arrangements.

Under the stated facts, the concrete vault is intended for burial use by a named owner as potential decedent. The vault is not to be delivered presently, but is intended for delivery to "designation" [destination] at owner's or owners' agent's request for placement in a cemetery. The seller retains a right to substitute a different burial receptacle at the time of placement. The contract provides that all sale proceeds shall be deposited in a federally insured account or government securities "under title of Lake Shore Burial Pre-Need Account." Such account is not a "separate account," nor is it "in the name of the depositor" as required by sec. 445.125(2), Stats. Under the stated facts, and sec. 445.125(1), Stats., the seller and funeral director would be beneficiaries rather than the depositor. The transaction constitutes an agreement for the use of personal property, the burial vault, under a prearranged funeral plan. The statute is applicable to prearranged funeral plans which may not cover every aspect of final disposition. Here the plan fails to provide for a trust fund as required by statute. You do not advise as to the dollar amounts involved in such contracts and I therefore decline to discuss aspects of revocability and right to refund.

BCL:RJV

Public Service Commission; Public Utilities; Words And Phrases; The Public Service Commission has the authority to determine that a holding company, formed by a public utility corporation to engage in non-utility business ventures, is itself a public utility within the meaning of sec. 196.01(1), Stats., where the holding company possesses the power to control the utility plant or equipment or where the arrangement is a device to enable the public utility corporation to evade regulatory jurisdiction. OAG 46-82

August 3, 1982.

FRED A. RISSER, *President*
State Senate

You have requested my opinion as to whether a holding company formed by a public utility corporation would itself be a "public utility" within the meaning of sec. 196.01(1), Stats., and thus subject to the regulatory jurisdiction of the Public Service Commission (Commission).

You indicate in your request that a public utility corporation has formulated a plan to create a holding company corporation. One element of the plan is an exchange of stock through which the newly formed holding company would acquire all common stock of the public utility corporation while each current shareholder would receive an equivalent number of shares in the holding company corporation. I understand that this plan is founded upon the assertion that the proposed holding company would be beyond the regulatory jurisdiction of the Commission and would therefore be able to engage in non-utility business ventures entirely free of regulatory control. You do not indicate in your request the degree to which the existing public utility corporation and the new holding company would share directors, officers, equipment, facilities, personnel, information and other resources.

There appear to be two legal bases upon which the Commission could conclude that such a holding company would be a "public utility" within the meaning of sec. 196.01(1), Stats. The Commission could properly regard the holding company to be a "public utility" within the meaning of sec. 196.01(1), Stats., if it determined that the holding company held the power to exercise direct or indirect con-

trol over the plant or equipment of the public utility corporation. Alternatively, the proposed holding company could be considered an instrumentality to enable the public utility corporation to evade regulatory jurisdiction and, for that reason, the Commission could properly disregard the separate corporate identity of the holding company and simply treat it as one component of an existing public utility.

The fundamental purpose of the Commission's regulatory jurisdiction is the protection of the consuming public. *Wis. Environmental Decade v. Public Service Comm.*, 81 Wis. 2d 344, 260 N.W.2d 712 (1978). In furtherance of that purpose, the Wisconsin Legislature has conferred comprehensive authority upon the Commission to protect the public's interest in utility service. Every "public utility" is subject to the jurisdiction of the Commission and that term is broadly defined to include,

> [E]very corporation, company, individual, association, their lessees ... that may own, operate, manage or control ... any plant or equipment or any part of a plant or equipment, within the state, ... for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public.

Sec. 196.01(1), Stats. The Wisconsin Supreme Court has characterized this definition as,

> [P]lainly designed to cover every conceivable situation of the existence of an industry of the nature mentioned. No room was left for controversies over technical ownership or capacity to own. The purpose was to encompass the physical situation, — to deal with the condition whatever it might be, and the person, natural or artificial, whatever might be the particular relation of the person, or persons, natural or artificial, to the physical situation or condition, whether that of owner, operator, manager or controller, and give thereto the status of a public utility.

Calumet Service Co. v. Chilton, 148 Wis. 334, 348, 135 N.W. 131 (1912). Thus, the question of whether any particular corporation is a "public utility" is primarily a factual question for the Commission, one which must focus upon the relationship of the corporation to the plant and equipment, and its power to control the use of that plant and equipment. *Commonwealth Telephone Co. v. Carley*, 192 Wis.

464, 213 N.W. 469 (1927); *see also Rochester Telephone Corporation v. United States,* 307 U.S. 125, 145 (1939).

Essentially, the Legislature has authorized the Commission to assert regulatory jurisdiction over any corporation which actually possesses power over plant or equipment that is used to provide utility service. There must, however, actually be some potential for control, albeit limited or indirect, before a corporation may be determined to be a "public utility." Normally, ownership of utility property carries with it the power to control the use of that property, but where that is not so, as where the technical owner cannot exercise even indirect control over the utility plant, the Commission cannot ignore that reality. In *Chippewa Power Co. v. Railroad Comm.,* 188 Wis. 246, 205 N.W. 900 (1925), the supreme court considered an arrangement whereby the owner of a hydroelectric plant leased that facility for a thirty-year term at a fixed annual cash rental. The court described the arrangement as one in which the owner, in effect, had conveyed the property to the corporation which actually was operating as a public utility and held that because the owner could not be involved in the use of the plant or the sale of electric power it therefore was not a public utility. The court has also ruled, however, that the power to exert control indirectly, together with a financial stake in the operation of utility property, is a sufficient factual basis to declare a corporation to be a "public utility." In *Wisconsin Traction, L., H. & P. Co. v. G. B. & M. C. Co.,* 188 Wis. 54, 205 N.W. 551 (1925), the court considered an agreement whereby a corporation which owned a hydroelectric plant leased it for operation by a municipality. The lease reserved to the plant owner the right to require dismissal of any unsatisfactory city employe and the rental amount was based upon the volume of power sold to the public as well as the rates charged. The agreement also provided for cancellation upon two years notice should the corporate owner itself undertake full public utility operations. Nothing in *Wisconsin Traction* suggests that the owner of the leased utility plant actually had sought dismissal of any municipal employe or had attempted to cancel the lease upon notice. The power retained by the owner was both limited and unexercised. That degree of indirect control over the operation of the utility plant was, nevertheless, held to be sufficient as an alternative basis to determine the owner to be a "public utility" within the meaning of sec. 196.01(1), Stats. *Wisconsin Traction,* 188 Wis. at 66.

The court in *Chippewa Power* observed that the corporate owner-lessor did not actually operate any utility equipment nor did it have any financial stake in the sale of utility service to anyone. *Chippewa Power*, 188 Wis. at 250-51. That observation was not intended, however, to limit the definition of "public utility" to those entities which did in fact operate facilities and sell power. The court had decided only one month before in *Wisconsin Traction* that a lessor-owner which retained only very limited and unexercised power to control the use of utility property was a "public utility." The *Chippewa Power* decision declared simply that where the owner held absolutely no power to control the operation of the leased plant, technical ownership alone would not bring the owner within the definition of "public utility." That decision did not modify the expansive definition of "public utility" adopted in *Wisconsin Traction* and indeed the court expressly cautioned against such a misreading of its later decision. *Chippewa Power*, 188 Wis. at 255.

The proposed holding company will own all common stock of a public utility corporation. It is a fundamental concept of corporation law that one corporation may so dominate another that the controlled corporation has in reality no independent existence, so that it is appropriate to regard the two as a single legal entity. 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* at 209, sec. 43 (ed. 1974); *United States v. Reading Co.*, 253 U.S. 26 (1920); *Chicago, M. & St. P. R. Co. v. Minneapolis C. & C. Asso.*, 247 U.S. 490 (1918); *People v. Michigan Bell Telephone Co.*, 246 Mich. 198, 224 N.W. 438 (1929). It is, however, possible for one corporation to exercise substantial control over another without reaching the point at which the separate corporate identities are effectively merged. Certainly, ownership of a majority of the corporation's stock represents an obvious opportunity to exercise substantial indirect control through the selection of directors. Indeed, the ownership of less than a majority of stock can confer effective control of a corporation. *Rochester Telephone Corporation*, 307 U.S. at 145. The potential power of indirect control through the selection of directors is something more than a mere possibility with respect to directors of a public utility corporation who are required by law to maintain direct involvement in the management of the corporation's property, affairs and business. Sec. 182.0135(1), Stats.

The Commission, in its consideration of the control that a holding company could exercise over a public utility, may wish to consider the substantial abuse of the holding company device which occurred at the national level. In 1928 the United States Senate ordered the Federal Trade Commission to investigate the development of national holding companies which controlled extensive networks of public utility corporations. That inquiry ascribed to the holding companies a wide range of abuses and determined that the resulting utility systems were, by virtue of their diversity and complexity, beyond effective regulatory control. Federal Trade Commission Report, *Utility Corporations,* S. Doc. No. 92, 70th Cong., 1st Sess. 62 (1935); Buchanan, *The Public Utility Holding Company Problem,* 25 Cal. L. Rev. 517 (1937). Congress thereafter enacted the Public Utility Holding Company Act of 1935 to control and, in effect, to eliminate interstate utility holding companies, 15 U.S.C.A. § 78 *et seq.* On the question of control, the act created a rebuttable presumption that a holding company which owned ten percent or more of the outstanding voting securities of a public utility thereby controlled or exercised a controlling influence over the utility operation. 15 U.S.C.A. § 79(b)(7). The United States Supreme Court upheld that presumption noting that, "[d]omination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of inter-corporate relationships." *North American Co. v. Securities & Exch. Comm.,* 327 U.S. 686, 693 (1946). The prospect confronting the Commission here is total ownership of utility common stock by the proposed holding company and that, almost unavoidably, confers at least indirect control over the public utility corporation.

The statutory definition of "public utility" expressly includes any corporation that may "operate, manage or control" utility plant or equipment used to provide utility service. Sec. 196.01(1), Stats. The *Wisconsin Traction* decision indicates that limited, unexercised control together with a financial stake in the utility operation is a proper basis upon which to determine a corporation to be a "public utility." "Control," in the context of the Commission's primary obligation to protect the interest of the public, must mean not only the total corporate domination that constitutes a de facto merger but must also include the power to exercise indirect control over utility operations through stock ownership. Here the ownership of all common stock of the utility by the holding company would constitute an obvious,

direct financial interest in the utility operation and would enable the holding company to exercise substantial indirect control through the directors of the utility corporation. The question of whether a particular holding company would be a "public utility" is for the Commission to decide but the circumstances you describe appear to provide a solid basis to assert regulatory jurisdiction.

The fact that the proposed holding company would be able to exercise control of utility operation through stock ownership is not the only basis for Commission jurisdiction. The proposed holding company is not simply a corporate investor acquiring utility stock in an arm's length transaction. In my opinion, the relationship between the proposed holding company and the existing public utility corporation could create a separate, alternative basis upon which the Commission could properly regard the holding company as a public utility.

Two factors, aside from the factual question of power to control, imply very forcefully that the Commission should not regard the proposed holding company as an entity legally distinct from the public utility corporation. The first is the fact that the initiative for the creation of the proposed holding company stems in large measure from the public utility corporation itself. Thus, the very manner in which the new holding company is being formed suggests that it is in fact merely an instrumentality of the public utility corporation. More importantly, I understand that one purpose of the holding company arrangement is to shield non-utility business ventures from Commission jurisdiction. It therefore appears that the proposed holding company is a mechanism to avoid Commission jurisdiction with respect to the non-utility business interests of the public utility corporation. These circumstances constitute, in my view, a proper basis for the Commission to regard the proposed holding company as a part of the public utility corporation and thus a "public utility" within the meaning of sec. 196.01(1), Stats.

The Commission has been assigned authority to monitor the non-utility business ventures of public utilities. Section 196.06(2), Stats., provides:

> Every public utility engaged directly or indirectly in any other business than that of the production, transmission or furnishing of heat, light, water or power or the conveyance of tele-

> phone messages or telegraph messages shall, if required by the commission, keep and render separately to the commission in like manner and form the accounts of all such other business, in which case all the provisions of this chapter shall apply to the books, accounts, papers and records of such other business.

The foregoing subsection derives, without substantive change, from sec. 1797m-8(2) of the initial enactment of state utility regulation, ch. 499, Laws of 1907. The Legislature acknowledged at the beginning of utility regulation that public utilities would be able to engage in non-utility businesses but provided to the Commission the power to monitor such activity as it saw fit.

The Legislature could properly regard regulation of non-utility business ventures to be necessary to protect the public's interest in utility service. As I have indicated, the primary purpose of the public utility regulation by the Commission is the protection of consumers. The development by a public utility of disparate interests and responsibilities could divert the attention of corporate managers from what would otherwise be their sole concern, namely, efficient utility service. *Cf. United Air Lines, Inc. v. Civil Aeronautics Bd., etc.*, 569 F.2d 640, 646 (D.C. Cir. 1978). The rate setting process requires that the operating costs of the public utility be accurately determined. Costs associated with non-utility business ventures are to be segregated from utility-related costs and that may be exceedingly difficult to do where personnel and equipment are used for utility and non-utility activities. *Cf. Smith v. Illinois Bell Teleph. Co.*, 282 U.S. 133, 150 (1930). Moreover, significant business losses in non-utility ventures must inevitably have an impact upon the financial stability of the public utility. Lilienthal, *Regulation of Utility Holding Companies*, 29 Colum. L. Rev. 404, 431 (1929). The power to review the non-utility business of a public utility is a logical and essential adjunct to the Commission's fiduciary responsibility with respect to the basic financial stability of the utility. Secs. 184.02, 184.03 and 184.11, Stats. Clearly, the Legislature authorized the Commission to monitor the non-utility business involvements of public utilities as part of the comprehensive jurisdiction assigned to the Commission.

The theoretical distinction between separate corporate identities will be disregarded where it is a device to evade proper regulatory jurisdiction. 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations*, sec. 45, at 252 (ed. 1974). *Chicago, M. & St. P. R. Co. v.*

Minneapolis C. & C. Asso., 247 U.S. 490 (1918); *Tenn. Public Serv. Com'n v. Nashville Gas Co.*, 551 S.W.2d 315, *cert. denied* 434 U.S. 904, *reh'g denied*, 434 U.S. 988 (1977); *May Department Stores Co. v. Union Electric L. & P. Co.*, 341 Mo. 299, 107 S.W.2d 41 (1937); *People v. Michigan Bell Telephone Co., 246 Mich. 198, 224 N.W. 438 (1929); Ohio Mining Co. v. Public Utilities Commission*, 106 Ohio St. 138, 140 N.E. 143 (1922); *General Telephone Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971). The Wisconsin Supreme Court, in *General Motors A. Corp. v. Commissioner of Banks*, 258 Wis. 56, 45 N.W.2d 83, 46 N.W.2d 328 (1950), considered the relationship between the Motor Insurance Corporation (MIC), a wholly-owned subsidiary of the General Motors Corporation which provided automobile insurance and the General Motors Acceptance Corporation (GMAC), another wholly-owned corporation which financed the purchase of new automobiles. The Legislature had enacted a limit upon the amount of commission that could be paid as a rebate to automobile dealers by lenders such as GMAC. Shortly after that limit was adopted, MIC was created, and began paying to dealers an "insurance commission" for each policy written. The commissioner of banks determined that these commissions constituted indirect additional payments by GMAC in violation of the maximum allowable rebate. The court found the commissioner had a proper factual basis to determine that the two corporations were separate in name only and observed, "[i]n legal language each corporation is considered as a separate entity. Separate corporations with common stock ownership, however, should not be treated as separate entities if reasonable regulation is hampered thereby." 258 Wis. at 64a. I understand that the separate holding company corporate entity is being formed by the public utility corporation apparently with the express purpose of removing from the jurisdiction of the Commission non-utility business activities that would otherwise fall within the ambit of sec. 196.06(2), Stats. Whether the proposed holding company is to be regarded as a separate entity remains a question of fact for the Commission but it is difficult to avoid the conclusion that it is merely an instrumentality to evade proper regulatory control.

The fact that the proposed holding company would be subject to Commission jurisdiction pursuant to secs. 196.52 and 196.79, Stats., does not preclude the Commission from treating the holding company as a "public utility" within the meaning of sec. 196.01(1), Stats.

Clearly, the formation of the proposed holding company would be a "reorganization" of the existing public utility corporation which would require the prior approval of the Commission pursuant to sec. 196.79, Stats. While a "reorganization" may be compelled by the creditors of a corporation in financial distress, the term also may refer to a restructuring by or on behalf of the stockholders to modify the character of the corporate entity. *Huber v. Martin,* 127 Wis. 412, 105 N.W. 1031, 105 N.W. 1135 (1906); 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations,* secs. 7201 and 7216 (ed. 1973); *Voluntary Reorganization of Corporations,* 23 Marq. L. Rev. 192 (1938). Presumably, the proposed transaction would be regarded as a "reorganization" within the meaning of sec. 71.368, Stats. *Cudahy v. Tax Comm.,* 226 Wis. 317, 276 N.W. 748 (1937). A plan by which an air carrier sought to diversify through the formation of a holding company, something apparently very similar to that which now is proposed by a Wisconsin public utility corporation, was described as a "reorganization" in *United Air Lines, Inc. v. Civil Aeronautics Bd., etc.,* 569 F.2d 640 (D.C. Cir. 1977). In my view, there appears to be no real question but that the proposed formation of the holding company and the exchange of common stock would be a "reorganization" of the utility corporation within the meaning of sec. 196.79, Stats., and thus subject to the prior approval of the Commission. Potentially, the Commission's jurisdiction to regulate affiliated interests pursuant to sec. 196.52, Stats., may also require that there be prior Commission approval of the formation of the proposed holding company. The holding company would, by virtue of stock ownership, be an "affiliated interest" of the existing public utility. Sec. 196.52(1)(a), Stats. The Commission must approve any contract or arrangement whereby a public utility provides to an affiliated interest any service, property or right worth more than $10,000. Sec. 196.52(3), Stats. Arguably, the effort to form the holding company, including the planning and promotion of the idea, is itself an arrangement for providing services which may require prior Commission approval depending upon the value of those services. The fact, however, that the formation of the proposed holding company would require prior Commission approval under sec. 196.79, Stats., and possibly under sec. 196.52, Stats., in no way suggests any limitation upon the power of the Commission to determine the holding company to be a "public utility." Neither sec. 196.79 nor sec. 196.52, Stats., would subject the holding company or the public utility to

conflicting or inconsistent requirements. The potentially overlapping jurisdiction based upon secs. 196.79 and 196.52, Stats., together with the broad, inclusive definition of "public utility" in sec. 196.01(1), Stats., illustrate clearly the intent that the interest of the public be represented by the Commission before fundamental changes in the control of a public utility corporation are undertaken.

It is noteworthy that the Commission's regulatory jurisdiction over an affiliated interest is far less extensive than it is with respect to a "public utility." For example, a corporation which is a "public utility" must obtain Commission approval for the issuance of securities while an affiliated interest need not do so. Sec. 184.03, Stats. It should also be noted that the affiliated interest concept was adopted in Wisconsin and elsewhere at a time when state utility commissions were unable to effectively regulate large national utility holding companies. The enactment of sec. 196.52, Stats., was an effort to gain some small degree of control over dealings between jointly held subsidiary corporations which were arguably immune from state regulation because of their interstate character. It was an attempt, without notable success, to indirectly control corporations that could not be subjected to direct state regulation as "public utilities." It most certainly was not intended to diminish the Commission's authority with respect to a corporation which is operating within Wisconsin and is within the definition of a "public utility" as set forth in sec. 196.01(1), Stats.

In summary, it is my opinion that the Commission has the authority to determine that a holding company formed by a public utility corporation is itself a "public utility" within the meaning of sec. 196.01(1), Stats., where the holding company possesses the power to control the utility property or where the arrangement is a device to enable the public utility corporation to evade regulatory jurisdiction.

BCL:DTF

Elections; Reapportionment; Votes And Voting; The federal district court apportioned both members and senatorial districts in its order of June 17, 1982. The effective date of new district lines for purposes of nominations, regular, recall and special elections, mass mailings and in-district travel is June 17, 1982, as to both holdover senators and incumbents in districts where elections are scheduled in the Fall of 1982. OAG 48-82

August 19, 1982.

FRED A. RISSER, *President*
State Senate

You request advice as to the date new legislative district lines as ordered by the three judge federal court become effective. You are particularly concerned with holdover senators in cases where district lines have been altered by the addition and deletion of territory. Your specific questions and my answers follow:

1. Are the electors of the old district or the electors of the new district required to sign petitions to recall a holdover senator?

Answer: Electors of the new district.

2. Are the electors of the old district or those of the new district entitled to vote in a special election to fill a vacancy in the office of a holdover senator?

Answer: Only electors of the new district.

3. Is a holdover senator entitled to reimbursement for travel and mailings within the boundaries of the new district?

The answer is yes, but only to the extent provided by statute and senate rules. *See* sec. 11.33, Stats.

Whether old legislative districts have any vitality depends upon the purpose being inquired into. By reason of the order of the federal district court, the old districts cannot be utilized for purposes of nomination and election after June 17, 1982. For purposes of nomination and election, the new legislative district lines became effective that date.

I. The Wisconsin Constitution Requires The Legislature To "apportion and district anew the members of the senate and assembly" And The Federal District Court Did Reapportion Members As Well As Districts.

A. Constitutional provisions.

The recent case of *The Wisconsin State AFL-CIO, et al v. Elections Board, et al,* No. 82-C-0113 (E.D. Wis. 1982), and other reapportionment cases talk in terms of reapportionment of districts. The state constitutional provision places a duty on the Legislature to: "apportion and district anew the members of the senate and assembly ...." Wis. Const. art. IV, § 3. Wisconsin Constitution art. IV, § 4, requires that "members of the assembly shall be chosen biennially, by single districts ... by the qualified electors of the several districts ...." Wisconsin Constitution art. IV, § 5, requires:

> [S]enators shall be elected by single districts .... The senate districts shall be numbered in the regular series, and the senators shall be chosen alternately from the odd and even numbered districts. The senators elected or holding over at the time of the adoption of this amendment shall continue in office till their successors are duly elected and qualified; and after the adoption of this amendment all senators shall be chosen for the term of four years.

Wisconsin Constitution art. IV, § 6, provides:

> No person shall be eligible to the legislature who shall not have resided one year within the state, and be a qualified elector in the district which he may be chosen to represent.

B. Power of the court in reapportionment cases in general.

After the 1980 federal census, the Wisconsin Legislature failed to timely reapportion its "members" or districts from which they were to be next elected. In other cases, as set forth in 25 Am. Jur. 2d *Elections* § 37, it has been held that:

> [W]here a state's legislative apportionment scheme has been found to be unconstitutional, and the state legislature, although afforded adequate opportunity to do so, has failed to enact a constitutionally acceptable apportionment scheme, the federal court may enjoin the holding of any further elections

> under the invalid apportionment act. It may order the legislature to reapportion itself on a constitutional basis within a specified time, and if the legislature fails to reapportion in accordance with the court order, the court may then proceed to reapportion the legislature pursuant to a plan devised by the court. At least two federal courts have declared vacant the offices of legislators elected under an invalid apportionment scheme, and ordered the governor to call a special election to be held at large to fill such vacancies. ... [Citing *Reynolds v. State Election Board,* 233 F. Supp. 323 (W.D. Okla. 1964).]
>
> ... Where an election is imminent and the state's election machinery is already in progress, a court may properly withhold the granting of immediately effective relief from an existing apportionment scheme that has been found to be invalid. In such circumstances District Courts, after having authorized the holding of regular legislative elections under the invalid apportionment system, have limited the time within which the legislators so elected may serve, have limited the legislature to enacting only such legislation as is essential to carrying on its activities until a constitutionally valid apportionment scheme has been enacted, and have ordered that the vote of each legislature elected under an invalid apportionment scheme be weighted in a specified proportion.

In *Sixty-Seventh Minnesota State Senate v. Beens,* 406 U.S. 187 (1972), it was held that a court could not drastically reduce the number of representatives and senators, but would have had power to change the number of representatives in a minor degree.

C. The federal court decision did not vacate offices held by incumbent senators so as to require holdover senators to stand election in their altered districts.

The Eastern District Court for Wisconsin did not choose to change the number of assemblymen or senators and did not act to vacate offices held by incumbents. It recognized that half the senators had more than two years remaining on terms for which they were elected. In its decision and amended order of June 17, 1982, the court renumbered senate districts and changed the boundaries of the district served by Senator Krueger. Thus, it appears to have given tacit consent to senators having two years remaining on their terms

to serve in the newly created districts without the necessity of running in the Fall elections in 1982. The court in effect reapportioned members as well as districts and concluded that all of the citizens in the various assembly and senate districts would be represented under the court promulgated plan, even though there would not be an immediate vote for each senator. *See* June 17, 1982 opinion at 4, 5.

II. From And After June 17, 1982, The New Districts Are To Be Utilized For All Elections For State Senator, Including Those Involving Recall Or Special Election To Fill A Vacancy.

A. Holdover senators are responsible to the inhabitants of the new district.

The three judge court made it very clear that it tried to keep the boundaries of *even numbered* senatorial districts, in which elections were not scheduled in 1982, as unaltered as possible while at the same time equalizing population. In reapportioning "members" as well as "districts," and in permitting senators having two years left on the term for which they were elected to continue to serve in newly created districts without standing for election in 1982, the court recognized the proposition that such senators are responsible *to the inhabitants of the district to which their numbers correspond, that is the new district,* and not to the inhabitants of the district from which they were elected.

B. The effective date of new district lines.

The February 22, 1982, order held that "the apportionment plan enacted by the Wisconsin Legislature in 1972 is unconstitutional ..." and enjoined defendants from utilizing such plan in the "nomination or election of members of the state Legislature" from such districts. The injunction was dissolved by the June 9, 1982, order, but the court ordered: "1. The attached judicial plan of reapportionment be effective for the 1982 legislative elections and thereafter until such time as a valid constitutional redistricting plan is enacted into law." The June 17, 1982, decision and amended order made changes in the numbering of districts and finalized their physical forms.

C. Recall elections or elections to fill vacancies must be based on the new district lines.

A special election to fill a vacancy in the office of a member of the state Legislature is an election. Secs. 5.02(4), 8.50, 17.19(1), Stats. Recall involves the election process. Wis. Const. art. XIII, § 12; sec. 9.10, Stats. In my opinion neither recall elections nor elections to fill a vacancy can be based on an apportionment plan which has been found unconstitutional.

In regard to recall petitions, the state constitution provides that "[s]uch petition shall be signed by electors ... in the ... district from which such officer is to be recalled." It does not require signatures by electors in the district from which the officer was elected although the districts would in the usual event be identical. Here, the number of senatorial districts was not changed and as subsequently renumbered, each senator was, in effect, reapportioned to the newly created district by number. As far as I have been able to determine, senators serving even numbered districts live within the boundaries of the new districts and no vacancy would result by reason of sec. 17.03(4), Stats. In my opinion the reference to the December 15, 1953, Opinion of the Wisconsin Attorney General by the three judge panel, in its June 17, 1982, decision is somewhat misplaced and is not an endorsement of the proposition expounded in such opinion that only electors from the *old district* vote in an election to fill a vacancy. *See* 39 Op. Att'y Gen. 360 (1950), 42 Op. Att'y Gen. 343 (1953). *Also see* discussion by H. Rupert Theobold in 1970 *Wisconsin Blue Book* at 234.

D. No vacancy is created where a senator in an odd numbered district presently does not reside within boundaries of the new district.

One or more senators in odd numbered districts do not reside within the boundaries of the new district bearing the number similar to that of the district from which such senators were elected. No vacancy would result by reason of sec. 17.03(4), Stats., since the senator remains an inhabitant of the "district from which he or she is elected." However, such a person would have to move into the new boundaries and qualify as an elector to be elected to represent the newly created district. Wis. Const. art. IV, § 6.

III. Mass Mailings And In-District Travel.

You advise that senate policy provides for mass mailings as well as reimbursement for "in-district travel." Section 11.33, Stats., prohibits the use of public funds by elected state officials for mass mailings between the period beginning with the first day for the circulation of nomination papers until after the date of the election.

It is my opinion that from and after June 17, 1982, each holdover senator or incumbent in a district in which an election is scheduled in the Fall of 1982, represents the newly created district which bears a number similar to that from which he or she was originally elected and, subject to senate rules and sec. 11.33, Stats., may make mass mailings and may qualify for "in-district travel" when mailings are made to persons, or miles are traveled, within the boundaries of the new district.

CONCLUSION

It is my opinion that, for purposes of nominations, regular, recall and special elections, mass mailings and in-district travel, the effective date of the new district lines is June 17, 1982, the date of the court order. This effective date applies, in my opinion, *both* to holdover senators and to incumbents in those districts where elections are scheduled for the Fall of 1982.

BCL:RJV

Elections; Legislature; Senate; A state senator need not resign his or her present seat before filing and running for a newly numbered senate seat, merely because he or she is presently an incumbent senator. OAG 49-82

September 9, 1982.

FRED A. RISSER, *President*
State Senate

You inquire on behalf of the Senate Organization Committee, as follows: "Can an incumbent Senator file and run for a newly numbered Senate seat without resigning his or her present seat?" No specific details or background is provided for your question.

In general response to your question, I advise that a state senator need not resign his or her present seat before filing and running for a newly numbered senate seat, merely because he or she is presently an incumbent senator.

Wisconsin Constitution art. IV, § 6, provides that "[n]o person shall be eligible to the legislature who shall not ... be a qualified elector in the district which he may be chosen to represent." To be "a qualified elector in the district which he may be chosen to represent," a candidate must be, among other things, a resident of the district. *The State ex rel. Wannemaker v. Alder,* 87 Wis. 554, 558, 58 N.W. 1045 (1894); Wis. Const. art. III, § 1; sec. 6.02, Stats. However, eligibility to office is generally determined as of the time the person assumes the duties of office. *State ex rel. Zimmerman v. Dammann,* 201 Wis. 84, 92-93, 228 N.W. 593 (1930). Section 8.15(4)(b), Stats., also presently provides that each candidate for nomination at the September partisan primary must declare that he or she "will *at the time he or she assumes office* meet applicable age, citizenship, residency or voting qualification requirements, if any ... and that he or she will otherwise qualify for office if nominated and elected." Therefore, under normal circumstances, these provisions would not act to require resignation of an incumbent senator in order for such person to file and run for a newly numbered senate seat. It should be noted, however, that such incumbent senator would vacate his or her present seat by "ceasing to be an inhabitant of the district from which he or she is elected." Wis. Const. art. XIII, § 10; sec. 17.03(4), Stats. Furthermore, candidates should be aware that the affidavits of circulation of nomination papers for the newly numbered district seat may only be made by qualified electors of the new district. Sec. 8.15(4)(a), Stats.

BCL:JCM

Forest Crop Law; Right Of Way; Section 77.03, Stats., relating to enrolling land in the forest cropland program, creates a right of access across an owner's non-enrolled lands to reach the owner's landlocked enrolled lands for the purposes of hunting and fishing. OAG 50-82

September 9, 1982.

PAUL MCLIMANS, *District Attorney*
Iowa County

You have asked whether the owner of a landlocked parcel of land which the owner has enrolled under the forest cropland law, sec. 77.03, Stats., must provide public access to the landlocked parcel across said owner's contiguous lands which abut public highways and are not enrolled themselves under sec. 77.03, Stats. The answer to your question is yes.

Section 77.03, Stats., grants an owner enrolled thereunder (as evidenced by a written contract) substantial property tax relief for twenty-five or fifty years provided the owner follows acceptable forestry standards and allows the public to hunt and fish on the enrolled parcel. Section 77.03, Stats., provides, in part: "The owners by such contract consent that the public may hunt and fish on the lands, subject to such rules as the department of natural resources prescribes regulating hunting and fishing."

Section 77.03, Stats., thus requires owners to convey access to parcels enrolled thereunder to those hunting and fishing. The question then becomes, if the enrolled parcel is landlocked is the owner required to provide public access to said landlocked parcel across the owner's other lands? As stated previously, my answer is yes.

An easement of necessity is created by sec. 77.03, Stats. To opine otherwise would subvert the statutory provision cited above. An easement of necessity over a seller's remaining contiguous land is created at common law by the seller's conveyance of a contiguous landlocked parcel to another. *Backhausen v. Mayer,* 204 Wis. 286, 234 N.W. 904 (1931); *Jurstadt v. Smith,* 51 Wis. 96, 8 N.W. 29 (1881). Here, unlike common law, the easement of necessity is created by contract provision required by statute. A sale of land is not consummated under sec. 77.03, Stats., but rather a sale or lease of some rights in the land for certain tax benefits. In order to comply with the statute, the owner must allow access to the landlocked parcel across his remaining lands.

The access the owner must provide need not be formal in the sense of a recorded and described easement, or a laid out road or the like. The owner need only allow the public to walk across non-enrolled

lands to reach enrolled land. Failure to allow access to the landlocked parcel may jeopardize enrollment in the forest croplands and its tax benefits. Sec. 77.10, Stats.

Thus, if the owner enrolls a landlocked parcel in the forest cropland program, the criminal trespass statute, sec. 943.13, Stats., cannot apply to those otherwise properly entering the owner's non-enrolled lands to reach the enrolled lands. Hunting and fishing on the enrolled lands by the public, of course, cannot be criminal trespass because sec. 77.03, Stats., permits such use. Other criminal statutes, however, may apply to those crossing the owner's non-enrolled lands or using enrolled lands for hunting and fishing. For example, such users may be causing criminal damage to property under sec. 943.01, Stats., by destroying crops or fences, cutting timber, damaging outbuildings, etc.

I am unable to provide a definitive answer to your second question: Whether an enrollee under the forest croplands law may restrict the number of hunters and fishermen crossing non-enrolled lands to gain access to the enrolled lands. Neither the common law nor the statute provides guidance on this question. No limitations on the landowner appear to be imposed by law. Similarly, no statute allows a landowner to so restrict numbers. Hundreds of fishermen crossing to reach good fishing on enrolled lands on opening day may cause crop damage or broken fences by sheer numbers rather than criminal intent. For purely practical reasons, then, the owner may wish to provide a fenced and designated access to the enrolled land. Particular circumstances will dictate different responsibilities, however. *See* sec. 29.68, Stats. Aggravated situations, nevertheless, should always be handled in cooperation with Department of Natural Resources wardens, or local law enforcement personnel.

BCL:JPA

Bonds; Municipalities; Vocational And Adult Education; Section 67.04(2)(a), (b), (8), Stats., does not authorize the City of Marshfield to utilize its bonding authority to construct a building wholly for use by the Mid-State Vocational Technical and Adult Education District on a leased basis. OAG 51-82

September 10, 1982.

ED JACKAMONIS, *Speaker*
State Assembly

You have requested my opinion on three questions based on the facts stated below.

The City of Marshfield presently leases the Purdy Building, which it owns, to the Mid-State Vocational, Technical and Adult Education District (hereafter VTAE District). The latter utilizes it for its educational purposes. The city is considering construction of a new building at a site adjacent to the University of Wisconsin Center, which would be owned by the city but which would be leased to the VTAE District. The Purdy Building would revert to the city to be used for other municipal purposes. It is suggested that construction of a building at the new site would foster a more comprehensive educational atmosphere and allow the University of Wisconsin and the VTAE District to cooperate more fully.

You inquire:

(1) Can the City of Marshfield borrow money or issue bonds for the construction of this building pursuant to SS67.04(2)(a), Stats., as a "public building"?

(2) If the answer to question (1) is in the negative, can the City construct this building, pursuant to SS67.04(2)(b), Stats., and consider it to be a "new school building"?

(3) If the answer to questions (1) and (2) are in the negative, can the City construct this building pursuant to SS67.04(8), Stats., as a regional project?

The answer to questions one and three is no. The answer to question two is probably not.

Where a city has statutory power to engage in an activity, such as operation of a hospital in a proprietary capacity, it may construct and lease municipal buildings to a non-profit organization to operate and maintain as a hospital and utilize revenue bonds to finance construction. *Meier v. Madison,* 257 Wis. 174, 42 N.W.2d 914 (1950). Where there is express statutory authority, buildings may be constructed by a city through the issuance of revenue bonds and leased to a private corporation where the purpose is to attract industry or

trade to the community or to stabilize the community and provide employment. *See* 15 McQuillen *Mun. Corp.* § 39.31 (3rd Ed.). While cities also have power to lease excess real estate held for a public purpose but not presently needed for such purpose, such power would not authorize a city to utilize bonding to construct buildings not presently needed for *its own public purpose* for lease to a private person or another municipality. Statutes authorizing bonding are to be strictly construed. In 15 McQuillen *Mun. Corp.* § 43.21 (3rd Ed.) it is stated:

> It is usually held that authority to issue bonds can be conferred only by language which leaves no reasonable doubt of an intention to grant it, and, in accordance with the well-established rule of construction, adhered to in early and late judicial decisions, if the intention of a statute purporting to authorize the issuance of bonds is doubtful, the doubt will be resolved against the authority to issue the bonds. Uniform bond acts exist in some states and they usually are strictly construed. In considering the legality of a proposed bond issue, courts construe the constitution and statutes more strictly than they are construed in determining the validity of bonds already issued and disposed of.

Although Wis. Const. art XI, § 3, guarantees cities and villages the power to determine their local affairs and government subject to the constitution and legislative enactments of statewide concern as shall with uniformity affect every city or every village, it also provides: "No county, city, town, village, school district or other municipal corporation may become indebted in an amount that exceeds an allowable percentage ..."; establishes percentage limits for cities and cities authorized to "issue bonds for school purposes"; and requires the levy of a tax before or at the time the bonds are issued.

Sections 67.03 and 67.04, Stats., were enacted to implement the constitutional provisions and sec. 67.04(2), (8), Stats., provides, in material part:

> (2) Cities *shall not borrow* money or issue bonds therefor *for any purpose except only those specified in this subsection,* and subject to the general limitation of amounts prescribed by s. 67.03, namely:

(a) For the erection, construction, enlargement or repair of a city hall or other *public buildings* and the purchase of sites for the buildings ....

(b) For the purchase or erection of *new school buildings*, or additions to old buildings ... for the purpose of providing for the educational requirements of the city including territory attached to such city for school purposes; to acquire sites and erect or enlarge buildings thereon, and to equip such new or old buildings for parental schools; to do renovating, remodeling and repairing of existing buildings ....

. . . .

(8) By any county, town, city or village, to acquire, develop, remodel, construct and equip land, buildings and facilities for *regional projects*, either alone or acting jointly under s. 66.30.

A basic rule of statutory construction requires that specific statutory language controls over less specific language. *Fred Rueping Leather Co. v. City of Fond du Lac*, 99 Wis. 2d 1, 298 N.W.2d 227 (1980). Section 67.04(2), Stats., refers only to city bonding. Therefore, a "public building" would be one used for city purposes, not VTAE purposes. Similarly, a "new school building" would be one erected "for the purpose of providing for the educational requirements of the city ..." and not for the needs of the VTAE District. Sec. 67.04(2)(b), Stats. As noted below, sec. 67.04(6), Stats., permits VTAE districts to issue bonds for the erection of its own school buildings.

In my opinion the building to be constructed by the City of Marshfield and leased to the VTAE District would not constitute a public building for a city public purpose within sec. 67.04(2)(a), Stats. It is to be constructed primarily for a VTAE District and any use by the citizens of Marshfield would be limited by the lease and by secs. 38.12 and 38.14, Stats., which places exclusive control of "the district schools," buildings and equipment therein in the hands of the district board.

In my opinion the proposed building, even if agreed upon jointly by the city council and the District VTAE Board, would not constitute a building for a "regional project" as that term is used in sec. 67.04(8), Stats. The term "regional project" is not defined in chs. 66

and 67, or other provisions of the statutes. While its meaning may not be limited to items or facilities included in an "adopted regional master plan" under sec. 66.945(10)-(12), Stats., it cannot be said that every project which may benefit a region is a regional project. A region is something different than a city or VTAE District. The boundaries of the latter are established under sec. 38.06, Stats. The boundaries of a region for regional planning purposes are fixed by the Governor under sec. 66.945(2)(b), Stats.

With respect to your second question, I am of the opinion that the city probably could not construct and fund the building under sec. 67.04(2)(b), Stats., as a "new school building." As stated in 71 Op. Att'y Gen. 9 (1982), VTAE District Boards do operate schools, and although a VTAE District may be a school district for purposes of the public records law, sec. 19.21, Stats., sec. 38.01(2), (4), Stats., distinguish "VTAE Districts" and "school districts" for purposes of ch. 38, Stats. In 64 Op. Att'y Gen. 24 (1975), it was stated that VTAE schools were not "district schools" within the meaning of Wis. Const. art. X, § 3, and were not subject to the restrictions of that provision which require that education be "free and without charge for tuition to all children between the ages of 4 and 20 years ...." I construe the terms school and school buildings as used in the first four phrases of sec. 67.04(2)(b), Stats., to be a school and school building operated by the public school system as primary, elementary and high schools under supervision of the Superintendent of Public Instruction. The 1961 statutes, provided for the creation of a vocational and adult education *area* school district having its own board and such board had power to levy taxes and could incur indebtedness for buildings. *See* secs. 41.155, 41.16, Stats. (1961). The statutes also provided for *local* schools of vocational and adult education within a city or village or as a local board of vocational and adult education comprising a union high school, common or unified school district. *See* sec. 41.15, Stats. (1961). In 50 Op. Att'y Gen. 25 (1961), it was stated that a city board of vocational and adult education was not a separate entity from the city and has no separate authority to borrow money and issue bonds. Such board had to request the city to utilize its bonding power under then sec. 67.04(2)(b), Stats. (1961), which provided that a city could issue bonds for the erection of buildings "for parental or schools of vocational and adult education, or for use by the local board of vocational and adult education." Chapter 154, Laws of 1971, amended

sec. 67.04(2)(b), Stats., to eliminate the word "or" after "parental" and the words "of vocational and adult education, or for use by the local board of vocational and adult education." The chapter also abolished the system of *local* vocational and adult education boards (city, village and school district) and replaced it with a system of vocational, technical and adult education districts having district boards with power to levy taxes and borrow money through issuance of general obligation bonds. *See* sec. 67.04(6), Stats., as to the express power of vocational, technical and adult education districts to borrow and bond for erection of educational buildings. In view of the legislative history of sec. 67.04(2)(b), Stats., and the restrictive meaning this office has placed on the words "district schools," it cannot be said that sec. 67.04(2)(b), Stats., would authorize the City of Marshfield to issue bonds to erect a building to be wholly utilized by the VTAE District on a leased basis.

BCL:RJV

Counties; Prisons And Prisoners; Wisconsin Resource Center; Rights and responsibilities of counties in prisoner transfers to the Wisconsin Resource Center discussed. OAG 52-82

September 13, 1982.

FRED A. RISSER, *President*
State Senate

You have requested my opinion concerning county authority and financial liability relating to inmate placements at the Wisconsin Resource Center (hereinafter referred to as Center). The statutes relating to the new Center, as created by ch. 20, secs. 752r, 753m, 968, 969i and 969mg, Laws of 1981, provide as follows:

> 46.052 Correctional and other institutions; expansion and establishment of facilities. (1) On or after the effective date of this act (1981), the department shall:
>
> . . . .
>
> (am) Provide the facilities necessary to operate Hughes hall at the Winnebago mental health institute with 160 beds. The facilities may be used for forensic patients and persons transferred under ch. 51 or 53.

46.056 Wisconsin resource center. The department shall establish the Wisconsin resource center on the grounds of the Winnebago mental health institute near Oshkosh. The subunit of the department responsible for community services shall have responsibility for inmates transferred under s. 53.055.

53.01 Names of prisons. ... *The resource facility at Oshkosh is named "Wisconsin Resource Center".* ... The institutions named in this section ... are state prisons.

53.055 Transfer of inmates to resource center. The department may transfer an inmate from a prison, jail or other criminal detention facility to the Wisconsin resource center if there is reason to believe that the inmate is in need of individualized care. The inmate is entitled to a transfer hearing by the department on the transfer to the Wisconsin resource center. Inmates who are admitted for involuntary treatment of mental illness, developmental disabilities, alcoholism or other drug abuse must be admitted under s. 51.37(5).

53.18(lm) Inmates transferred to the Wisconsin resource center shall be afforded a transfer hearing under s. 53.055.

Through the above provisions, inmates can be transferred to the Center under two distinct authorities: (1) sec. 53.055, Stats., which provides for inmate transfers for "individual care"; and (2) sec. 51.37(5), Stats., which provides for inmate transfers for treatment of individuals who are mentally ill, drug dependent, developmentally disabled or alcoholic. These separate procedural mechanisms result in authorizing different degrees of county authority and financial responsibility.

In my opinion, counties have no authority over transfers initiated pursuant to sec. 53.055, Stats. This statute expressly vests the exclusive power to transfer inmates in the Department of Health and Social Services. I find no specific statutory language indicating that counties should have any transfer authority under sec. 53.055, Stats.

You further inquire as to the departmental authority to transfer "county prisoners" from a county jail to the Center. The term "county prisoner" is somewhat ambiguous. Section 59.23, Stats., provides that the sheriff has "custody" of all persons detained or imprisoned in his jail, although in some instances this "custody" simply consists of temporarily *detaining* a prisoner who is in the

actual custody of the department. Section 53.055, Stats., certainly permits the department to transfer inmates detained in a county jail, when that inmate is considered to be in department custody. However, it is my opinion that the statute does not allow the department to transfer an inmate to the Center where the county has custody. It is true that sec. 53.055, Stats., states that "[t]he department may transfer an inmate from a ... jail ... to the Wisconsin Resource Center," without any specific qualifying clause regarding department custody. However, that statutory grant of authority is immediately followed by the requirement that the inmate be afforded "a transfer hearing by the department on the transfer to the Wisconsin resource center." Transfer hearings are provided for in the Department of Health and Social Services' rules. Sections HSS 302.17(5) and 302.20(3) Wis. Adm. Code. Such rules specifically relate to the assessment, evaluation and classification of convicted offenders sentenced or committed to state correctional institutions, and include considerations which would be inapplicable to persons detained in or sentenced to county jail who are not in the custody of the department. *See* sections HSS 302.01 and 302.14 Wis. Adm. Code.

Therefore, if an inmate of a county jail is already in departmental custody, then the department can use sec. 53.055, Stats., procedures to transfer the inmate to the Center. That is, the department can hold a "transfer hearing" pursuant to its administrative rules. The determination of the need for individualized care would be made at this hearing. However, if the jail inmate is not in department custody, sec. 51.37, Stats., procedures must be utilized to the extent they are applicable.

With regard to county financial responsibilities under sec. 53.055, Stats., transfers, it is my opinion that the county does not incur liability, except under sec. 51.37(5), Stats. Section 46.056, Stats., states: "The subunit of the department responsible for community services shall have responsibility for inmates transferred under s. 53.055."

Section 51.42(1)(b), Stats., provides:

> *Responsibility of county government.* The county boards of supervisors have the primary responsibility for the well-being, treatment and care of the mentally ill, developmentally disabled, alcoholic and other drug dependent citizens residing within their respective counties and for ensuring that those

> individuals in need of such emergency services found within their respective counties receive immediate emergency services. County liability for care and services purchased through or provided by a board established under this section shall be based upon the client's county of residence except for emergency services for which liability shall be placed with the county in which the individual is found. For the purpose of establishing county liability, "emergency" services includes those services provided under the authority of s. 51.15, 51.45(11)(b) and (12), 55.05(4), 55.06(11)(a) or 51.45(11)(a) for not more than 72 hours. Nothing in this paragraph prevents recovery of liability under s. 46.10 or any other statute creating liability upon the individual receiving a service or any other designated responsible party.

I view sec. 51.42(1)(b), Stats., as a strong indication that the Legislature intended the term "responsibility" in sec. 46.056, Stats., to encompass financial liability. Under the subheading of "Responsibility of county government," sec. 51.42(1)(b), Stats., gives county boards "primary responsibility" in the first sentence, and then outlines county liability.

The Legislature, through sec. 46.056, Stats., designated that the Division of Community Services of the Department of Health and Social Services would be "responsible" for transfers pursuant to sec. 53.055, Stats. Since this is an exclusive designation of responsibility, and this responsibility includes financial liability, counties do not incur liability for sec. 53.055, Stats., transfers.

County officials have authority to initiate transfers from a county jail to the Center under sec. 51.37(5), Stats., subject to department approval. The last sentence of sec. 53.055, Stats., requires that transfers for involuntary treatment of mental illness, developmental disabilities, alcoholism or other drug abuse proceed under sec. 51.37(5), Stats. Transfers for voluntary treatment of mental illness, developmental disabilities, alcoholism or other drug abuse are not specifically provided for under sec. 53.055, Stats.

Section 51.37(5)(a), Stats., provides:

> When a licensed physician or licensed psychologist of a state prison, of a county jail or of the department reports in writing to the officer in charge of a jail or institution that any prisoner

> is, in his or her opinion, mentally ill, drug dependent, or developmentally disabled and is dangerous as defined in s. 51.20(1), or is an alcoholic and is dangerous as provided in s. 51.45(13)(a) 1 and 2; or that the prisoner is mentally ill, drug dependent, developmentally disabled or is an alcoholic and is in need of psychiatric or psychological treatment, and that the prisoner voluntarily consents to a transfer for treatment, the officer shall make a written report to the department which may transfer the prisoner if a voluntary application is made, and if not file a petition for involuntary commitment under s. 51.20(1) or 51.45(13). Any time spent by a prisoner in an institution designated under sub. (2) or (3) shall be included as part of the individual's sentence.

Under the above provisions, a licensed physician or psychologist of a county jail may submit a report to the officer in charge of the jail, who may then submit a report to the department suggesting a transfer to the Center.

Further, sec. 51.37(5)(b), Stats., authorizes emergency transfers to a state treatment facility:

> The department may authorize an emergency transfer of an individual from a prison, jail or other criminal detention facility to a state treatment facility if there is cause to believe that such individual is mentally ill, drug dependent or developmentally disabled and exhibits conduct which constitutes a danger as defined in s. 51.20(1)(a)2 of physical harm to himself or herself or to others, or is an alcoholic and is dangerous as provided in s. 51.45(13)(a)1 and 2. The correctional custodian of the sending institution shall execute a statement of emergency detention or petition for emergency commitment for such individual and deliver it to the receiving state treatment facility. The department shall file the statement or petition with the court within 24 hours after receiving the subject individual for detention.

Again, while the county has some authority under sec. 51.37(5)(b), Stats., where the "correctional custodian of the sending institution" is the county sheriff, this authority is limited in that the transfer is subject to department authorization.

Also, as you have correctly noted, transfers from the county jail can be made under sec. 51.37(5)(a), (b), Stats., with no county authority over the transfer decision. The first sentence of sec. 51.37(5)(a), Stats., provides that a physician or psychologist of the department can submit the initial report recommending treatment of any inmate thought to be in need of the specified treatment to the officer in charge of the jail. The officer is then required to submit a report to the department. Likewise, under sec. 51.37(5)(b), Stats., for emergency transfers, the department may authorize the transfer proceedings from a county jail, and the "correctional custodian" of the jail is required to then "execute a statement of emergency detention or petition for emergency commitment."

Section 51.05(2), Stats., addresses this question of board authority over sec. 51.37(5), Stats., transfers:

> The department may not accept for admission to a mental health institute any resident person, except in an emergency, unless the board established under s. 51.42 in the county where the person has legal residency authorizes the care, as provided in s. 51.42(9). *Patients who are ... transferred from ... a jail or prison to a state treatment facility under s. 51.37(5) are not subject to this section.*

As the above also suggests, a sec. 51.37(5), Stats., transfer to the Center also necessitates interpreting the Center as a "state treatment facility."

Section 51.01(15), Stats., defines "state treatment facility," as used in ch. 51, as: "any of the institutions operated by the department for the purpose of providing diagnosis, care or treatment for mental or emotional disturbance, developmental disability, alcoholism or drug dependency and includes but is not limited to mental health institutes."

Since sec. 53.055, Stats., provides that "[i]nmates who are admitted for involuntary treatment of mental illness, developmental disabilities, alcoholism, or other drug abuse must be admitted under s. 51.37(5)," it is necessarily implied that the Center will be providing such treatment, and will therefore meet the sec. 51.01(15), Stats., definition for state treatment facility. I also note that ch. 108, Laws of 1981, which provides additional funding for the Hughes Hall conversion, identifies the funds as being for "mental health facilities."

This does not ignore, however, sec. 53.01, Stats., as amended by ch. 20, Laws of 1981, which designates the "Wisconsin Resource Center" as one of the state prisons. It is clear that, for purposes of sec. 51.37(5), Stats., inmate transfers at least, the Center meets the sec. 51.01(15), Stats., definition of a state treatment facility, notwithstanding the fact that it may also be a prison, under sec. 53.01, Stats.

With regard to county financial liability for sec. 51.37(5), Stats., transfers to the Center, it is my opinion that the board established under sec. 51.42, Stats., is responsible where there is a transfer of a county resident or a non-county emergency transfer resident from the county jail to the Center. Section 51.42(1)(b), Stats., gives the county board of supervisors the responsibility, which, in turn is delegated to the respective community boards, sec. 51.42(3)(a), Stats. Section 51.42(9)(a), Stats., states:

> CARE IN OTHER FACILITIES. (a) Authorization for all care of any patient in a state, local or private facility shall be provided under a contractual agreement between the board and the facility, unless the board governs the facility. The need for inpatient care shall be determined by the clinical director of the program. In cases of emergency, a facility under contract with any board shall charge the board having jurisdiction in the county where the patient is found. The board shall reimburse the facility for the actual cost of all authorized care and services less applicable collections according to s. 46.036, unless the department determines that a charge is administratively infeasible, or unless the department, after individual review, determines that the charge is not attributable to the cost of basic care and services. *Boards shall not reimburse any state institution nor receive credit for collections for care received therein by* nonresidents of this state, interstate compact clients, transfers under s. 51.35(3), and *transfers from Wisconsin state prisons under s. 51.37(5)(a),* commitments under s. 971.14, 971.17, 975.01, 1977 stats., 975.02, 1977 stats., 975.06 or admissions under s. 975.17, 1977 stats., or children placed in the guardianship or legal custody of the department under s. 48.355, 48.427 or 48.43.

Since there is an express provision that the boards have no financial responsibility for sec. 51.37(5)(a), Stats., transfers from state

prisons, it may be inferred that board financial liability does exist in sec. 51.37(5), Stats., transfers from county jails.

The inference drawn from sec. 51.42(9)(a), Stats., is also directly applicable in reference to voluntary transfers. If it had not been intended to hold boards liable for sec. 51.37(5), Stats., transfers, the exclusion of state prison transfers from financial liability under sec. 51.37(5)(a), Stats., would not be necessary.

In answer, then, to your general question on county financial liability for transfers to the Wisconsin Resource Center, I am of the opinion that, based on the present applicable statutes, counties normally are liable for involuntary transfers from jails under sec. 51.37(5), Stats., unless the transfer involves a prisoner previously committed to the department, and/or the transfer is from the Wisconsin state prisons for treatment of mental illness, developmental disabilities, alcoholism or other drug abuse.

BCL:JCM:bh

Newspapers; Words And Phrases; A municipality may not expend funds to publish the text of a legal notice in a shopper paper which does not meet the qualifications contained in sec. 985.03(1)(a), Stats. OAG 55-82

September 20, 1982.

MATTHEW F. ANICH, *District Attorney*
Ashland County

You ask whether sec. 985.08(5), Stats., prohibits a municipality from expending funds to publish the text of a legal notice in a shopper paper which does not meet the circulation and publication requirements in sec. 985.03(1)(a), Stats., even in situations where the text of the notice is simultaneously published in the municipality's official newspaper.

In my opinion, secs. 985.03(1)(a) and 985.08(5), Stats., contain such a prohibition.

Section 985.08(5), Stats., provides: "Except as otherwise provided in this section, no fee shall be paid and no public funds shall be used for subsidizing any privately owned newspaper for payment for any

legal notice, which newspaper has not previously qualified as a public newspaper as defined in s. 985.03."

A municipality may designate one official newspaper under sec. 985.05(1), Stats. If it elects to do so, the text of all legal notices must be published in the designated newspaper. Sec. 985.05(2), Stats. Section 985.05(2), Stats., has been interpreted by this office as requiring that the text of any legal notice be published, at a minimum, in the municipality's official newspaper; sec. 985.02(1), Stats., was interpreted to also permit publication in other *qualified* newspapers. 60 Op. Att'y Gen. 95 (1971).

To be a qualified newspaper, a publication must meet the requirement that:

> [F]or at least 2 years, immediately before the date of the notice publication, the newspaper has been published regularly and continuously in the city, village or town where published, and has had a bona fide paid circulation:
>
> 1. That has constituted 50% or more of its circulation; and,
>
> 2. That has had actual subscribers at each publication of not less than 1,000 copies in 1st and 2nd class cities, or 300 copies if in 3rd and 4th class cities, villages or towns.

Sec. 985.03(1)(a), Stats.

This office has previously indicated that funds may not be expended to publish the text of a legal notice in a publication with no paid circulation. 39 Op. Att'y Gen. 347 (1950). The following discussion contained in *Wisconsin Legislative Council Committees,* 1963-65, V. 7, Minutes of Legal Notices Advisory Committee, June 17, 1964, at 3, indicates that the holding in 39 Op. Att'y Gen. 347 (1950) is also applicable to secs. 985.03(1) and 985.08(5), Stats.:

> § 985.03(1) - This section is not now a part of the bill. Mr. Zielke suggested an amendment in regard to the paid circulation and also as to shutdowns due to strike, lockout, war, fire, or act of God. The amendments which he proposed were incorporated into the section and annexed to the minutes of the March 18, 1964, meeting. Discussion followed as to the exact intent of Mr. Zielke in proposing the suggested changes. He stated that the changes would guarantee that the circulation is in the area where the newspaper is published and that paid cir-

culation is the basis. Mr. Zielke said that if paid circulation is one of the requisites it should be made to mean something, otherwise it should be omitted. Mr. Tipler presented the situation where a newspaper, due to tourist trade during a part of the year, may tend to give away a large quantity of newspapers to obtain tourist trade for the merchants advertising therein. Under such a situation the newspaper could never qualify if these amendments were enacted. Mr. Zielke said that frequently he has seen it work just the opposite. That is why the amendments were proposed.

Since the substance of the proposed amendments was adopted, it is a reasonable inference that the Legislature intended to require publication in newspapers with paid circulation.

You question, however, whether a shopper paper contains sufficient "reports of happenings of recent occurrence of a varied character, such as political, social, moral and religious subjects ..." to qualify as a newspaper under sec. 985.03(1)(c), Stats. It is my opinion that the quantity of news or the number of reports contained in a shopper publication is immaterial; a shopper publication containing any such items is a "newspaper" within the meaning of sec. 985.03(1)(c), Stats. *Cf. Greenfield Town Crier v. Com'r of Revenue,* 385 Mass. 692, 433 N.E.2d 898 (1982).

Finally, you question whether publication of the text of a legal notice in a non-qualifying newspaper or other print media is tantamount to the publication of a "legal notice" under sec. 985.01(1), Stats., in situations where the text of that legal notice is also published in a qualifying newspaper. The definition of the term "legal notice" is extremely broad. 39 Op. Att'y Gen. 347, 348 (1950). Recognizing the breadth of the term, the Legislature provided in sec. 985.08(6), Stats., that: "In addition to required legal notice, the requisitioning agency may also publish such notice in other media such as trade journals and newspapers published in this state devoted substantially to the publication of official notices to bidders, *but such additional notice shall not be construed as a legal notice."* The underscored language would not have been employed unless each insertion in one of the print media would ordinarily constitute the publication of a "legal notice." It is therefore my opinion that, except for publication in trade journals and similar publications specifically designed to give notice to bidders, each time the text of an item

which must be published appears in the print media, the publication of a "legal notice" within the meaning of sec. 985.01(1), Stats., occurs.

I therefore conclude that a municipality may not expend funds to publish the text of a legal notice in a shopper paper which does not meet the qualifications contained in sec. 985.03(1)(a), Stats.

BCL:FTC

Wisconsin Relocation Assistance Act; Words And Phrases; Under the Relocation Assistance Act, tenants may not be treated as owners and are limited to those benefits provided by the Legislature for tenants. OAG 57-82

October 4, 1982.

JAMES J. GOSLING, *Secretary*
Department of Industry, Labor and Human Relations

You have requested my opinion as to what constitutes an "ownership interest" under the State Relocation Assistance Act. In a letter dated February 4, 1982, your predecessor explained the situation, which provides the basis for your present concern, as follows:

> [It is] our view that a tenant business having a real property ownership interest (e.g. one having a long-term lease which is acquired) should be considered as an owner-occupant business for relocation purposes and would be entitled to benefits provided under s. 32.19(4m)(a).
>
> Our position is a key factor preventing our approval of a relocation plan submitted by the City of Milwaukee for a major downtown redevelopment project. This project will displace a number of tenant businesses having what we feel are substantial real property interests. The City's position is that *all* tenant-businesses, regardless of the fact that they may possess a substantial ownership interest in the land being acquired, should be treated as tenant-occupants. They argue, for example, that even a tenant having a remaining leasehold of 15 years who receives compensation for the value of this lease as part of the award should be classified as a tenant entitled only to a four year rent differential and a maximum payment of $30,000 pur-

suant to s. 32.19(4m)(b). It is our belief that a tenant having this kind of property interest is more properly defined as an owner-occupant and should be entitled to a differential payment computed on the rent differential over a 15 year period with a maximum payment of $50,000 as provided under s. 32.19(4m)(a).

Under the State Relocation Assistance Act you cannot treat a tenant as an owner.

Section 32.19(2)(i), Stats., defines the term "owner" as follows: "'Owner displaced person' means a displaced person who owned the real property being acquired and also owned the business or farm operation conducted on the real property being acquired."

Section 32.19(2)(j), Stats., defines the term "tenant" as follows: "'Tenant displaced person' means a displaced person who owned the business or farm operation conducted on the real property being acquired but leased or rented the real property."

Section 32.19(4), Stats., provides benefits for owner-occupants. On the other hand, sec. 32.19(4)(b), Stats., provides other, albeit lesser, benefits for tenants who are displaced from dwellings as a consequence of public acquisitions.

Section 32.19(4m)(a), Stats., provides benefits for a landowner who operates a business on the acquired property.

Section 32.19(4m)(b), Stats., provides benefits, albeit smaller benefits, for a tenant who occupies the business on the acquired property.

Thus, we have six acts of the Legislature which define tenants and owners and prescribe specific and separate benefits for each classification. There simply is no legal basis for ignoring this clear intent of the Legislature.

It is generally accepted that a "tenant" is one who has possession of property by the written (lease) or oral permission of the owner. An "owner" is one who has legal title to the real estate. The common and ordinary meaning of these words hardly need further elaboration or explanation.

In the absence of ambiguity there is no legal basis for agency interpretation. *Trojan v. Board of Regents,* 100 Wis. 2d 53, 301 N.W.2d 269 (Ct. App. 1980).

It is implicit in your letter that you feel there is possible inequality in the operation of these statutes. In this regard you ask that I address any constitutional issues that may exist.

Inequality does not defeat a statute if there is a reasonable basis for the different treatment or, in other words, the classification. *State v. Consolidated Freightways Corp.*, 72 Wis. 2d 727, 242 N.W.2d 192 (1976). A classification is presumed valid unless it can be said that no set of facts can reasonably be conceived that would sustain it. *State ex rel. Real Est. Exam. Bd. v. Gerhardt*, 39 Wis. 2d 701, 159 N.W.2d 622 (1968). In determining whether there is a rational basis for a statutory classification, the constitution is contravened only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. *Stanhope v. Brown County*, 90 Wis. 2d 823, 280 N.W.2d 711 (1979).

The purpose of the Relocation Act is set forth in sec. 32.19(1), Stats., which states in part:

> 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.

The losses suffered by an owner are different in kind from the losses sustained by a tenant. These differences form a reasonable basis for the classifications adopted by the Legislature.

Also, treatment of tenants is not necessarily less generous or fair than treatment of ownership interests. For example, a tenant, whose leasehold interest has been acquired, is entitled to the fair market value of his lease. *Maxey v. Redevelopment Authority of Racine*, 94 Wis. 2d 375, 288 N.W.2d 794 (1980). The fair market value of the acquired leasehold interest is the difference between the payments under the acquired leasehold and the rental market of comparable properties. Moreover, it appears the tenant receives, in part, double compensation, *i.e.*, fair market value of the acquired lease plus the rent subsidy, which is similarly determined, under the Relocation Assistance Act. On the other hand, as an example, an owner's building may be valued at cost of reproduction less depreciation. The various factors considered under depreciation, while as a matter of law are correct, may not be realistic criteria in periods of an inflationary

economy. Thus, the displaced owner may actually suffer a noncompensable loss as a consequence of the taking or condemnation. Benefits under the Relocation Assistance Act may provide compensation for this loss. Accordingly, the property owner may not, as a practical matter, have a favored position or classification under the law.

In any event, your agency cannot adopt a rule that would be contrary to the clear intent of the Legislature.

BCL:CAB

Patient's Rights Law; Patients; Prisons And Prisoners; An individual in custody of the sheriff for transport to, from and during an involuntary commitment hearing under sec. 51.20, Stats., has rights to the least restrictive restraint appropriate for the individual, regardless of the individual's patient status under sec. 51.61, Stats. OAG 58-82

October 15, 1982.

MARK S. GEMPELER, *Corporation Counsel*
Waukesha County

You have asked whether sec. 51.61, Stats., the Patient's Rights Law, applies when an individual is in the custody of the sheriff for transport to, from and during an involuntary commitment hearing under sec. 51.20, Stats.

Section 51.61(1), Stats., confers certain rights upon "patients." The word "patient" is defined in the first paragraph of sec. 51.61(1), Stats., as:

> [A]ny individual who is receiving services for mental illness, developmental disabilities, alcoholism or drug dependency, including any individual who is admitted to a treatment facility in accordance with this chapter or ch. 55 or who is detained, committed or placed under this chapter or ch. 55, 971 or 975, or who is transferred to a treatment facility under s. 51.35(3) or 51.37 or who is receiving care or treatment for such conditions through the department or a board established under s. 51.42 or 51.437 or in a private treatment facility.

Implicit in this definition is the fact that a patient is in a physical setting appropriate to receive "services," "care" or "treatment" for the conditions enumerated in sec. 51.61(1), Stats. The concept of receiving services, treatment or care is severely strained if a person is deemed to be receiving such services, treatment or care when in the custody of the sheriff for transport to, from and during an involuntary commitment hearing.

I conclude that sec. 51.61, Stats., applies only to "patients" and that individuals in the custody of the sheriff for transport to, from and during an involuntary commitment hearing are not "patients" by reason of that custody. If persons facing an involuntary commitment hearing under sec. 51.20, Stats. (a chapter 51 detainee), have rights to be free from physical restraint, those rights are independent of sec. 51.61, Stats.

A chapter 51 detainee has the right to be free from unreasonable force asserted to keep him in custody. *See Landrigan v. City of Warwick*, 628 F.2d 736, 742 (1st Cir. 1980); *Clark v. Ziedonis*, 513 F.2d 79, 80 n. 1 (7th Cir. 1975), and cases cited therein; *Johnson v. Ray*, 99 Wis. 2d 777, 299 N.W.2d 849 (1981); *Wirsing v. Krzeminski*, 61 Wis. 2d 513, 213 N.W.2d 37 (1973).

Clearly, a police officer may use reasonable force to maintain custody over an individual facing an involuntary commitment hearing. But, if no force is necessary, then any force at all is unreasonable. Under the circumstances here involved, I equate the use of physical restraints with the use of physical force.

The "excessive force restraint" doctrine is a species of the "least drastic alternative" principle used by the courts in such cases as *Lessard v. Schmidt*, 379 F. Supp. 1376 (E.D. Wis. 1974) (wherein Wisconsin's civil commitment law was found constitutionally defective in seven areas), and of the "least restrictive restraint" principle which surrounds liberty interests.

Therefore, the automatic or universal use of handcuffs or other restraints amounts to an unreasonable use of force where no restraint is required and is to that extent a violation of the rights of a chapter 51 detainee.

Second, once a detainee is present at a chapter 51 hearing, either before the court as fact-finder or before a jury under sec. 51.20(11),

Stats., a new interest arises. One of the primary issues in a chapter 51 hearing is whether the detainee is dangerous. The uninterrupted shackling and handcuffing of a chapter 51 detainee poses a powerful suggestion to the fact-finder that the detainee is in fact dangerous simply because of the badges of restraint he or she must wear. Such restraints act as a "constant reminder of the accused's condition ... [that] may affect a juror's judgment." *Estelle v. Williams*, 425 U.S. 501, 504-05, *reh. denied* 426 U.S. 954 (1976). For that reason, the Supreme Court has ordered that shackles and manacles may be used against an accused only as a last resort. *Illinois v. Allen*, 397 U.S. 337, 344 (1970). The cases are united in condemning such excessive and unfair measures. *See United States v. Roustio*, 455 F.2d 366, 370-71 (7th Cir. 1972); *Way v. United States*, 285 F.2d 253, 254 (10th Cir. 1960); *U.S. ex rel. Boothe v. Superintendent, Etc.*, 506 F. Supp. 1337, 1340-42 (E.D.N.Y. 1981); *State v. Staples*, 99 Wis. 2d 364, 373-74, 299 N.W.2d 270 (Ct. App. 1980); *State v. Cassel*, 48 Wis. 2d 619, 623-25, 180 N.W.2d 607 (1970) (Wisconsin adoption of principles announced in *Way*). I see no reason to distinguish chapter 51 proceedings from the principles underlying the criminal cases just cited.

In summary, a chapter 51 detainee is entitled to the least restrictive restraint during transportation and during a hearing.

It is axiomatic that the state has an interest in providing for the security and safety of all of its citizens. A chapter 51 detainee is either alleged to be or has been found dangerous under the criteria set forth in sec. 51.20(1)(a)2., Stats. Therefore, the rights of the detainee need to be balanced against security considerations to arrive at the least restrictive amount of restraint during transport and hearings which will avoid self-inflicted physical harm or impairment to the detainee as well as protect the citizenry and the sheriff from physical harm.

This calls for a determination as to the least amount of restraint appropriate for each individual. Obviously, this must be made on a case-by-case basis; an automatic rule applying equally to all is not justified.

BCL:DJS:BAO

Public Officials; Salaries And Wages; The Wisconsin Housing Finance Authority does not have the power to increase the salary of its Executive Director up to the maximum of the executive group range established under sec. 20.923(1), Stats., for positions assigned to Wisconsin state executive salary group 6 until February 1, 1983. OAG 59-82

October 15, 1982.

WILLIAM KRAUS, *Secretary*
Department of Development

Your predecessor asked whether the Wisconsin Housing Finance Authority (herein the Authority), by due action of its members, has the power to increase the current salary of its Executive Director above the maximum of the executive group range established under sec. 20.923(1), Stats., for positions assigned to Wisconsin state executive salary group 3 notwithstanding the compensation limitation of sec. 234.02(3), Stats. Section 234.02(3), Stats., as amended by ch. 349, sec. 10, Laws of 1981, provides that "the compensation of any employe of the authority shall not exceed the maximum of the executive salary group range established under s. 20.923(1) for positions assigned to executive salary group *6.*"

Chapter 349, sec. 33(2), Laws of 1981, provides that "[t]he treatment of sec. 234.02(3), Stats, by this Act takes effect on February 1, 1983."

It is my opinion that the Authority has the power beginning February 1, 1983, to increase the compensation of its Executive Director beyond the level of executive salary group 3. However, because the changes in sec. 234.02(3), Stats., do not become effective until February 1, 1983, the maximum salary range remains at executive salary range 3 until that date.

My answer to your predecessor's question is found in the clear language of ch. 349, sec. 33(2), Laws of 1981. Although arguments have been advanced by the Authority's bond counsel to justify an increase in compensation beyond the current ceiling imposed by pertinent provisions of ch. 349, Laws of 1981, these arguments are without merit.

If a statute is clear and unambiguous on its face, courts will not look to outside aids in applying it. *Swanson Furniture v. Advance Transformer,* 105 Wis. 2d 321, 326, 313 N.W.2d 840 (1982). The meaning of a legislative act must be determined from what it says. *A.O. Smith Corp. v. Department of Revenue,* 43 Wis. 2d 420, 427, 168 N.W.2d 887 (1969).

Chapter 349, sec. 33(2), Laws of 1981, is clear and means exactly what it says — the treatment of sec. 234.02(3), Stats., by ch. 349, Laws of 1981, takes effect on February 1, 1983. This language is simply not capable of being understood by reasonably well-informed persons in two or more different ways. Because I conclude this legislation is not ambiguous, resort to statutory construction is not necessary to ascertain the legislative intent. *See Swanson.*

It has been contended by the Authority's bond counsel that the statutory limitation on compensation is violative of the Wisconsin and federal constitutions. This contention is without merit.

As a general proposition, there exists a strong presumption in favor of a statute's constitutionality. *See, e.g., State ex rel. Bldg. Owners v. Adamany,* 64 Wis. 2d 280, 285-86, 219 N.W.2d 274 (1974); *State ex rel. Hammermill Paper Co. v. La Plante,* 58 Wis. 2d 32, 47, 205 N.W.2d 784 (1973). Further, in the instant situation the statutory limitation on compensation is not unconstitutional in any respect. It is not violative of Wis. Const. art. I, § 13, as a taking of property without just compensation, nor is it violative of the fourteenth amendment to the United States Constitution as a taking of property without due process of law. A limitation on the salary of the executive director is not taking any existing property of the Authority. Similarly, such a limitation is not a taking of the executive director's property because he has no property right to a higher salary.

I find a similar absence of legal support in the Authority's bond counsel's theory that the statutory limitation on compensation constitutes an impairment of a contractual obligation in violation of Wis. Const. art. I, § 12, or U.S. Const. art I, § 10. There is no factual or legal basis to believe the compensation ceiling contained in sec. 234.02(3), Stats., impairs any contractual right bondholders may have that the Authority's supervisory personnel be reasonably compensated. In light of the fact that the present executive director has

held that position through many bond issues, I fail to perceive how the current compensation ceiling could be construed as unreasonable or inadequate to attract and secure competent supervisory personnel, even assuming *arguendo* bondholders have such a contractual right.

While the Authority is to a degree independent of the state, it is not totally independent. This was recognized by the supreme court in *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 446, 208 N.W.2d 780 (1973):

> The Authority, denominated a public body corporate and politic, is granted only those powers "necessary or convenient" to implement the purposes of ch. 234, Stats. It was not the intention of the legislature to create a corporation in the ordinary sense. Ch. 234 grants to the Authority those corporate powers essential to its performance in improving and otherwise promoting the health, welfare and prosperity of the people of this state.

The Authority is a creature of the Legislature. The power and conduct of the Authority must be exercised in accordance with standards and limitations fixed by the Legislature. This is an elementary principle of delegation of legislative authority. Here, the Legislature has delegated to the Authority the power to determine the "qualifications, duties and compensation" of its executive director and other employes. Sec. 234.02(3), Stats. In delegating to the Authority the power to determine compensation, however, the Legislature prescribed an upper salary limit for these employes. The Authority is legally bound by this parameter.

In summary, I find without merit the arguments advanced by the Authority's bond counsel. The Authority's ability to award an increase in compensation is limited by the ceiling imposed by ch. 349, sec. 10, Laws of 1981; the timing of any increase is controlled by ch. 349, sec. 33(2), Laws of 1981. Accordingly, any attempt by the Authority to raise the salary of its' executive director beyond statutory limits is contrary to state law.

BCL:DJS

Cities; County Board; Ordinances; Taxation; Words And Phrases; Section 74.80(2), Stats., permits counties and cities to impose by ordinance a flat six percent or less penalty on overdue real estate taxes and special assessments, regardless of when they became or become overdue. OAG 60-82

October 15, 1982.

GLENN L. HENRY, *Corporation Counsel*
Dane County

You request my opinion on the applicability and interpretation of sec. 74.80(2), Stats., as created by ch. 167, Laws of 1981. Section 74.80(2), Stats., states:

> The board of any county or the city council of any city authorized by law to collect and sell its own taxes may by ordinance impose a penalty of 6% or less, in addition to the interest under sub. (1), on any overdue or delinquent real estate taxes and special assessments. The ordinance may specify that the penalty under this subsection shall apply to any real estate taxes and special assessments that are overdue or delinquent on the effective date of the ordinance. The ordinance may specify that the penalty under this subsection shall apply to any real estate taxes and special assessments that become overdue or delinquent on or after the January 1 preceding the effective date of this subsection (1981). The ordinance may specify that any or all of the real estate taxes and special assessments on an owner-occupied residence or farm is not subject to the penalty under this subsection. The ordinance may specify that the county treasurer shall exclude the additional revenue generated by the penalty from the distributions required by ss. 74.03(7) and 74.031(12)(c) and (d).

Chapter 167, Laws of 1981, was published April 15, 1982, and by reason of sec. 990.05, Stats., became effective on April 16, 1982.

Your first question is whether the six percent penalty is a flat penalty or a penalty calculated at one half of one percent per month.

In my opinion, sec. 74.80(2), Stats., allows counties and cities to impose a *flat penalty* of six percent or less.

The Wisconsin Supreme Court has stated that "[w]here the legislature uses two different phrases ... in two paragraphs in the same section, it is presumed to have intended the two phrases to have different meanings." *Armes v. Kenosha County,* 81 Wis. 2d 309, 318, 260 N.W.2d 515 (1977). Subsection (1) of sec. 74.80, Stats., provides for an interest rate of "one percent *per month or fraction of a month*" while subsection (2) provides for "a penalty of 6%." Had the Legislature wished to provide for a penalty of one half of one percent per month in subsection (2), it could have used language similar to that used in subsection (1). Subsection (2) provides that the penalty may be *less* than six percent but includes no language which would permit the penalty to be calculated on a *per month* basis. Therefore, I conclude that the plain meaning of the wording in subsection (2) is intended to impose a flat penalty. The penalty is calculated only once; at six percent (or lesser percentage provided for) of the value of the overdue or delinquent taxes. *Compare* secs. 71.13(1)(a) and 71.20(5)(c), Stats., *with* secs. 71.13(1)(b) and 71.20(5)(b), Stats.

Your second question is whether a county or city may impose the penalty on delinquent taxes which became due prior to the January 1 preceding the effective date of the subsection. I am of the opinion that it can, at its option. The first, second and third sentences of the subsection are relevant to your inquiry and each must be read in light of the meaning of the other. *State v. Wachsmuth,* 73 Wis. 2d 318, 323, 243 N.W.2d 410 (1976). The first sentence permits imposition of a penalty "in addition to the interest under sub. (1), *on any overdue or delinquent* real estate taxes and special assessments." The second sentence plainly states that the penalty may be imposed and "apply *to any real estate taxes* and special assessments *that are overdue* or delinquent" *at the time the ordinance is adopted.* This would include all overdue taxes regardless of the date upon which they became overdue. Had the Legislature intended the second sentence to operate only as to taxes which might become overdue in the future, it could have included the words "that become overdue" (after the effective date of the ordinance) as it did in the third sentence. When the one time six percent or less penalty is applied to taxes which are overdue or delinquent at the time an ordinance is adopted, there is no retroactive application of the penalty. In such case, the taxes are overdue and delinquent and it is immaterial as to the date on which they became overdue and delinquent.

The third sentence makes it possible for counties and cities to adopt an ordinance and to limit application of the penalty to overdue taxes of a certain class or vintage. It permits counties and cities to choose to impose the penalty on taxes as they become overdue after the adoption of any ordinance. It also permits a county or a city to choose to limit the application of the penalty so as to not be applicable to all taxes which were overdue and delinquent at the date of enactment of the ordinance. The ordinance may provide that the penalty be applicable only to those taxes which become or became overdue or delinquent on or after January 1, 1982, which was the January 1 preceding the effective date of chapter 167, Laws of 1981. However, to interpret the statute as authorizing application of the penalty only to those taxes which become delinquent after January 1 of the year preceding the effective date of sec. 74.80(2), Stats., would ignore the plain language of the second sentence of the section. Effect must be given to all the provisions of a statute. *Wachsmuth*, 73 Wis. 2d at 324.

I, therefore, conclude that a county or city *may* adopt an ordinance which imposes a penalty on *any* overdue or delinquent taxes regardless of when they became overdue. This interpretation is consistent with the first sentence which uses the terms "any overdue or delinquent real estate taxes and special assessments." "Any" means "all" or "every." *Falk v. Tax Comm.*, 218 Wis. 130, 134, 259 N.W.2d 624 (1935).

BCL:RJV:cm

Indians; Zoning; The Lac du Flambeau Indian Tribe has exclusive authority to zone Indian land, and has concurrent jurisdiction with the state to zone private property within the tribe's reservation boundaries unless county zoning would infringe on tribal self-government. OAG 61-82

October 19, 1982.

JAMES B. MOHR, *District Attorney*
Vilas County

You ask whether the Lac du Flambeau Band of Lake Superior Chippewa Indians has exclusive jurisdiction to regulate land use

within the outer boundary of the Lac du Flambeau Reservation. You also ask whether the Band has authority to impose a moratorium on land division within the outer boundary of its reservation. It is my understanding that the Band recently rescinded its ordinance imposing such a moratorium and has no plan to reenact the ordinance within the foreseeable future. Consequently, this opinion will not address your second inquiry.

In this opinion, land tenure within the outer boundary of the Lac du Flambeau Reservation will be referred to either as "Indian land" or "fee land." Indian land includes land held in trust by the federal government, either for the Band or for individual Band members, together with land owned in fee by the Band and by Band members. Fee land refers to all land other than Indian land.

In my opinion, the Band has exclusive jurisdiction to zone all Indian land, and has jurisdiction concurrent with Vilas and Iron Counties to zone fee land located in each county unless it is established that county zoning would infringe on tribal self-government. If the exercise of county zoning jurisdiction infringes on tribal self-government, the Band would have exclusive zoning jurisdiction within the reservation.

The United States Supreme Court has repeatedly stated that Indian tribes retain attributes of sovereignty over both their members *and their territory. See Merrion v. Jicarilla Apache Tribe,* 102 S. Ct. 894 (1982); *Montana v. United States,* 450 U.S. 544, 563 (1981); *United States v. Mazurie,* 419 U.S. 544, 557 (1975). A tribe's territorial jurisdiction has been held to include in many cases all land within its reservation boundaries. *See, e.g., Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906) and *United States v. Wheeler,* 433 U.S. 313 (1978). A tribe's sovereign power is not derived from an Act of Congress, but is an inherent power which has never been extinguished. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). One aspect of a tribe's inherent sovereign power is the authority to zone all land within the reservation boundaries. *See, e.g., Knight v. Shoshone & Arapahoe Indian Tribes, etc.,* 670 F.2d 900 (10th Cir. 1982). *See also Confederated Salish & Kootenai Tribes, etc. v. Namen,* 665 F.2d 951, 962-64 (9th Cir. 1982), U.S. *appeal pending,* No. 82-22 (July 1, 1982).

An Indian tribe has the power to zone all land within its reservation unless divested of such power by federal law or necessary implication of its dependent status. *Cf. Merrion; Washington v. Confederated Tribes,* 447 U.S. 134 (1980). Congress has not acted to deny Indian tribes the right to control through zoning the use of land located within their territorial jurisdiction. Nor, in my opinion, is such right denied by implication as a necessary result of an Indian tribe's dependent status.

In my opinion, the state has no power to zone Indian lands within the outer boundary of the Lac du Flambeau Reservation. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975), *cert. denied,* 425 U.S. 1038 (1977). *See generally* 65 Op. Att'y Gen. 276 (1976). It follows that the Band's zoning authority over such land vis-a-vis the state is exclusive. The issue of whether the state has authority to zone fee land within the Lac du Flambeau Reservation is less clear.

The authority of local governments to regulate land use through zoning was recognized by the Supreme Court in *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365 (1926). Such zoning is considered an exercise of the sovereign police power to protect, among other things, the health, safety, morals or general welfare of the community. *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

The basic test for determining whether state or local governments have any regulatory authority within reservation boundaries was considered by the Supreme Court in *Williams v. Lee,* 358 U.S. 218 (1959). The Court held: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220.

Since a tribe has a significant governmental interest in controlling any conduct or activity within its territorial jurisdiction that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *Montana,* 450 U.S. at 566, it is likely that state regulation of the same subject matter would infringe on the tribe's powers of self-government. Concurrent state and tribal regulation of land use within a reservation, or the existence of a situation where the state and the tribe each zone different areas of a reservation in a checkerboard fashion, would be impracti-

cal. Unless both governmental authorities have similar long range planning goals, the two zoning plans may contradict and defeat each other. If such were the case, state zoning would probably infringe on tribal self-government and would be unenforceable. *Cf. Mescalero Apache Tribe v. State of N. M.*, 630 F.2d 724 (10th Cir. 1980), *vacated*, 450 U.S. 1036 (1981), *reinstated*, 677 F.2d 55 (10th Cir. 1982); *compare Washington*.

If both plans are substantially similar, then the need for dual regulation is minimized. Because state regulation cannot be applied to Indian lands, tribal zoning appears to be the only means to achieve comprehensive land use planning on reservations with mixed land ownership.

Two important related issues that arise in the context of tribal zoning of all reservation land which involve the rights of non-Indian land-owners merit comment. First, because non-Indians do not usually have the right to participate in tribal governments, there must be concern for the equal protection and property rights of non-Indians in the administration of the zoning plan. Second, non-Indians must have a judicial forum within which to pursue those rights.

Under the Indian Civil Rights Act, 25 U.S.C. sec. 1302, no tribe shall: "(5) take any private property for a public use without just compensation; ... (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

These provisions, substantially similar to the relevant provisions of the United States Constitution, protect non-Indians as well as Indians in the enjoyment of their rights vis-a-vis tribal government. The rights of non-Indians are enforceable in the tribal courts. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Martinez*, 436 U.S. at 65.

While there may be some concern that non-Indians are not represented in tribal governments, the Supreme Court has held that fact to be immaterial. *Williams*, 358 U.S. at 223; *Mazurie*, 419 U.S. at 557-58. *Cf. Merrion*, 894 S. Ct. at 906-07.

In my opinion, the Lac du Flambeau Indian Band has exclusive authority to zone Indian land, and has concurrent jurisdiction with the state to zone fee land within the tribe's reservation boundaries unless county zoning would infringe on tribal self-government.

BCL:JDN

Banks And Banking; Credit Unions; Savings And Loan Associations; Constitutionality of ch. 45, Laws of 1981, delegating authority to commissioners of various financial institutions, discussed. OAG 62-82

November 19, 1982.

ED JACKAMONIS, *Speaker*
State Assembly

The Assembly Organization Committee has requested my opinion as to the constitutionality of ch. 45, secs. 21, 22 and 27, Laws of 1981. These sections empower the Commissioners of Credit Unions, Savings and Loan and Banking, upon approval of their respective boards, to promulgate rules authorizing the financial institutions which they regulate to exercise any right, power or privilege of their federal counterparts permitted under federal law. In particular, the Committee asks whether these sections constitute an improper delegation of legislative power on the grounds that they adopt not only present federal laws but future ones as well and they authorize the Commissioners to adopt rules that are contrary to statutes.

Chapter 45, sec. 21, Laws of 1981, creates the following statutory subsection:

> 186.012(4) Unless the commissioner is expressly restricted by statute from acting under this subsection with respect to a specific power, right or privilege, the commissioner by rule may, with the approval of the credit union review board, authorize credit unions to exercise any power under the notice, disclosure or procedural requirements governing federally chartered credit unions or to make any loan or investment or exercise any right, power or privilege of federally chartered credit unions permitted under a federal law, regulation or interpretation. Notice, disclosure and procedures prescribed by stat-

> ute which may be modified by a rule adopted under this subsection include, but are not limited to, those provided under s. 138.056. A rule adopted under this subsection may not affect s. 138.041 or chs. 421 to 428 or restrict powers granted credit unions under this chapter.

Chapter 45, secs. 22 and 27, Laws of 1981, create secs. 215.02(18) and 220.04(8), Stats., respectively, which contain virtually the same language applicable to savings and loan associations and banks.

All legislation enjoys a strong presumption of constitutionality.

> It is an elementary principle of law in this state that this court will search for a means to sustain a statute and will not infer or go out of its way to find means with which to condemn a statute adopted by the legislature. In fact, this court has in the past and will continue to sustain the constitutionality of a statute if any facts can be reasonably conceived which will support its constitutionality. Thus, the burden of establishing the unconstitutionality of a statute is on the person attacking it, who must overcome the strong presumption in favor of its validity.

White House Milk Company, Inc. v. Reynolds, 12 Wis. 2d 143, 150-51, 106 N.W.2d 441 (1960). The person attacking a statute has the burden of overcoming the presumption of constitutionality by demonstrating unconstitutionality beyond a reasonable doubt. *Wis. Bingo Sup. & Equip. Co. v. Bingo Control Bd.,* 88 Wis. 2d 293, 301, 276 N.W.2d 716 (1979).

Before applying these principles to the particular questions posed, I first must note that my role in rendering opinions on legislation already enacted differs from my role in regard to proposed legislative action. Once legislation is enacted, it becomes the affirmative duty of the Attorney General to defend its constitutionality. *Chicago & N.W. R. Co. v. La Follette,* 27 Wis. 2d 505, 523, 135 N.W.2d 269 (1965). Prior to enactment, however, no such obligation exists. In the present circumstance, therefore, where questions are raised concerning legislation already enacted, my response depends on whether a reasonable defense of the legislation is available, not whether I would have found the bill constitutional had it been presented to me prior to passage.

I believe a reasonable defense of this legislation can be made by arguing, first, that there is no delegation of legislative power to the federal government in the instant case. The federal enactments do not automatically become effective. By stating "the commissioner by rule may, with the approval of the ... review board, authorize [state financial institutions] to exercise any ... power, right or privilege of federally chartered [financial institutions] permitted under federal law, regulation or interpretation," the Legislature has provided that any federal enactment is subject to review by an administrative agency to determine whether all or any part is appropriate for Wisconsin. The mere possibility of new regulations resulting from enactment of ch. 45, Laws of 1981, does not constitute a delegation of legislative authority to the federal government, particularly since ultimate responsibility remains with the state administrative agency. *Niagara of Wisconsin Paper Company v. DNR*, 84 Wis. 2d 32, 52, 268 N.W.2d 153 (1978); *Joint School Dist. No. 8 v. Wis. E. R. Board*, 37 Wis. 2d 483, 494, 155 N.W.2d 78 (1967).

Moreover, these sections arguably pass constitutional muster under the standards for testing the constitutionality of delegation generally. In *State (Department of Administration) v. ILHR Department*, 77 Wis. 2d 126, 134, 252 N.W.2d 353 (1977), the court set forth the standards for review of delegations of authority to administrative agencies as follows:

> In determining whether the legislature has properly delegated its power to an agency, this court applies the following rule:
>
> "'A delegation of legislative power to a subordinate agency will be upheld if the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the board or agency acts within that legislative purpose.'"

The purpose of the delegating statutes in question, to permit state agencies by rule to allow state-chartered financial institutions to achieve or maintain parity with their federal competitors, is ascertainable from the language and context of the statutes. On their face, these provisions enable identity of treatment between state and federal institutions, and they specifically forbid the Commissioners from adopting a rule which would affect the parity provisions of sec. 138.041, Stats. Furthermore, the legislative history reveals a purpose

to attain federal-state parity. *See* Summary of the June 4, 1981, Proceedings of the Legislative Council's Special Committee on Interest Rate Practices, page 3, Agenda Item 4. In addition, the procedural safeguards of public hearings and the opportunity for judicial review of such rules' validity are met. *See ILHR Department*, 77 Wis. 2d at 135.

I turn now to the Assembly Organization Committee's concern with the ability of the commissioners and the boards to override statutes by rule, referring to the sentence in each of the sections which states: "Notice, disclosure and procedures prescribed by statute which may be modified by a rule adopted under this subsection include, but are not limited to, those provided under s. 138.056."

The general rule is that the Legislature may give an administrative body "the power to suspend or repeal prior legislative enactments by administrative regulation within the standard designated by the statute giving the administrative body the power to act." Sutherland, *Statutes and Statutory Construction*, 4th ed., § 23.19. Wisconsin is in accord with this rule. *Wisconsin Telephone Co. v. Public Service Comm.*, 206 Wis. 589, 596-99, 240 N.W. 411 (1932). The United States Supreme Court has also affirmed the constitutionality of statutes empowering an administrative agency to dispense with stated statutory limitations when necessary. *Intermountain Rate Cases*, 234 U.S. 476 (1914); *Sproles v. Binford*, 286 U.S. 374 (1932). *See generally* Note, *The Power of Dispensation in Administrative Law—A Critical Survey*, 87 Pa. L. Rev. 201 (1938).

Applying these principles to the statutes at hand, at least a considerable number of the provisions can be argued to be initial findings of fact which the Legislature could permit the administrative agencies to modify as may be needed to achieve the overall legislative objective to preserve federal-state parity among financial institutions. For example, sec. 138.056(2)(c), Stats., states that a variable rate loan contract shall provide for a term of not more than forty years. It is arguably competent of the Legislature to enable the commissioners and their boards to modify the maximum length of these loans if necessary to maintain a competitively healthy state financial climate. I cannot assure you with certainty, however, that each and every potential administrative change of statutory terms would survive constitutional attack. Each case must be determined on its own facts. As a general matter, however, I can argue that the courts

should uphold the action of the commissioners and the boards in modifying these statutes so long as the modification is reasonably calculated to maintain federal-state competitive parity and is not a change in fundamental legislative policy.

Accordingly, reasonable argument can be made that this legislation is constitutional on its face, although future action of the commissioners and their boards may be subject to judicial review on constitutional grounds.

BCL:CDH:th

County Board; Sheriffs; County board in county under 500,000 not having civil services system for deputy sheriffs can abolish traffic department organized under sec. 83.016, Stats., and with the cooperation of the sheriff, such traffic patrolmen can be appointed deputies in the sheriff's department without providing for civil service selection under sec. 59.21(8)(cm), Stats. Language in 36 Op. Att'y Gen. 174 (1947) and 38 Op. Att'y Gen. 245 (1949) distinguished in view of sec. 59.025, Stats., which was enacted after issuance of those opinions. OAG 64-82

November 22, 1982.

ROBERT J. MRAZ, *Corporation Counsel*
Oconto County

You request my opinion on several questions concerning the power of a county board of supervisors to reorganize its sheriff's and traffic departments. The traffic department was created pursuant to sec. 83.016, Stats. You state that the county does not have any civil service system which is applicable to sheriff's deputies or traffic officers. You indicate that the county board intends to abolish the position of undersheriff and transfer such officer's duties to a chief deputy. The board intends to abolish the traffic department and place the traffic officers under the authority of the sheriff who would deputize them so that they could assist the sheriff in performance of constitutional and statutory duties. Such deputies would be called deputy patrolmen, but would not be part of a separate division in the sheriff's department. Other deputies would be called deputy investigators, and the department would include a dispatcher and jailer.

Your first question is: Must Oconto County provide for civil service selection of deputies under sec. 59.21(8)(cm), Stats., where the traffic department is abolished and traffic officers are placed under the authority of the sheriff as deputy patrolmen?

The answer is no. I am aware that it was stated in 36 Op. Att'y Gen. 174 (1947) and 38 Op. Att'y Gen. 245 (1949) that a traffic division of the sheriff's department could only be established in connection with an ordinance placing deputies under civil service pursuant to sec. 59.21(8)(cm), Stats. Although the latter statute has not been changed in material degree, the Legislature, subsequent to the issuance of 38 Op. Att'y Gen. 245 (1949), enacted sec. 59.025, Stats., which grants a county board considerable discretionary power with respect to county organization and provides in part:

> (2) INTENT AND CONSTRUCTION. For the purpose of giving counties the largest measure of organizational autonomy compatible with the constitution and general law, it is hereby declared that this section shall be construed in favor of the rights, powers and privileges of counties to organize and administer county functions. The *powers hereby conferred shall be in addition to all other grants and shall be limited only by express language but shall be subject to the constitution and such enactments of the legislature of statewide concern as shall with uniformity affect every county.* In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail.
>
> (3) CREATION OF OFFICES. *Except for* the offices of supervisor, county executive and county assessor and *those officers elected under section 4 of article VI of the constitution,* the county board may:
>
> (a) Create any county office, department, committee, board, commission, position or employment it deems necessary to administer functions authorized by the legislature.
>
> (b) Consolidate, abolish or reestablish any county office, department, committee, board, commission, position or employment.
>
> (c) Transfer some or all functions, duties, responsibilities and privileges of any county office, department, committee,

board, commission, position or employment to any other agency including a committee of the board.

While the powers of the county board cannot be exercised with respect to "those *officers* elected under section 4 of Article VI of the Constitution," which includes *the office* of sheriff, certain powers set forth in sec. 59.025(3), Stats., can be exercised with respect to a traffic department and traffic patrol officers appointed pursuant to sec. 83.016, Stats., and to certain positions in the *sheriff's department*. In OAG 25-82 it was stated that a county board of a county with a population of less than 500,000 could abolish the office of undersheriff and transfer all statutory powers and duties of such officer to a chief deputy civil service position.

In my opinion sec. 59.21(8), Stats., is not an enactment of "statewide concern as shall affect every county." By its own terms it is not applicable to counties having a population of more than 500,000. Further, it is permissive as to counties of less than 500,000 population and counties may elect to have no civil service ordinance or one enacted under sec. 59.07(20) or ch. 63, Stats. *See* sec. 59.21(8)(d), Stats. You note that Oconto County does not have a deputy sheriff's civil service ordinance, and does not intend to create a traffic division in the sheriff's department and that sec. 59.21(8)(cm), Stats., is therefore not applicable. I agree. If the transfer of personnel is to be accomplished, there will have to be cooperation by the sheriff, who will be the appointing power as to deputies. Under sec. 83.016(1), Stats., the appointment of a traffic patrolmen may be revoked at any time by the county board or its committee to which it has delegated the authority. Section 59.21(8)(cm), Stats., is indicative of a legislative attempt to confer power on a county board to ease the way for consolidation of traffic patrolmen appointed pursuant to sec. 83.016, Stats., into a division of the sheriff's department where deputies in such department *were subject* to a sec. 59.21(8), Stats., civil service ordinance. But it would be novel and somewhat absurd if traffic patrolmen who had no guarantee of tenure under sec. 83.016, Stats., were required to be accorded civil service ordinance protection under sec. 59.21(8)(cm), Stats., when transferred to the sheriff's department in a county where other employes in the department, including deputies, were not subject to any civil service ordinance.

Your second question is: Does the county board have any control over the employment of the chief deputy, investigator deputies and

patrolmen deputies under the proposed reorganization if the county does not provide for civil service selection?

I am of the opinion that it does in limited degree. The power of appointment and removal would be in the sheriff by reason of secs. 17.10(6) and 59.21(1), (2), (3), (4), Stats. 38 Op. Att'y Gen. 245, 247 (1949), 61 Op. Att'y Gen. 80 (1972). In *State ex rel. Milwaukee County v. Buech,* 171 Wis. 474, 177 N.W. 781 (1920), the court upheld a civil service statute requiring the sheriff to make appointments of deputies from those certified as competent by a commission. It was stated that the power of appointment of deputies was not an immemorial duty which characterized or distinguished the office of sheriff. However, under the statute in *Buech* the sheriff was the final appointing authority. I am aware that sec. 59.025(4), Stats., provides that a county board may determine the method of selection of certain county offices, with exceptions including sheriff, and that such board could determine the appointing authority subject to secs. 59.031 and 59.032, Stats. It might therefore be argued that the county board could designate itself or one of its committees as appointing power for the new positions of deputy patrolmen. In my opinion, however, sec. 59.21(1), (2), (3), (4), Stats., contains "express language" reserving the power of appointment of deputies to the sheriff and are "enactments of the legislature of statewide concern as shall with uniformity effect every county" and therefore control over sec. 59.025(4), Stats., as to preclude transfer of the appointing power from the sheriff. A county board would have power to establish the number of *paid* deputies and establish their compensation. Secs. 59.15(2), (3), (4) and 59.21(8)(a)(intro), Stats. In limited degree the county board could "establish regulations of employment" for such deputies pursuant to sec. 59.15(2)(c), Stats., and could enter into collective bargaining agreements under secs. 111.70-111.77, Stats. However, a county board cannot bind a sheriff to collective bargaining provisions which contradict or conflict with constitutional or immemorial duties of a sheriff. *Professional Police Ass'n v. Dane County,* 106 Wis. 2d 303, 316 N.W.2d 656 (1982). In some cases immemorial duties of a sheriff have been codified into statutory form. It is stated in *Professional Police Ass'n* at 312 that "[i]t is the nature of the job assigned rather than the general power of job assignment which must be analyzed in light of the sheriff's constitutional powers." Where constitutional, immemorial or certain express statutory duties are concerned, the county board cannot in a collec-

tive bargaining agreement, or otherwise, deprive the sheriff of the right to select who among his deputies shall act in his stead. After appointment as deputies, such personnel would be primarily subject to lawful orders of the sheriff with respect to assignment of duties in areas which are properly regarded as constitutional or immemorial. Although their working titles would be "deputy patrolman" or "deputy investigator," they would remain deputies and could be utilized by the sheriff to carry out those constitutional, immemorial or statutory duties of the sheriff as such officer may assign without limitation which might be suggested by the job title or organizational table for the sheriff's department promulgated by the county board.

BCL:RJV

Loans; Physicians And Surgeons; If sec. 39.377, Stats., is repealed or amended to change the eligibility guidelines, the state would not be liable under the former guidelines to students who have not yet effectively acted in reliance on the statute in setting up their qualifying health care practice in a particular area. OAG 66-82

November 23, 1982.

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

You request an opinion as to whether the state will have continuing legal obligations on debts incurred by medical students while sec. 39.377, Stats., providing for "loan forgiveness," was in effect, if the statute is now amended or repealed.

Under the provisions of sec. 39.377, Stats., as created by ch. 34, Laws of 1979, physicians, after completion of their medical school education in Wisconsin, may become eligible for up to $10,000. Section 39.377, Stats., provides[1]:

> (1) There is established, to be administered by the board, a ~~forgiveness~~ *grant* component of the Wisconsin health education loan program under s. 39.325, for students enrolled in the uni-

[1] Section 39.377, Stats., was recently amended by ch. 20, Laws of 1981. Both the original and present versions are reprinted herein. In my opinion the alteration does not materially affect the reasoning of this opinion.

versity of Wisconsin medical school or in the medical college of Wisconsin.

(2) ~~Up~~ *A grant of up* to $5,000 ~~in loan principal and accrued interest commitment incurred by a medical student under~~ *may be awarded annually for 4 years to a physician who participated in* the loan program ~~in~~ *under* s. 39.325 ~~may be forgiven annually for 4 years~~, subject to the requirements in pars. (a), (b) and (c):

(a) ~~Twelve~~ *A grant equal to twelve* and one-half percent of principal and accrued interest commitment, not to exceed $2,500, may be ~~forgiven~~ *awarded* annually for 4 years if the physician establishes a primary care medical practice in this state.

(b) ~~Twelve~~ *A grant equal to twelve* and one-half percent of principal and accrued interest commitment, not to exceed $2,500, may be ~~forgiven~~ *awarded* annually for 4 years if the physician practices any specialty in a geographical area of this state designated by the department of health and social services as underserved.

(c) The ~~amount forgiven for~~ *total grant awarded to* any individual may not exceed the total amount borrowed by that individual.

(3) A definition of primary care medical specialties and a methodology to designate underserved areas of this state shall be developed by the department of health and social services in consultation with the medical education review committee, the health policy council, the university of Wisconsin office of rural health and local health systems agencies. The department of health and social services shall promulgate rules for the implementation and operation of the program under this section and shall report to the assembly health and social services committee, the senate human resources committee, the joint committee for review of administrative rules and the joint committee on finance regarding the definitions of primary care specialists, designated underserved areas of this state and proposals for the periodic review of the rules and guidelines for the continued operation of the ~~loan forgiveness~~ *grant* program under this section.

A recommendation has been made by an advisory committee appointed by the Department that this program be significantly altered. You state that new legislation is being considered which would: (1) limit the geographical areas in which a physician could locate and still be eligible, (2) limit the type of practices which would qualify, (3) increase the financial incentives and (4) expand the class of qualifying loans to all institutional loans, dropping Higher Education Assistance Loans (HEAL) participation as an eligibility requirement.

As a result of such an amendment to sec. 39.377, Stats., the regions and fields of practice which originally would have qualified a student for future loan forgiveness under the program may no longer qualify. Under such circumstances, it is difficult to predict all the legal arguments which might be advanced to justify a formerly qualifying student's claim. However, I assume that a claim might be based on due process or other constitutional grounds which would assert that the former statute created a vested right which could not be repealed retroactively.

Initially, it is important to remember that all statutes enacted by the Legislature enjoy a presumption of constitutionality. *State ex rel. Bldg. Owners v. Adamany,* 64 Wis. 2d 280, 286, 219 N.W.2d 274 (1974), and *St. ex rel. Ft. How. Paper v. Lake Dist. Bd.,* 82 Wis. 2d 491, 505, 263 N.W.2d 178, 185 (1978). The amendment of sec. 39.377, Stats., must be presumed to be a constitutional alteration of the eligibility requirements unless an interested party can meet the requisite burden of proving otherwise. In *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15 (1976), the Supreme Court stated:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

The law applicable to the circumstances you describe is stated in 16A Am. Jur. 2d *Constitutional Law* § 691 (1979), as follows:

> Although it may be taken as a general rule that rights conferred by statute are not contractual in their nature so as to prevent their alteration or abrogation ... it is a matter of established law that a legislative enactment in the ordinary form of a

> statute may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of the clause of the Federal Constitution forbidding impairment of contract obligations; rights may accrue under a statute, or even be conferred by it, of such character as to be regarded as contractual and such rights cannot be defeated by subsequent legislation. ... The presumption is that a state law is not intended to create private contractual rights but merely declares a policy to be pursued until the legislature shall ordain otherwise, and he who asserts the creation of a contract with the state has the burden of overcoming the presumption.

The applicable legal principles are stated in slightly differing terms in 16A Am. Jur. 2d *Constitutional Law* § 692, as follows:

> The general principle is established in American jurisprudence that a legislative grant under which rights have vested amounts to a contract and that a subsequent statute attempting to impair or annul such grant is unconstitutional because it is a law impairing the obligation of contracts. Thus, if a state makes a grant absolute in terms and without any reservation of a right to alter, modify, or repeal it, this constitutes an executed contract, and the state is forbidden to pass laws impairing the obligation arising therefrom. The state cannot afterward recall the grant even though it was originally executed without consideration. ...
>
> On the other hand, it is also the rule that the legislature has the power to take away by statute that which has been given by statute except when to do so would obviously amount to the impairment of a vested right. The recall of such a privilege is not an impairment of the obligation of contracts.

As the above quotes from 16A Am. Jur. 2d *Constitutional Law* §§ 691, 692, point out, there is a presumption that statutes merely declare policy which may be altered by the Legislature at any time. However, there are instances in which an individual can act in reliance on a statute which creates contract rights enforceable against a state. The burden is on the citizen to prove the existence of a contract right. The analysis to determine whether contract rights are impaired appears to be indistinguishable from the analysis used to determine

whether there has been deprivation of due process because of an impairment of vested rights. *See State ex rel. Briggs & Stratton v. Noll,* 100 Wis. 2d 650, 662 n.3, 302 N.W.2d 487 (1981). Presumably, if rights may be considered to have "vested" under the statute, or if a contract arising under the statute may be viewed as fully executed, such rights or contract may not be impaired.

In *State ex rel. Bartlet v. Thompson,* 246 Wis. 11, 16 N.W.2d 420 (1944), the court examined the constitutionality of an amendment which altered retirement and death benefits under state law. The deceased in that case had elected into the system on January 1, 1938, and made contributions until his death on December 20, 1942. On June 28, 1941, the Legislature had amended the death benefit provisions of state law by inserting a $1,000 limit on the city's contribution. The effect of the amendment was to reduce the decedent's death benefits from $2,722.58 to $2,012.58. In sustaining the constitutionality of the amendment the court stated:

> [U]nder the provisions of sec. 5(4) the right to receive a contribution from the city does not arise until the proper proofs of death of a member are filed. At the time of the amendment in 1941, the deceased employee had no vested right to the contribution provided for by sub. (4). While sec. 10 ... makes the payment of the funds therein described an obligation of the city, that obligation does not vest until the death of the member, and for that reason neither he nor his estate has a vested interest in the benefit to be paid by the city pursuant to the provisions of sub. (4). The deceased having no vested interest in the contribution of the city and the relation between the parties not being contractual, it was within the competency of the legislature to prescribe a different amount than that prescribed in ch. 396, Laws of 1937, at any time before the death of a member.

Thompson, 246 Wis. at 15.

A comprehensive analysis of several approaches to determining the constitutionality of statutes which are alleged to have some retroactive effect is set forth in Justice Abrahamson's dissent in *Noll,* 100 Wis. 2d at 661-62. As the dissenting opinion points out, it is conclusory and simplistic to say that a statute which impairs "vested rights" is unconstitutional. *Noll,* 100 Wis. 2d at 663. The problem is to determine which expectations, interests and rights created by a

statute are deserving of constitutional protection. Justice Abrahamson goes on to point out:

> The cases pose two principal factors as determinative of the validity of a retroactive statute: (1) the nature and strength of the public interest served by the statute and (2) the unfairness created by its retroactivity. The extent of the party's reasonable reliance on the law existing at the time of the conduct whose legal consequences would be altered is a useful gauge of the element of unfairness.

Noll, 100 Wis. 2d at 664.

It is my opinion that a student cannot be said to have executed a contract or effectively relied on the statute so as to cause a "vesting of rights" until he has established a practice which responds to the then current statutory requirements. Under the facts you have given, it does not appear that students have acted any differently than they would have acted had no such program existed. Borrowing money to finance a medical education is based on considerations apart from the statutory incentives of sec. 39.377, Stats. The loan made with the private financial institution has its own terms and is a complete contract standing alone. The incentives in the statute were enacted by the Legislature not to encourage students to borrow money, but to encourage those who do to pursue their medical practice in particular areas and in particular fields. The Legislature determines which areas and fields the state has an interest in having doctors provide more health care services. The Legislature is free to alter the incentives and the conditions until the student effectively acts in reliance on and in compliance with the statute.

If, on the other hand, a graduate had begun a practice in a particular community he may have done so because of the financial incentives of sec. 39.377, Stats. In my opinion, this student would have a much stronger argument for unfairness, should the statute then be repealed or altered. The retroactive effect of such action at this point might make it unconstitutional. According to the facts you have given, however, reliance of this type has not yet occurred.

Students who have borrowed money may argue they have relied on sec. 39.377, Stats., at the time they incurred the debt. The program, however, would not be repealed under the proposed legislation. Only the guidelines for eligibility would be altered. In fact, as

you state, the new legislation would substantially increase the financial incentives for location and practice in what the state determines are areas of present need. Therefore, the "alteration of rights" from the student's perspective is not significant considering the increased economic incentives which may be made available as opposed to the decreased freedom of choice of location and type of practice. Furthermore, I doubt that a court would find this was the actual motivation for taking out a low interest HEAL program loan, or, that such initial motivation constitutes the kind of reliance which would create a contractual relationship. Such reliance on the program at the time of borrowing would be totally premature and unreasonable, because the student should know that the program might change or terminate altogether in the future.

I must emphasize that this opinion is based in part upon the fact that I am advised that sec. 39.377, Stats., has never been implemented and not a single student has as yet come forward to inquire about or seek benefits under the program. Based on the foregoing, therefore, it is my opinion that if sec. 39.377, Stats., is repealed or amended to change the eligibility guidelines, the state would not be liable under former guidelines to students who have not yet effectively acted in reliance on the statute in setting up their qualifying health care practice in a particular area.

BCL:JCM:cm

Drivers; Schools and School Districts; Public school districts may not charge students for the cost of providing driver education programs if the programs are credited towards graduation. OAG 67-82

November 23, 1982.

ED JACKAMONIS, *Speaker*
State Assembly

On behalf of the Committee on Assembly Organization, you have asked me whether public school districts may charge students in driver education programs for the cost of providing the programs. Specifically, you ask whether such charges would contravene Wis. Const. art. X, § 3, which states that the Legislature shall provide for

the establishment of district schools which shall be "free and without charge for tuition."

Since Wis. Const. art X, § 3, does not apply to vocational, technical and adult education school districts, *see* 64 Op. Att'y Gen. 24 (1975), I assume your question refers to other public school districts. Wisconsin Constitution art. X, § 3, applies, in such districts, to any course that is credited toward graduation, even though not a required course in the curriculum. *Board of Education v. Sinclair,* 65 Wis. 2d 179, 187, 222 N.W.2d 143 (1974).

As you correctly point out, there is no statutory authority for such school districts to charge fees for driver education programs. *See* 57 Op. Att'y Gen. 45, 53 (1968). School districts, in exercising the delegated power of operating public schools, act as agencies of the state. *Buse v. Smith,* 74 Wis. 2d 550, 563, 247 N.W.2d 141 (1976). Agencies of the state have only the powers which are either expressly conferred or necessarily implied by statute. *Village of Silver Lake v. Department of Revenue,* 87 Wis. 2d 463, 468, 275 N.W.2d 119 (1978). Hence, public school districts may not charge students in driver education programs for the cost of providing the programs.

If there were such statutory authority, the determination as to whether it contravened Wis. Const. art. X, § 3, would depend upon what the student would receive for the fees charged by the school districts. In *Sinclair,* 65 Wis. 2d at 182, it was held that, as used in the phrase "free and without charge for tuition to all children" in Wis. Const. art. X, § 3, the word "free" means without cost for physical facilities and equipment and "without charge for tuition" means there should be no fee charged for instruction. Hence, if the statute authorized charges for the cost of the school building and equipment, construction, rental or use of a building, automobile, movie projector or electronic apparatus, cost of fuel and light, etc., or for the cost of instruction, it would violate Wis. Const. art. X, § 3. If, however, the statute authorized charges for textbooks, workbooks, pencils, pens, notebooks, paper, etc., it would not violate Wis. Const. art. X, § 3.

BCL:JJG

Indigent; Public Defenders; The State Public Defender has discretion under sec. 977.05(4)(j), Stats., to refuse appointment for indigents in conditions of confinement cases and in cases seeking post-conviction and post-commitment remedies where there is no absolute right to counsel. OAG 68-82

November 24, 1982.

DAVID NIBLACK
State Public Defender

You have requested my opinion concerning the scope of discretion available to the State Public Defender in electing not to provide counsel in conditions of confinement cases and in cases seeking post-conviction and post-commitment remedies in which there is no absolute right to counsel for indigents. Specifically, you request my opinion as to the effect of the changes in the State Public Defender's responsibility and discretion made by ch. 20, Laws of 1981.

Prior to the amendments contained in ch. 20, Laws of 1981, the relevant portions of sec. 977.05(4), Stats., provided that the State Public Defender should:

> (i) Provide legal services in:
>
> 1. Cases involving persons charged with a crime against life under ss. 940.01 to 940.12.
>
> 2. Cases involving persons charged with a felony not specified under subd. 1.
>
> 3. Cases involving persons charged with a misdemeanor not specified under subd. 1.
>
> 4. Cases involving persons subject to emergency detention or involuntary civil commitment under ch. 51.
>
> 5. Cases involving children subject to adjudication as a delinquent.
>
> 6. Cases involving persons attacking the conditions of their confinement.
>
> 7. Cases involving paternity determinations under ch. 767 where the state is the petitioner under s. 767.45(1)(g) or where the petitioner is represented by the district attorney, corpora-

tion counsel or other state or county attorneys under s. 767.45(6).

(j) At the request of any person determined by the state public defender to be indigent or upon referral of any court to prosecute a writ of error, appeal, writ of habeas corpus or other post-conviction or post-commitment remedy on behalf of such person before any court, if the state public defender is first satisfied there is arguable merit to such proceedings.

Chapter 20, Laws of 1981, made the following changes:

SECTION 1829. 977.05(4)(i)6 of the statutes is repealed.

SECTION 1831. 977.05(4)(j) of the statutes is amended to read:

977.05(4)(j) At the request of any person determined by the state public defender to be indigent or upon referral of any court ~~to~~, prosecute a writ of error, appeal, writ of habeas corpus or other post-conviction or post-commitment remedy *or attack the conditions of confinement* on behalf of such person before any court, if the state public defender ~~is first satisfied there is arguable merit to such proceedings~~ *determines the case should be pursued.*

It is clear that the changes made by ch. 20, Laws of 1981, modified the scope of discretion afforded the State Public Defender in two respects: (1) the repeal of sec. 977.05(4)(i)6, Stats., and the transfer of responsibility for representation in conditions of confinement cases to sec. 977.05(4)(j), Stats., demonstrate a legislative intent that legal representation in these cases is not mandatory and is subject to the State Public Defender's discretion; and (2) the deletion of the arguable merit language in sec. 977.05(4)(j), Stats., and the substitution of language "if the state public defender determines the case should be pursued" demonstrates a legislative intent that the arguable merit of the individual case referred to the State Public Defender is not the only factor which may be considered in deciding whether to provide legal representation for an indigent in the types of cases specified in subsection (j).

The comments of the Legislative Fiscal Bureau to ch. 20, Laws of 1981, support the above conclusions since they explain that the revision:

> [Modifies] the duties of the State Public Defender to eliminate an existing statutory requirement that the office provide representation for all indigent persons attacking the conditions of their confinement. In addition [it provides] the State Public Defender with discretionary authority to determine whether a request from an indigent defendant or a court referral to prosecute a post-conviction or post-commitment remedy or a confinement challenge should be pursued by the office or not. Under current law, the office is required to handle such a request or referral if it is first satisfied there is arguable merit to the proceedings (except for confinement challenges which, as noted, is currently a mandatory duty of the office).

There are two appellate decisions which consider the scope of the State Public Defender's discretion prior to the amendments contained in ch. 20, Laws of 1981. The first case is *State v. Alston*, 92 Wis. 2d 893, 288 N.W.2d 866 (Ct. App. 1979). The appellant in *Alston* appealed from an order denying his motion to modify sentence and requested that the court of appeals appoint counsel for him. The court of appeals referred the matter to the State Public Defender under ch. 977. The State Public Defender's Office advised the court of appeals that it construed the court's order as a referral under sec. 977.05(4)(j), Stats., that it had concluded the appeal was without merit and, accordingly, declined representation. The State Public Defender's Office provided the court of appeals with memoranda explaining the basis for its decision. The court of appeals ruled as follows, *Alston*, 92 Wis. 2d at 896, 898-99:

> In the context of this appeal, under this section [sec. 977.05(4)(j)], the SPD has been delegated the statutory duty to exercise discretion with respect to representing Mr. Alston on an appeal of a denial of a sec. 974.06 motion. The existence of arguable merit to the appeal is the keystone to the exercise of such discretion.
>
> . . . .
>
> We, therefore, hold that where an appeal has been filed in our court and where we have made a referral to the SPD in

> response to appellant's motion for appointment of counsel, where representation is discretionary, the SPD shall report its decision to our court within a reasonable period of time in a statement of sufficient detail to demonstrate that the SPD has properly exercised its discretion so that we may efficiently dispose of the motion for appointment of counsel and ultimately perform our appellate decision-making function. The scope of the statement shall depend upon the particular circumstances. The statement must contain more than the SPD's conclusions, and it shall explain the reasons for the determination made by the SPD, but it need not be the scope of an *Anders* no merit report.

The second case is *Public Defender Office v. Dodge County Cir. Ct.*, 104 Wis. 2d 579, 312 N.W.2d 767 (1981). The narrow question presented was whether a circuit court, in the exercise of its inherent power to appoint counsel, could appoint the State Public Defender in a conditions of confinement case when that office, after investigation, advised the circuit court that it declined to provide representation. The supreme court ruled that the State Public Defender could not be required to provide representation in these circumstances. However, the supreme court reached this conclusion by invoking its supervisory power over courts and not by construing the provisions of ch. 977. First, the supreme court recognized that the State Public Defender's Office, in the exercise of its discretion to accept or decline representation, could properly consider the impact of representation on its case load and its financial resources. *Dodge County Cir. Ct.*, 104 Wis. 2d at 588-90:

> It is apparent that if we were to require the Office of State Public Defender to accept all circuit court appointments as counsel in conditions-of-confinement cases, these appointments might generate a large volume of cases which the Office might not be able to handle properly. We observe that it is the policy of the Public Defender's Office, in view of that office's finite resources, to carry out a planned program of litigation and other services which necessarily require an allocation of resources. Allocation of resources is not merely good administrative practice, but may, in certain instances, be required as a matter of conscientious commitment to the obligations imposed by the Code of Professional Responsibility. *See* SCR

> 20.31 (1980); ABA Committee on Ethics and Professional Responsibility, Formal Opinion 334 (1974), and Informal Opinion 1359 (1976). The interests of defendants, of inmates, of the public, and of the legal system are not well served if the Office of State Public Defender is forced to represent a substantially greater number of persons than the Office's resources realistically permit. The maintenance of inmate access to the courts, *Bounds v. Smith*, 430 U.S. 817 (1977), requires not only an open route to the courthouse but an assurance that if representation is afforded, the representation be competent to provide pursuit of the claim.

(Footnotes omitted.)

The supreme court then established the following procedure for the appointment of counsel in conditions of confinement cases, 104 Wis. 2d at 591:

> We conclude that the following procedure should be employed by the circuit court in a case such as the one before us when it determines that counsel should be appointed to represent an inmate in a *pro se* conditions-of-confinement claim: The circuit court should refer the *pro se* conditions-of-confinement claim to the Office of State Public Defender for representation. The Office should review any such referral and promptly advise the circuit court in writing whether or not it will represent the inmate. If the Office refuses to represent the inmate, the circuit court should appoint counsel for the inmate in the conditions-of-confinement case other than the Office of State Public Defender. We believe this procedure is consistent with the public policy set forth by the legislature in Ch. 977, with the professional and statutory obligations of the Office of State Public Defender, and with the needs of the inmates, the judicial system, and the public.

The court of appeals in *Alston* measured the State Public Defender's exercise of discretion by the arguable merit standard. This standard is codified in sec. 809.32, Stats. It provides that on a direct appeal, where the indigent defendant has a constitutionally protected right to an attorney, counsel may withdraw only if it can be demonstrated that the case is frivolous and without any arguable merit. *See Anders v. California*, 386 U.S. 738, 744-45 (1967). The

Wisconsin Supreme Court emphasized in *State v. Mosley,* 102 Wis. 2d 636, 668, 307 N.W.2d 200 (1981), that, absent a finding of no arguable merit under sec. 809.32, Stats., the State Public Defender has a duty to represent the indigent defendant on a direct appeal under sec. 977.05(4)(j), Stats.

Chapter 20, Laws of 1981, removed the arguable merit standard from sec. 977.05(4)(j), Stats., and substituted language that the State Public Defender may accept referrals for representation if he or she "determines the case should be pursued." I would emphasize that this increase in the State Public Defender's discretion and the removal of the arguable merit standard does not apply to direct appeals from a criminal conviction. *See Mosley,* 102 Wis. 2d at 668. However, it does appear that the Legislature intended to increase the State Public Defender's discretion in other cases specified in subsection (j) where the indigent has no absolute right to counsel under the constitution or applicable statute.

Under *Alston,* the State Public Defender could decline representation in a post-conviction proceeding only if it is demonstrated to the appellate court that the indigent's case was completely frivolous. The amendment made by ch. 20, Laws of 1981, removes the strict standard of arguable merit but does not specify any new standard for the exercise of discretion. It appears that the State Public Defender, in conditions of confinement cases and in cases seeking post-conviction and post-commitment remedies where there is no absolute right to counsel, may decline representation if it can be demonstrated that there is a reasonable basis for that decision. This may include, for example, the likelihood of success on the merits, the complexity of the legal and factual issues involved in the case, or the significance or lack of significance of the case to the development of criminal law. It would also appear from the supreme court's discussion in *Dodge County Cir. Ct.,* that in addition to the merits of the individual case, the State Public Defender may also consider any impact on case load and financial resources when reaching a decision on representation. These grounds are arguably a reasonable basis for the exercise of discretion under sec. 977.05(4)(j), Stats., as amended by ch. 20, Laws of 1981. However, the exercise of discretion by the State Public Defender is subject to judicial review under *Alston* and the final arbiter of reasonableness will be the judiciary.

In conclusion, I suggest that the Office of the State Public Defender should establish a set of standards for the exercise of its discretion under sec. 977.05(4)(j), Stats. A set of standards would not only assist the reviewing court but it would also assist the State Public Defender's Office in developing an administrative program which could be uniformly applied to individual cases.

BCL:MRK

Firearms; Youthful Offenders Act; Persons who previously received dispositions under the repealed Youthful Offenders Act are not precluded from possessing firearms under sec. 941.29, Stats. OAG 69-82

December 23, 1982.

RICHARD ALAN GINKOWSKI, *District Attorney*
Rusk County

You have requested my opinion as to whether sec. 941.29, Stats., created by ch. 141, Laws of 1981, applies to individuals who had received a disposition under the repealed Youthful Offenders Act.

Specifically, you have asked whether a person who had been "convicted" in 1977 of sexual assault under the Youthful Offenders Act, ch. 54, Stats. (1975), may now possess a firearm in view of sec. 941.29, Stats.

In my opinion, persons who received youthful offender dispositions were not "convicted" of felonies. Therefore, those youthful offenders are not subject to the sec. 941.29, Stats., requirements and penalties.

Section 941.29, Stats., provides:

> (1) A person is subject to the requirements and penalties of this section if he or she has been convicted of a felony in this state or of a crime elsewhere that would be a felony if committed in this state.
>
> (2) Any person specified in sub. (1) who, subsequent to the conviction for the felony or other crime, as specified in sub. (1), possesses a firearm is guilty of a Class E felony.

Under sec. 54.03(1), Stats. (1975), an individual had to be under the age of twenty-one at the time of the commission of the offense and also found guilty of a felony before being considered for a youthful offender disposition. If the court subsequently determined that a person was not a youthful offender under further criteria stated in sec. 54.03(1)(a) and (b), Stats. (1975), the court could enter a judgment of conviction pursuant to sec. 54.03(4)(c), Stats. (1975). However, sec. 972.13(1), Stats. (1975), provided that "if the defendant is found to be a youthful offender under that section, *a judgment of conviction shall not be entered* but rather the judgment shall be for disposition as a youthful offender." A youthful offender disposition resulted in either an order for probation or commitment to the department. Sec. 53.04(4)(a), Stats. (1975).

Further, the stated intent of the Youthful Offenders Act was "to provide an *alternative* to procedures in the criminal code relating to *conviction* and sentencing." Sec. 54.01(2), Stats. (1975) (emphasis added).

Thus, the Legislature clearly made a distinction between convictions and youthful offender dispositions of probation or commitment. I therefore believe those persons adjudged guilty under the Youthful Offenders Act were never convicted and are not subject to the sec. 941.29, Stats., arms possession limitation.

You also ask whether the disposition of persons adjudged guilty under the Youthful Offenders Act should be expunged upon discharge.

As I previously stated, when comparing the Youthful Offenders Act to sec. 161.47, Stats., "a judgment under the Youthful Offenders Act is never expunged." 66 Op. Att'y Gen. 242, 244 (1977).

While sec. 973.015(1), Stats. (1975), provided for expungement upon successful completion of the sentence for persons under twenty-one convicted of misdemeanors, there is no corresponding provision for persons receiving a youthful offender disposition who are discharged.

You have further inquired whether youthful offender dispositions may be considered in subsequent sentencings.

The Youthful Offenders Act provided no express restriction against using records in subsequent proceedings. As you noted, sec.

54.03(4)(b), Stats. (1975), prohibited using a youthful offender disposition to bar persons from public or private employment, securing occupational and professional licenses, holding public office or voting. The Youthful Offenders Act provided no further restrictions regarding consideration of youthful offender dispositions.

Further, "[I]t is clear that a juvenile record is highly relevant and proper as a matter to be considered in the exercise of the sentencing discretion." *Lange v. State,* 54 Wis. 2d 569, 574, 196 N.W.2d 680 (1972). In my opinion, if reviewing juvenile records is considered proper for the purposes of sentencing, reviewing dispositions under the Youthful Offenders Act is also appropriate.

As I have previously stated, "the Legislature only intended to provide noncriminal alternatives to the conviction and sentencing of youthful offenders; in all other respects, a commitment under the Act remains an essentially criminal disposition." 66 Op. Att'y Gen. 242 (1977).

In my opinion, the Legislature did not expressly provide, nor did it intend to provide, for restrictions on the use of youthful offender disposition information at subsequent sentencing proceedings.

BCL:SDE:bah

STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION LAWS, LEGISLATIVE BILLS, OPINIONS OF THE ATTORNEY GENERAL, AND RESOLUTIONS REFERRED TO AND CONSTRUED

U.S. CODE

UNITED STATES CONSTITUTION

WISCONSIN CONSTITUTION

RESOLUTIONS

SENATE BILLS

ASSEMBLY BILLS

SESSION LAWS

OPINIONS

STATUTES

INDEX

N. B. The texts of Unpublished Opinions appearing in this Index without page references are available on request from the Office of the Attorney General.

Page

Page

Page

County Highway Committee

Courts

Page

Page

Page

Page

Page

Page

Public Defenders

Public Inland Lake Protection And Rehabilitation

Public Officials

Public Records

Page

vices. The Department is given the discretion to decide what special expertise it needs and the most practical and economical means to obtain it in connection with its highway program activities. (Unpublished Opinion) OAG 35–82

Reimbursement

Reimbursement; State; The reimbursement rate payable by state employes for personal use of state automobiles is the rate set forth in the Uniform Travel Schedule for state reimbursement of state employes for business use of personal automobiles when a state owned automobile is not available. (Unpublished Opinion) OAG 63–82

Religion

Foster Homes; Health And Social Services, Department Of; Licenses And Permits; Religion; A facility owned and operated by a religious organization is subject to licensure and regulation under ch. 50, Stats., and chapter HSS 3 Wis. Adm. Code, unless the facility is a convent, monastery or similar place where residents are all members of a religious hierarchy living in seclusion and operating under a set of religious vows or rules. The Department of Health and Social Services can constitutionally license and regulate Community Based Residential Facilities (CBRFs) operated by religious organizations not exempt under sec. 50.01(1), Stats., or sec. 50.03(9), Stats. Application of CBRF licensure and regulatory requirements to certain facilities operated by the Salvation Army discussed. OAG 32–82 112

Right Of Way

Forest Crop Law; Right Of Way; Section 77.03, Stats., relating to enrolling land in the forest cropland program, creates a right of access across an owner's non-enrolled lands to reach the owner's landlocked enrolled lands for the purposes of hunting and fishing. OAG 50–82 163

Salaries And Wages

Public Officials; Salaries And Wages; The Wisconsin Housing Finance Authority does not have the power to increase the salary of its Executive Director up to the maximum of the executive group range established under sec. 20.923(1), Stats., for positions assigned to Wisconsin state executive salary group 6 until February 1, 1983. OAG 59–82 186

Savings And Loan Associations

Banks And Banking; Credit Unions; Savings And Loan Associations; Constitutionality of ch. 45, Laws of 1981, delegating authority to commissioners of various financial institutions, discussed. OAG 62–82 195

Schools And School Districts

Drivers; Schools and School Districts; Public school districts may not charge students for the cost of providing driver education programs if the programs are credited towards graduation. OAG 67–82 209

Page

Senate

Elections; Legislature; Senate; A state senator need not resign his or her present seat before filing and running for a newly numbered senate seat, merely because he or she is presently an incumbent senator. OAG 49–82..... 162

Sheriffs

Coroner; County Board; Sheriffs; The county board of a county with a population less than 500,000 may abolish the position of undersheriff and transfer all statutory duties and powers of an undersheriff, including those set forth in sec. 59.21(8)(b)1., Stats., to the civil service position of chief deputy sheriff, created under sec. 59.21(8), Stats.
The coroner does not exercise the powers and duties of the sheriff, under the authority of sec. 59.34(2), Stats., when there is no sheriff, if the functions, duties, responsibilities and privileges of undersheriff have been properly transferred, pursuant to sec. 59.025(3)(b), (c), Stats., to the position of chief deputy sheriff, which is created and filled, pursuant to sec. 59.21(8), Stats. (Unpublished Opinion) OAG 25–82

County Board; Sheriffs; County board in county under 500,000 not having civil services system for deputy sheriffs can abolish traffic department organized under sec. 83.016, Stats., and with the cooperation of the sheriff, such traffic patrolmen can be appointed deputies in the sheriff's department without providing for civil service selection under sec. 59.21(8)(cm), Stats. Language in 36 Op. Att'y Gen. 174 (1947) and 38 Op. Att'y Gen. 245 (1949) distinguished in view of sec. 59.025, Stats., which was enacted after issuance of those opinions. OAG 64–82 199

State

Reimbursement; State; The reimbursement rate payable by state employes for personal use of state automobiles is the rate set forth in the Uniform Travel Schedule for state reimbursement of state employes for business use of personal automobiles when a state owned automobile is not available. (Unpublished Opinion) OAG 63–82

Statutes

Appropriations And Expenditures; Governor; Statutes; Taxation; The base amount for determining 1983 shared revenue distributions is $675,000,000. (Unpublished Opinion) OAG 22–82

Students

Loans; Students; Change in method of computing special allowance payable on eligible student loans will not result in "materially lower rate of return." (Unpublished Opinion) OAG 40–82

Taxation

Appropriations And Expenditures; Governor; Statutes; Taxation; The base amount for determining 1983 shared revenue distributions is $675,000,000. (Unpublished Opinion) OAG 22–82

Cities; County Board; Ordinances; Taxation; Words And Phrases; Section 74.80(2), Stats., permits counties and cities to impose by ordinance a flat six percent or less penalty on overdue real estate taxes and special assessments, regardless of when they became or become overdue. OAG 60–82..... 189

Page

Page

Page