OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

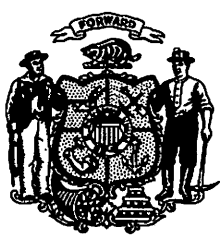
STATE OF WISCONSIN

VOLUME 73

January 1, 1984 through December 31, 1984

BRONSON C. LA FOLLETTE

ATTORNEY GENERAL



MADISON, WISCONSIN
1984

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

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LEGAL SERVICES DIVISION

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ED GARVEY	Deputy Attorney General
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JAMES D. JEFFRIES	Admin., Legal Services Division
JAMES P. ALTMAN	Assistant Attorney General
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CHARLES A. BLECK	Assistant Attorney General
MARY V. BOWMAN	Assistant Attorney General
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ROXANNE C. BROWN	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
KATHLEEN M. FALK	Assistant Attorney General
DANIEL S. FARWELL	Assistant Attorney General
WILLIAM FIELDS	Assistant Attorney General
DAVID T. FLANAGAN	Assistant Attorney General
MATTHEW FRANK	Assistant Attorney General
JEFFREY M. GABRYSIAK	Assistant Attorney General
WILLIAM L. GANSNER	Assistant Attorney General
DAVID J. GILLES	Assistant Attorney General
JOHN J. GLINSKI	Assistant Attorney General
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ALBERT O. HARRIMAN	Assistant Attorney General
CHRIS HEIKENEN	Assistant Attorney General
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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
BARRY LEVENSON	Assistant Attorney General
MICHAEL J. LOSSE	Assistant Attorney General
PAUL LUNDSTEN	Assistant Attorney General
PAMELA MAGEE-HEILPRIN	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
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
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[1]	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	Assistant Attorney General
CARL A. SINDERBRAND	Assistant Attorney General
JONATHAN P. SINER[1]	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
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ARNOLD J. WIGHTMAN[2]	Assistant Attorney General
GERALD S. WILCOX	Assistant Attorney General
WILLIAM H. WILKER	Assistant Attorney General
WILLIAM C. WOLFORD	Assistant Attorney General
CHRISTOPHER G. WREN[2]	Assistant Attorney General
E. GORDON YOUNG	Assistant Attorney General
MICHAEL L. ZALESKI	Assistant Attorney General

[1]Resigned, 1984

[2]Appointed, 1984

OPINIONS

OF THE

ATTORNEY GENERAL

Volume 73

COUNTY BOARD; RESIDENCE, DOMICILE AND LEGAL SETTLEMENT; TEACHERS; County board has power to adopt ordinance requiring all county employes, including those employed by the Handicapped Childrens Education Board (HCEB) pursuant to section 115.86(5), Stats., to maintain residence within the county. However, HCEB rather than county board has power to appoint such personnel and to remove them. Exercise of such power may be limited by civil service ordinance or labor contract. OAG 1-84

January 5, 1984

KENNETH J. BUKOWSKI, *Corporation Counsel*
Brown County

You request my opinion whether teachers and other personnel employed by the Brown County Handicapped Children's Education Board (hereinafter HCEB) pursuant to section 115.86(5), Stats., are subject to section 4.103 of the Brown County Code of Ordinances adopted by the Brown County Board of Supervisors, which provides

in part: "All employees of Brown County must reside within the physical boundaries of the county."

It is my opinion that teachers and other personnel employed by HCEB are county employes and are subject to the residency requirement.

You further inquire whether the county board has the power to terminate HCEB employes who fail to comply with the residence requirement. The answer is no. Such power is within the power of the HCEB under the provisions of section 115.86(5). *See* 44 Op. Att'y Gen. 262 (1955). The county board may exercise indirect control with respect to retention of staff through budget approval procedures.

Section 115.82(2) permits a county board "to establish a special education program for children with exceptional needs, for school districts in the county." The program is supervised by a board appointed by the county board or county board chairman pursuant to section 115.86(3). Compensation and reimbursement for mileage of board members is fixed by the county board. Neither the "program" nor the "board" are entities separate from the county. Although the HCEB may apply for state aids, section 115.86(10) provides: "All state aid shall be paid to the county treasurer and credited to the fund of the board." Section 115.86(5) provides that the HCEB may "employ teachers and other personnel." However, such personnel are county employes paid from the county treasury under authority of a budget prepared by the HCEB board and approved by the county board. Section 115.86(5) provides:

> BOARD DUTIES. The board shall have charge of all matters pertaining to the organization, equipment, operation and maintenance of such programs and may do all things necessary to perform its functions, including, without restriction because of enumeration, the authority to erect buildings subject to county board approval and employ teachers and other personnel. The board shall prepare an annual budget which shall be subject to approval of the county board under s. 65.90 and shall include, without limitation because of enumeration, funds for the hiring of staff, the purchase of materials, supplies and equipment and the operation and maintenance of buildings or classrooms.

I construe the words "employ teachers and other personnel" as granting the HCEB power of appointment which includes power of removal. Appointment and removal may be limited by civil service provisions or labor contract. *See* secs. 59.07(20), 59.15(2)(d), 59.21(8), 63.01-63.17 and 111.70-111.77, Stats. You advise that Brown County does not have a civil service ordinance applicable to these or other county positions.

A county may lawfully require as a condition of employment that employes reside within their territorial limits. *McCarthy v. Philadelphia Civil Service Commission,* 424 U.S. 645 (1976); *Miller v. Krawczyk,* 414 F. Supp. 998 (E.D. Wis. 1976).

In my opinion the provisions of section 59.15(2)(a) and (c) which, with exceptions, permit the county board to "establish regulations of employment for any person paid from the county treasury ..." and section 59.025(3), which empowers the county board to create and abolish positions, coupled with the power of the county board to approve the annual budget of HCEB, including "funds for the hiring of staff" under section 115.86(5), represent an adequate basis for enactment of a reasonable ordinance requiring county employes to maintain residence within the county.

BCL:RJV

CIRCUIT COURT; FEES; GARNISHMENT; In garnishment actions, a clerk of circuit court is not authorized to collect the deposit and disbursement fees set forth in section 814.61(12)(a), Stats., unless the garnishee has paid money into court and obtained a court order directing the clerk of courts to deposit the money in a safe depository. State agencies are not required to pay the fees outlined in section 814.61 (except for the filing fee in section 814.61(1)), nor are they required to pay the fee for filing a garnishment action under section 814.62(1). OAG 2-84

January 5, 1984

MICHAEL LEY, *Secretary*
Wisconsin Department of Revenue

You have requested my opinion as to whether a clerk of circuit court has authority in garnishment actions to collect not only the

filing fee established by section 814.62(1), Stats., but also the deposit and disbursement fees set forth in section 814.61(12)(a). It is my opinion that a collection of the fees outlined in section 814.61(12)(a) is only authorized in those garnishment proceedings where the garnishee has paid at least $1000 into court and has also obtained a court order directing the clerk of courts to deposit the money in a safe depository.

Section 814.62(1) provides:

> The fee for commencing a garnishment action under ch. 812, including actions under s. 799.01(4)(b), is $12. Of the fees received by the clerk under this subsection, the county treasurer shall pay 50% to the state treasurer for deposit in the general fund and shall retain the balance for the use of the county.

Section 814.61(12)(a), added to the statutes by chapter 317, Laws of 1981, provides:

> In a civil action, the clerk of court shall collect the following fees:
>
> . . . .
>
> (12) RECEIVING AND DISBURSING MONEY. (a) *Trust funds and small estates.* 1. For receiving a trust fund, *or handling or depositing money under s. 757.25,* 807.10 (3) or 880.04 (2)(a), at the time the money is deposited with the clerk, a fee of $10 or 0.5% of the amount deposited, whichever is greater. In addition, a fee of $10 shall be charged upon each withdrawal of any or all of the money deposited with the clerk.

You report that at least one circuit court clerk has interpreted section 814.61(12)(a) as encompassing garnishment actions. Accordingly, the clerk has requested your agency, the plaintiff/creditor in a garnishment action, to pay the deposit and disbursement fees outlined in that section. More specifically, you report that the clerk believes section 757.25, referred to in section 814.61(12)(a), to be applicable to *any* garnishment involving a sum of at least $1000. It is my opinion that this interpretation is erroneous.

Section 757.25 states:

> The judge of any court of record on the application of a party to any action or proceeding therein who has paid $1,000 or more

> into court in the action or proceeding may order the money to be deposited in a safe depository until the further order of the court or judge thereof. After the money has been so deposited it shall be withdrawn only upon a check signed by the clerk of the court pursuant to whose order the deposit was made and upon an order made by the court or the judge thereof. The fee for the clerk's services for depositing and disbursing the money is prescribed in s. 814.61(12)(a).

Though the first sentence of this section has been a part of the statutes for nearly a century, its applicability has not been analyzed in any appellate decisions. Based on the plain wording of the section, I interpret it as requiring (1) that a party to the action have paid at least $1000 into court; and (2) that the same party have obtained from the judge an order directing the clerk of courts to deposit the money in a safe depository. Given the framework of Wisconsin's garnishment laws contained in chapter 812, most garnishees would have no reason to seek a court order of the kind described in section 757.25. Therefore, it is my opinion that section 757.25 is inapplicable to a garnishment proceeding where no such court order exists.

A typical garnishment involves three parties: the plaintiff/creditor, the garnishee and the defendant/debtor. One portion of the garnishment proceedings involves the plaintiff filing a complaint against the garnishee, alleging that the garnishee is believed to be indebted to the defendant. Sec. 812.05, Stats. Under section 812.13, if the garnishee is in fact indebted to the defendant and sets forth this fact in his or her answer, the garnishee is then allowed to pay voluntarily to the clerk of courts the amount of money in controversy between the plaintiff and defendant. The clerk issues the garnishee a receipt for the payment and the garnishee is thereby discharged of all liability for the amount paid. Sec. 812.13(1), Stats. It is probable that a garnishee who voluntarily pays money into court in this manner maintains little direct interest in the money, for by the terms of section 812.13 the money is not paid to the court until the garnishee has already admitted being indebted to the defendant. Further, upon completion of the garnishment action the money will most likely be distributed to either the plaintiff/creditor or the defendant/debtor, not to the garnishee. *See* secs. 812.13(3) and 812.13(5). Stats. Given this lack of direct interest in the deposited money, and since the garnishee's liability ends at the point the money is paid to the clerk of

courts, I do not envision a need for most garnishees to seek a court order under section 757.25 directing the clerk of courts to deposit the money in a safe depository.

This is not to say that a garnishee would never have a need or desire to do so. Under section 812.15(1) a garnishee has a right to defend the principal action in a garnishment proceeding (*i.e.*, the action between the plaintiff/creditor and the defendant/debtor) if the defendant chooses not to defend. This section apparently applies to a garnishee whose affairs are so closely tied to those of the defendant that the garnishee does in fact hold a direct interest in the money allegedly owed to the plaintiff. Such a garnishee may still choose to pay the controverted amount into court voluntarily, but because of his or her direct interest in the fund, the garnishee may wish to ensure the security and the growth of the fund by requesting a court order as described in section 757.25. Further, under section 812.13(1), the plaintiff can request the garnishee to pay the controverted amount to the court, and if the request is not complied with, the plaintiff is entitled to a judgment against the garnishee. A garnishee who has a financial interest in the outcome of the garnishment action may respond to such a request by seeking protection of the deposited fund under section 757.25. Hence, it is my opinion that section 757.25 does apply to garnishment proceedings where a garnishee with a direct stake in the sum being paid to the court has obtained a court order directing the clerk of courts to deposit the fund in a particular safe depository, and where the amount deposited totals at least $1000. In this narrow situation, a clerk of courts is authorized to collect the deposit and disbursement fees outlined in section 814.61(12)(a).

My opinion that section 757.25 applies only in those instances where a court order exists finds further support in the structure of section 814.61(12)(a) itself. The section speaks of handling and depositing money under three statutory sections: sections 807.10(3), 880.04(2)(a) and 757.25. The first section, section 807.10(3), focuses on the situation where money is awarded to a minor who lacks a guardian. It empowers a court to order a clerk of courts to handle the money in accordance with section 880.04(2), the second section listed in section 814.61(12)(a). Section 880.04(2) authorizes a clerk of courts to deposit the funds into savings accounts on behalf of the child, or to invest the funds in the stock of a savings and loan associ-

ation. I have already discussed the language of the third section, section 757.25. In enacting section 814.61(12)(a), which groups together these three sections, the Legislature appears to have viewed the sections as sharing a common characteristic. It is my opinion that a court order is the common characteristic, an order which directs the clerk of courts to deposit a sum of money in a given fashion. Not every garnishment action will bear this characteristic, as I have discussed. Hence, it is my opinion that only those garnishment actions that do involve a garnishee obtaining a court order fall within the parameters of section 814.61(12)(a).

An important question inextricably tied to the question you ask is whether the Department of Revenue or any other state agency must pay any of the fees enumerated in section 814.61. It is my opinion that a state agency must pay only the filing fee set forth in section 814.61(1). It is a long-standing rule of statutory construction that the state is not subject to a statute of general application that inures to the cost or burden of the state unless the state is explicitly included within the provisions of the statute. *Fulton v. State Annuity Inv. Board,* 204 Wis. 355, 360-61, 236 N.W. 120 (1931); *State ex rel. Martin v. Reis,* 230 Wis. 683, 687, 284 N.W. 580 (1939); *Kenosha v. State,* 35 Wis. 2d 317, 323, 151 N.W. 36 (1967); *State ex rel. Dept. of Pub. Instruction v. ILHR,* 68 Wis. 2d 677, 229 N.W.2d 591 (1975). This rule arises from the presumption that "the legislature does not intend to deprive the crown of any prerogatives, rights, or property unless it expresses its intention to do so in explicit terms ...." *State v. Milwaukee,* 145 Wis. 131, 135, 129 N.W.2d 1101 (1911). An analysis of section 814.61 reveals that subsection (1), regarding filing fees, refers specifically to state agencies. It states: "This includes actions and proceedings commenced by a government unit as defined in s. 108.02(28)." No other subsections of section 814.61 contain this or a similar provision. Thus, it is my opinion that the remaining subsections of section 814.61 are meant to be of general applicability only, and hence do not affect state agencies. As a corollary matter, it is my opinion that state agencies are also not required to pay the fee for filing a garnishment action as set forth in section 814.62(1), for that section likewise makes no reference to the state.

BCL:RCB

CORPORATION COUNSEL; COUNTIES; DISTRICT ATTORNEY; 51.42 BOARD; WORDS AND PHRASES; Section 51.42(5)(h)7. permits multicounty 51.42/51.437 board to retain private legal counsel only where the corporation counsel of *each* county, or district attorney of each county not having a corporation counsel, notifies the board that he or she is unable to provide specific services in a timely manner. Litigation, as used in section 59.44(3), applies only to civil court proceedings and does not include grievance proceedings or proceedings before an administrative agency. OAG 3-84

January 5, 1984

WILLIAM A. J. DRENGLER, *Corporation Counsel*
Marathon County

You request advice to clarify language in unpublished opinions of this office, OAG 31-83, dated August 11, 1983, and OAG 38-82, dated May 20, 1982. The latter opinion was addressed to you and stated in part:

> You request my opinion whether the Human Services Board of Langlade, Lincoln and Marathon counties, which was organized by the county boards of the three respective counties pursuant to secs. 51.42(3)(a) and 51.437(4), (7)(b), Stats., to carry out sec. 51.42, Stats., responsibilities for Langlade, Lincoln and Marathon counties, and sec. 51.437, Stats., responsibilities for Langlade and Marathon counties, can retain private legal counsel to advise and act for the Human Services Board in administrative hearings and court proceedings.
>
> It is my opinion that it does not have such authority. These legal duties are the responsibilities of the district attorneys or corporation counsel of the respective counties. It is my opinion, however, that the counties could jointly employ a county corporation counsel or assistant county corporation counsel to furnish certain legal service to the Human Services Board. *See* secs. 59.025(3), 59.07(44), 66.30, Stats. and 60 Op. Att'y Gen. 313, 314 (1971). The combined board does have authority to purchase limited legal services for certain clients pursuant to secs. 46.03(17), 46.036 and 55.04(1)(a)8., Stats. However, in furnishing legal services to clients, a private attorney would be without authority to appear in

court as an attorney for the board. Further, there must be no interference with the powers of the district attorney of each county with respect to prosecution of criminal actions in the courts of such county and no interference with the duties of each respective district attorney or county corporation counsel with respect to the prosecution and defense of civil actions in which either the state or respective county is interested.

In 63 Op. Att'y Gen. 468 (1974), it was stated that a sec. 51.42 board probably did not have authority to contract with private legal counsel to furnish legal services to the board. I am of the opinion that certain sections of the statutes, not referred to in that opinion, appear to support limited contracts for the purchase of legal services for clients.

The opinion concluded:

I suggest that you, members of the Human Services Board and members of the respective county boards of supervisors review the resolutions, ordinances and contractual agreements involved.

You have not furnished me with copies of the multi-county plan and contractual agreement approved by the respective county boards and Secretary of the Department of Health and Social Services pursuant to section 51.42(3)(b) and (c). Certain of the advice given herein may be subject to modification depending upon specific duties contracted for in such documents.

You state that the Human Services Board of Langlade, Lincoln and Marathon counties continues to retain outside counsel independent of supervision by the district attorneys or corporation counsel of the counties involved. Subsequent to the issuance of OAG 38-82, section 1106 of 1983 Wisconsin Act 27 amended section 51.42(5)(h)7. to provide that a 51.42 Board had the power to:

Enter into contracts to render services to or secure services from other agencies or resources including out-of-state agencies or resources. *Notwithstanding ss. 59.07(44), 59.456 and 59.47, a multicounty board organized under sub. (3)(a) or s. 51.437(7)(b) may contract for professional legal services that are necessary to carry out the duties of the board if the corporation counsel of each county of the multicounty board has notified the board that he or she is unable to provide such services in a timely manner* ....

Similar amendatory language was made in section 51.437(9)(c).

You inquire:

1. To what extent does the referenced statutory change modify your opinion contained in OAG 38-82 regarding multicounty 51.437 or 51.42 Boards' abilities to hire independent outside counsel not supervised by a district attorney or corporation counsel?

In my opinion the change in the statute grants a multicounty board power to contract for professional legal services with private counsel on an independent contractor basis if sufficient funds are available *only "if* the corporation counsel of *each* county [or district attorney of each county not having a corporation counsel] of the multicounty board has notified the board that he or she is unable to provide such services in a timely manner." The amendment evidently was passed in recognition of the opinion referred to and of the restrictive interpretation of then applicable statutes contained therein. The Legislature could have granted broader power to the board to retain private counsel, but chose to place a strict rein upon its use. The statute mentions only corporation counsel without reference to district attorneys even though powers under section 59.47 are cited. Historically, corporation counsels' functions were carved out of the district attorneys' responsibilities, first in Milwaukee and later in other counties. It is reasonable to assume that the Legislature intended that corporation counsel type functions in those counties having only a district attorney should be considered when determining whether private legal counsel could be retained. I conclude that the Legislature intended that the legal officer in each county performing civil legal services have opportunity to provide the legal services required by the board. I therefore construe the section as requiring notification of declination from the corporation counsel of each county having such officer and from the district attorney of each other county. Your subquestions and my responses follow:

a) If the new statute allows for such hiring, in what manner should a corporation counsel "notif[y] the board that he or she is unable to provide such services in a timely manner?"

No notification is called for unless the board requests the respective corporation counsel or district attorney to provide specific legal services. Notification of inability to provide "such services" could be made by letter to the board citing reasons. Any declination should be fully considered in light of the needs of the board, the staff of the corporation counsel or district attorney, and budget and time limitations.

b) If several member counties of such a service providing board rely on a district attorney because no corporation counsel is employed by those counties, is it presumed said district attorneys must so notify that board as well?

For reasons set forth above, the answer is yes. The multicounty plan and contractual agreement approved by the respective county boards and Secretary of the Department of Health and Social Services under section 51.42(3)(b) and (c) should be reviewed to determine which officers have initial responsibility to furnish legal services to the board.

c) If a county employs both a corporation counsel and a district attorney and the duties for a 51.42 or 51.437 legal services have not been assigned by the County Board to the Corporation Counsel, should the District Attorney or Corporation Counsel or both provide such notification?

In my opinion each officer should notify the board of his or her inability to timely furnish the legal services requested. The letter of notification should in such case note that the county board resolution or ordinance establishing the office of corporation counsel does not authorize the corporation counsel to perform such services. It is conceivable that a multicounty contract could provide that a district attorney of a county not having a corporation counsel furnish legal advice and representation to the multicounty board.

d) If either counsel is unable or unwilling to so "notify the board," is the multi-county 51.42 or 51.437 Board without power to retain outside counsel?

If any county corporation counsel or district attorney of a county not having a corporation counsel declines to notify the 51.42-51.437

Board, such board is without power to retain private counsel to represent it in matters before courts or administrative agencies or to render legal advice to the board or its officers.

Your second question relates to language contained in OAG 31-83 which is captioned:

> Although a county board in a county with a population of under 500,000 has no permanent or continuing authority to retain special counsel, it may obtain special counsel with the approval of the circuit court under section 59.44 on a case-by-case basis in those situations where the district attorney or corporation counsel is unable to continue to perform his or her duties without potentially violating the rules of professional conduct established by the Wisconsin Supreme Court. Unless otherwise provided by statute, in those situations where legal services are required in civil matters and the provisions of section 59.44 cannot be utilized, the district attorney or corporation counsel has the exclusive authority to perform or supervise the provision of those services.

At page four of the typewritten opinion it is stated:

> A labor negotiator need not necessarily be an attorney. As long as no legal services within the meaning of section 59.47(1) and (3) are performed, the employment of such a person falls within the general authority of the board to manage its business and concerns under section 59.07(5). There is no special statute authorizing a county board to retain independent counsel to engage in labor litigation. Unless a conflict of interest situation has arisen, counsel who performs labor litigation must therefore be an assistant district attorney or an assistant corporation counsel, or be supervised by the district attorney or corporation counsel under section 59.44(3).

You inquire:

2. Regarding OAG 31-83, page 4, how is "labor litigation" defined? That is, at what point is a labor negotiator or advisor hired under general 59.07(5) powers practicing law? If such a person is an attorney, though he or she need not be as noted by your opinion, and negotiation strategies are used or recommended with an awareness of the law, is there some point short of the actual filing of a lawsuit where independent

> counsel may not be retained without offending your opinion on the provision or supervision of legal services being "vested exclusively in the District Attorney or Corporation Counsel?"

I construe "labor litigation" as used in that opinion and "civil litigation" as used in section 59.44(3) as being applicable only to civil proceedings, including judicial reviews, in a court of law to the exclusion of grievance proceedings, arbitration before an arbitrator or proceedings before an administrative agency. *See Bablitch & Bablitch v. Lincoln County,* 82 Wis. 2d 574, 263 N.W.2d 218 (1978) and *Bearns v. ILHR Department,* 102 Wis. 2d 70, 306 N.W.2d 22 (1981).

Section 59.07(5) grants the county board general power to "[r]epresent the county, have management of the business and concerns of the county *in all cases where no other provision is made* [by statute] ...." That section does not empower a county board to employ staff attorneys (other than a corporation counsel or assistant district attorneys) to advise the board or represent the board or its agencies or to retain private counsel to perform those tasks, since other provisions of the statutes specifically provide the manner in which such professionals are to be chosen. Such special statutes for most purposes grant the district attorney and his or her assistants and county corporation counsel exclusive power to provide legal services and legal representation to the board and other county agencies. The opinion referred to was careful to point out that a person could be employed as labor negotiator only "as long as no legal services within the meaning section 59.47(1) [legal representation in court] and (3) [legal advice] are performed ...." In my opinion a person who is licensed as an attorney would be performing legal services if he or she represented the county or a multicounty 51.42/51.437 board in formal grievance proceedings, arbitration proceedings or proceedings before an administrative agency. *See* sec. 111.70, Stats. A county board or multicounty 51.42/51.437 board does not have power to hire a private attorney to perform such tasks or for the purpose of rendering legal advice in such areas except as may be provided by sections 51.42(5)(h)7., 51.437(9)(c), 59.44(3) or other special statute. I will not speculate as to whether certain advice given by a labor negotiator or labor advisor, who may be but who need not be licensed to practice law, constitutes the practice of law.

Your third set of questions follows:

3. If the County Board determines that certain legal services, such as labor counsel or 51.42/51.437 counsel, are most efficiently provided by a private attorney specialist on an ongoing day-to-day basis, may this be done?

   a) If this is done, may such counsel be hired as an assistant district attorney or assistant corporation counsel?

   b) If this is done, must a district attorney or corporation counsel directly supervise such legal services? If so, to what recommended extent?

   c) If such private counsel is unwilling to be supervised by a district attorney or a corporation counsel, would such unwillingness to be supervised change your opinion?

   d) If a multi-county 51.42/51.437 Board chooses to continue to retain independent counsel, what responsibilities do the respective county boards have in this regard?

The answer to your first question is no if you mean that a "private attorney specialist" would be retained as private counsel on an independent contract basis. *See* OAG 31-83 and discussion under question one. In view of this answer, subquestions (a), (b) and (c) need not be answered. However, it is noted that where attorneys are appointed under section 59.44(3), they are appointed to "assist the district attorney" or corporation counsel and would be subject to supervision by such officer. Subquestion (d) is concerned with responsibilities county boards have with respect to a multicounty 51.42/51.437 board's retention of independent private counsel. As stated under question one, such contracting is permissible only where the corporation counsel of each county has notified the board that he or she is unable to provide such services in a timely manner. The county boards of the various counties can influence such policy by limiting funds or providing funds in the budget approved for such board, in approval of the plan and in formulating the multicounty contract pursuant to section 51.42(3)(b) and (c). County boards can also influence the decision of a 51.42/51.437 board with respect to any desire to contract for private counsel by providing adequate competent staff in the offices of corporation counsel and district

attorney including county employment of an adequate number of assistants.

A multicounty 51.42/51.437 board should seek and rely on advice of the district attorney (district attorneys), corporation counsel (corporation counsels) of the county or counties involved. There may be provisions in the multicounty plan or contract approved under section 51.42(3)(b) and (c) which establish lines of primary responsibility or first reference with respect to rendering legal services to the 51.42/51.437 board. Public officers are accorded a degree of protection when they seek and rely on advice of an attorney who has a duty to render legal advice to them. *See State v. Davis,* 63 Wis. 2d 75, 216 N.W.2d 31 (1974), which also held that the statutory limitation of section 59.07(44) to civil matters was not intended to preclude a corporation counsel from apprising his county board and its members of the consequences, both civil and criminal, which result from specific actions of the board, as well as the legal implications of its actions. A public officer such as a member of the multicounty 51.42/51.437 board risks personal liability and may be in violation of a criminal statute such as section 946.12(2) if he or she "does an act which he knows is in excess of his lawful authority or which he knows he is forbidden by law to do in his official capacity." In *Pugnier v. Ramharter,* 275 Wis. 70, 81 N.W.2d 38 (1957), a taxpayer successfully prosecuted a suit against members of a town board to recover back into the public treasury funds which the town board had contributed to charitable agencies. The court held that such payments were illegal as being beyond the power of the town or town board to make.

In submitting future requests, please conform to the requirements to be observed by district attorneys and county corporation counsels set forth in 62 Op. Att'y Gen. Preface (1973). We have not had the benefit of your preliminary research or opinion with respect to your numerous questions.

BCL:RJV

CLERK OF COURT; FEES; PUBLIC RECORDS; REGISTER IN PROBATE; The alphabetical index which the register in probate must maintain pursuant to section 851.72(5) is not a court record and thus is open to public access under sections 59.14(1) and 19.31. The index may not, however, contain results of proceedings under chapters 55 and 880.

The $4.00 search fee of section 814.66(1)(j) applies only when a person fails to furnish the docket or file number or when a search is conducted to ascertain the existence or non-existence of a record.

The charge for a one page certified copy from the register in probate or clerk of court is comprised of an initial $3.00 certifying fee and a $1.00 per page fee and is thus $4.00. OAG 4-84

January 5, 1984

DAVID H. RAIHLE, *Corporation Counsel*
Chippewa County

You have asked several questions relating to access to certain public records and the fees which the register in probate and the clerk of court may charge for providing such access.

Your first question concerns the alphabetical index of court records which the register in probate is required to maintain pursuant to section 851.72(5), Stats. You indicate that this index "contains matters that are closed by the restrictions of 880.33(6) and Chapter 55." I have been informed that currently in Chippewa County a single unified index includes probate records, the names of people who have been placed under protective services and the names of people who have been found incompetent. Specifically you ask: "Pursuant to the open records law, does the public have access to the alphabetical index which contains closed matters?"

In my opinion, the public should have access to the alphabetical index which the register in probate is required to maintain pursuant to section 851.72. Those matters which are not accessible by the public because of sections 55.06(17)(a) and 880.33(6) should not be maintained in the alphabetical index.

Section 59.14(1) provides that the register in probate must allow public inspection of all books and papers which are required to be

maintained in that office. This section grants " 'an absolute right of inspection subject only to reasonable administrative regulations. ...' " *State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983). The court in *Bilder* recognized an exception to this rule where there is a countervailing statute. Sections 55.06(17)(a) and 880.33(6), however, are not countervailing statutes because they provide exceptions for court records but not for indices to court records. The alphabetical index which the register in probate is required to maintain pursuant to section 851.72(5) must therefore be accessible.

Similarly, the Wisconsin public records law declares a "presumption of complete public access ...." Sec. 19.31, Stats. The Legislature has recognized as a matter of public policy that there are areas where countervailing interests override the public interest in access to public records. Sections 55.06(17)(a) and 880.33(6), however, once again only restrict access to the court records and not to the index to the court records.

Chapter 55 provides for protective services for people in need of such services such as the developmentally disabled, the chronically mentally ill and the mentally retarded. Section 55.06(17)(a) provides: "Any *records of the court* pertaining to protective services or placement proceedings ... are not open to public inspection ...." The statute provides exceptions for the subject of the proceedings, for the subject's guardian, attorney and guardian ad litem, and for other persons with the consent of the subject or by court order.

Section 880.33 describes the procedures to be used in determining incompetency. Section 880.33(6) provides: "All *court records* pertinent to the finding of incompetency are closed but subject to access as provided in s. 55.06(17). The fact that a person has been found incompetent is accessible to any person who demonstrates to the custodian of the records a need for that information."

The alphabetical index required by section 851.72(5) is not a court record. Section 851.72(5) requires that the register in probate "[k]eep an alphabetical index *to* the court record and the file containing the original documents or microfilm copies thereof." Because the index is not a part of the court record, sections 55.06(17)(a) and 880.33(6) do not prevent public access to the alphabetical index. The alphabetical index should not, however, disclose the results of incompetency

or protective services proceedings. The alphabetical index can only inform the user where such information is located.

My answer is guided by a previous opinion and the legislative history of the statutes following that opinion. In 1978 I stated that under the former public records law, section 19.21, *et. seq.*, and under former section 880.33(6), an alphabetical index of names of proposed wards and a docket containing a list of all documents filed with the register of probate in Milwaukee County were open to public inspection because they were not court records pertinent to the finding of incompetency. 67 Op. Att'y Gen. 130 (1978). In contrast, I said that under the former section 55.06(17) there could be no public access to an index of persons placed under protective services because the statute at that time forbad disclosure of "[a]ny records of the department, court, or other agency pertaining to a person who is protected under this chapter ...."

The Legislature responded by adding the second sentence of section 880.33(6) and by amending section 55.06(17). Ch. 379, Laws of 1981. By amending section 880.33(6), the Legislature allowed limited access to the fact that a person had been found incompetent to those people who showed a need for the information. The alphabetical index, therefore, should not disclose the results of an incompetency proceeding. A person desiring this information must demonstrate a need for the information.

The change in section 55.06(17)(a) has broadened access for records under the protective service system. The section now only bars access to "court records pertaining to protective services or placement proceedings" rather than to "any records of the department, court or agency pertaining to a person who is protected ...." The index to these records is thus no longer protected from public access.

The alphabetical index which the register in probate must maintain pursuant to section 851.72(5) is therefore not a court record and is thus open to public access under sections 59.14(1) and 19.31. The index may not however contain results of proceedings held under chapters 55 and 880. The most a person searching the index would be able to determine is that such a proceeding occurred. He or she can then find out further information only if he or she fits under an

exception listed in section 55.06(17) or by demonstrating a need for that information under section 880.33(6).

Your second question asks: "If the public has no access to the alphabetical index and the Register in Probate locates the case number for a party, does the search fee provided by Wis. Stat. 814.66(1)(j) of $4.00 apply?"

In my opinion, the search fee does not apply. As discussed above, the public has complete access to the alphabetical index by virtue of sections 59.14(1) and 19.31. The fee imposed by section 814.66(1)(j) is applicable only when a person fails to furnish the docket or file number or when a search is conducted to ascertain the existence or non-existence of a record.

Your third and fourth questions concern the application of sections 814.66(1)(g) and (h) and 814.61(5)(a) and (10), which provide fees to be charged by the register in probate and the clerk of court respectively for issuing certificates and for providing copies. Specifically you ask:

> When a party secures a certified copy from the Register in Probate of a court record, should the Register charge $3.00 for certifying and the $1.00 for either comparing or copying? In effect, is the cost of one certified page $4.00?
>
> . . . .
>
> When the Clerk certifies a copy, should she charge the $3.00 under (5)(a), $1.00 under (10), or the combination of the two for a total charge of $4.00 per copy?

In my opinion, the cost of a one page certified copy in both situations is $4.00. Section 814.66(1)(g) provides that the register in probate shall collect $3.00 for each certificate issued. This fee is an initial fee for certifying the document. Section 814.66(1)(h) imposes an additional $1.00 per page charge for "copies, certified or otherwise." The fee for a one page certified copy would thus be $4.00 and the fee for a two page certified copy would be $5.00.

Similarly, section 814.61(5)(a) provides that the clerk of court shall collect a fee of $3.00 for issuing certificates. This fee is the initial fee for certifying the document. Section 814.61(10) provides that the clerk shall collect a $1.00 per page fee "[f]or copies, certified or otherwise ...." As in section 814.66, the $1.00 per page charge is

added to the initial $3.00 certifying fee. Thus, the fee for a one page certified copy is once again $4.00 and for a two page certified copy is once again $5.00.

BCL:WHW

EMPLOYER AND EMPLOYE; LABOR; PUBLIC RECORDS; Public records relating to employe grievances are not generally exempt from disclosure under the public records law, and nondisclosure must be justified on a case-by-case basis. OAG 5-84

January 16, 1984

KEITH R. ZEHMS, *Corporation Counsel*
Eau Claire County

You have requested my opinion as to whether records relating to labor grievances of Eau Claire County employes are accessible under the state public records law in subchapter II of chapter 19, Stats.

Apparently the records are kept by the county's personnel director. Therefore, they are "records" kept by an "authority" as those terms are defined in section 19.32. As such, there is "a presumption of complete public access ..." since "denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." Sec. 19.31, Stats.

Section 19.35(1)(a) states:

> Access to records; fees. (1) RIGHT TO INSPECTION. (a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

This provision recognizes three possible bases for denying access to public records: (1) express statutory exemptions; (2) exemptions

under the open meetings law if the requisite demonstration is made; and (3) common law principles. The crux of the common law on public records is the "balancing test" which provides that the custodian "must balance the harm to the public interest from public examination of the records against the benefit to the public interest from opening these records to examination, giving much weight to the beneficial public interest in open public records." *State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983).

Express statutory exemptions to the public records law are contemplated further in section 19.36(1), which reads as follows:

> Limitations upon access and withholding. (1) APPLICATION OF OTHER LAWS. Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35(1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).

An example of an express statutory exemption is section 146.82 which makes patient health care records confidential. Another example is the confidentiality of pupil records under section 118.125. In specific areas such as these, the Legislature has determined as a matter of public policy that the interests protected by confidentiality generally outweigh the interests that favor access to public records. Where such a statute exists, the inquiry usually need go no farther.

I have found no statute that expressly makes labor grievance records confidential.

As to exemptions under the open meetings law, you point out correctly that section 19.85(1)(a), (b), (c) and (f) indicates some legislative sensitivity to personnel matters. However, their scope is limited to such serious matters as those involving the investigation or discipline of a public employe or those where the information involved "would be likely to have a substantial adverse effect upon the reputation of ... [the] person referred to ..." if made public. I assume that relatively few grievances initiated by employes or their union representatives fall within these categories. For example, it seems unlikely that complaints about working conditions would fall within the purview of any of the cited exemptions in the open meetings law. Cer-

tainly it cannot be said that the substance of all grievances would fall within such exemptions.

Moreover, just because a subject falls within the purview of an exemption to the open meetings law does not necessarily mean that a meeting to discuss that subject must be closed. Whether to go into a closed session based on any one of the exemption provisions is a discretionary matter for the governmental body, because section 19.85(1) merely states that "[a] closed session *may be held* for any of the following purposes."

The fact that the exemption provisions may justify, but do not compel, a closed meeting is reflected in that part of section 19.35(1)(a), which reads as follows:

> The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

The statute recognizes that in the exemption provisions the Legislature has identified categories of sensitive information, but the Legislature has not mandated that all such information be withheld all the time. In my opinion the exemptions under section 19.85 may not be used as the basis for general blanket exceptions under the public records law. When exemptions to the open meetings law are relied on, section 19.35(1)(a) requires a case-by-case determination with respect to each request as of the time of the request. Any blanket custodial policy would be contrary to this requirement. 66 Op. Att'y Gen. 302, 306 (1977).

Likewise, it is my opinion that the common law balancing test must be applied by the custodian on a case-by-case basis. 63 Op. Att'y Gen. 400, 401 (1974).

As part of your request you advocate the position that the blanket confidentiality of grievance records is necessarily implied by section 19.82(1), which reads as follows:

> "Governmental body" means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule

or order; a governmental or quasi-governmental corporation; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. IV or V of ch. III.

You note that grievance procedures are considered to be an aspect of collective bargaining. Sec. 111.70(1)(d), Stats.; 67 Op. Att'y Gen. 276 (1978). You conclude that "[s]ince the treatment of grievances is exempt from the Open Meeting Law and the documentation of grievances is an integral part of the grievance procedure it follows that such documentation should be exempt from the Public Records Law."

Your reasoning and reliance on section 19.82(1) has some appeal, but I cannot embrace the breadth of your conclusion.

First, you would imply a blanket categorical exception to the public records law when the law itself states it will accommodate only specific statutory exemptions. Sec. 19.36(1), Stats.

Secondly, the exception of collective bargaining meetings from the open meetings law under section 19.82(1) is not as extensive as the exception to the public records law you would imply. Section 19.85(3) requires that the "final ratification or approval of a collective bargaining agreement ..." be conducted in open session. Also, the exception in section 19.82(1) applies only to "governmental bodies." It would not apply to those steps in the grievance procedure which involve public employes and officials who do not constitute a "governmental body" as defined in section 19.82(1).

In my opinion the exception of collective bargaining meetings from the open meetings law under section 19.82(1) should be treated as the other exemptions under section 19.85 for the purpose of applying the public records law. Therefore, pursuant to section 19.35(1), the fact that collective bargaining meetings of governmental bodies are not subject to the open meetings law may be taken as an expression of public policy on the subject, but in order to deny access to the records involved the custodian must make "a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made."

BCL:RWL

AUTOMOBILES AND MOTOR VEHICLES; LICENSES AND PERMITS; TRAFFIC; Imprisonment or suspension of license under section 345.47(1)(a) and (b), Stats., does not eliminate the liability of a defendant for payment of the $150 surcharge provided for in section 346.655. The county does not become liable for the surcharge if not paid. An application for an occupational license is not a special proceeding requiring the payment of clerk's fees under section 814.61(1). OAG 6-84

January 16, 1984

J. DENIS MORAN, *Director*
State Courts

You have asked several questions regarding the following statutes. Section 346.655(1), Stats., reads:

> Driver improvement surcharge. (1) On or after January 1, 1982, if a court imposes a fine or a forfeiture for a violation of s. 346.63(1), or a local ordinance in conformity therewith, or s. 346.63(2) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, it shall impose a driver improvement surcharge in an amount of $150 in addition to the fine or forfeiture and penalty assessment.

Section 345.47(1)(a) and (b) reads:

> Judgment of forfeiture and penalty assessment. (1) If the defendant is found guilty, the court may enter judgment against the defendant for a monetary amount not to exceed the maximum forfeiture and penalty assessment, if required by s. 165.87, provided for the violation and for costs under s. 345.53 and, in addition, may suspend or revoke his or her operating privilege under s. 343.30. If the judgment is not paid, the court shall order:
>
> (a) That the defendant be imprisoned for a time specified by the court until the judgment is paid, but not to exceed 90 days; or
>
> (b) In lieu of imprisonment and in addition to any other suspension or revocation, that the defendant's operating privilege be suspended for a period of time not less than 30 days nor more than 6 months. If the person pays the forfeiture and the penalty assessment, if required by s. 165.87, after suspension under this

section, the suspension shall be reduced to the minimum period of 30 days. Suspension under this paragraph shall not affect the power of the court to suspend or revoke under s. 343.30 or the power of the secretary to suspend or revoke such operating privilege.

Your first question is whether imprisonment or suspension under section 345.47(1)(a) and (b) eliminates the liability of a defendant for payment of the surcharge provided in section 346.655(1). The answer is no. The law provides a method for coercing payment of judgments in traffic cases. A person may be imprisoned until he pays, but not longer than ninety (90) days. In the alternative, the driver's operating privilege may be suspended until the judgment is paid, but not longer than six (6) months. If a person chooses to serve the full period of imprisonment or suspension, he cannot be further imprisoned or suspended. However, the imprisonment or suspension does not extinguish the obligation to pay. In *State ex rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 295 n.6, 201 N.W.2d 778 (1972), the court said that section 973.07, which contemplates imprisonment until the fine and costs are paid, does not provide even by implication that such imprisonment is in satisfaction of the debt. This is the rule in this state although in many other states the contrary is true.

Your second question is whether the county is liable for the payment of the surcharge to the state treasurer if the defendant does not pay. The answer is no. There is no provision making the county liable where such surcharge is not paid by the defendant.

Your third question is what enforcement mechanisms are available to collect the surcharge from the defendant. As to the first offense of driving under the influence, which is a civil forfeiture action, the forfeiture may be collected in a civil action brought under chapter 778. As to the second offense of driving under the influence, which is criminal, the method of collecting the fine and other charges is set forth in section 973.07. The court may sentence the defendant to jail until the fine and other charges are paid, but not to exceed six (6) months. If the fine is not paid, the judgment may be perfected and execution issued as provided in chapter 815.

Your last question is whether an application to a judge for an occupational license under section 343.10 is a special proceeding within the meaning of section 814.61(1)(a), thus requiring payment

of a clerk's filing fee. The answer is no. Section 801.01(1) provides that proceedings in courts are divided into actions and special proceedings. It also provides that the word "action," as used in chapters 801 to 847, includes "special proceeding" unless otherwise provided. Thus a special proceeding is an action in court. Section 814.61 relates to civil actions in court. Section 814.61(1) provides for a clerk's filing fee at the commencement of all civil actions and special proceedings. This applies only to actions and special proceedings in court.

Section 343.10(1) provides that an application for an occupational license may be filed with a judge of a court of record. It further provides that the judge may issue an order for an occupational license. In *State v. Marcus*, 259 Wis. 543, 49 N.W.2d 447 (1951), the court pointed out that the occupational license statute confers no judicial power on the court and that the judge in entering the order is acting solely in an administrative capacity. Thus it is clear that an application for an occupational license is not a special proceeding in court and no clerk's fee is required.

BCL:AH

CONFIDENTIALITY; PUBLIC RECORDS; WORDS AND PHRASES; Information on sex, ethnic background and handicapped status obtained through state employment applications for affirmative action purposes is exempt from disclosure under the public records law, but birth date information is not. OAG 7-84

January 17, 1984

HOWARD FULLER, *Secretary*
Department of Employment Relations

You have asked a series of questions regarding access under the public records law to certain information obtained from state employes in connection with state affirmative action programs.

Your first question is:

1. What state or federal statutory or administrative limitations, if any, exist upon the right of a requester (as defined in Sec. 19.32(3), Stats.) to have access to records in my custody which identify the date of birth, sex, ethnic status and handicap status of individual state employes?

Section 19.36(1) reads as follows:

> Limitations upon access and withholding. (1) APPLICATION OF OTHER LAWS. Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35(1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).

Limitation on access to a particular file may be based on the exemptions to the open meetings law under section 19.85 if the custodian can make a specific demonstration that there is a need to restrict public access at the time the request is made. Sec. 19.35(1)(a), Stats. The former limitation applies generally to categories of records. The latter requires a case-by-case determination at the particular time the request is made.

The pertinent statutory exemption that relates to your programs is section 230.13, which reads as follows:

> Closed records. Except as provided in s. 103.13, the secretary and the administrator may keep records of the following personnel matters closed to the public:
>
> (1) Evaluations of applicants.
>
> (2) Names of applicants other than those certified for employment.
>
> (3) Dismissals.
>
> (4) Demotions.
>
> (5) Disciplinary actions.
>
> (6) Pay survey data obtained from identifiable nonpublic employers.
>
> (7) Names of nonpublic employers contributing pay survey data.

This statute does not exempt personnel information, such as date of birth, sex, ethnic and handicapped status, provided on a job application form. Failure to specifically exempt this category of information means that it is subject to the general presumption in favor of disclosure. Indeed, under the rule of statutory construction *expressio unius est exclusio alterius* the exemption of certain items under section

230.13 implies that other items not mentioned are not exempt. *Teamsters Union Local 695 v. Waukesha County*, 57 Wis. 2d 62, 67, 203 N.W.2d 707 (1973).

You refer to section 103.13 as possibly having a bearing on this matter. It details the rights of an employe to gain access to his or her own personnel file. Although there are exceptions prescribed, it appears an employe will always have a right to see the part of the file relating to date of birth, sex and ethnic and handicapped status. In my opinion the affirmative establishment of these employe rights under the employment regulation provisions of chapter 103 does not necessarily deprive other persons of access to the same information pursuant to the open records law. Although the statute evinces a legislative sensitivity to personnel matters, it does not constitute a specific exemption for the purpose of section 19.36(1), and thus may not be used as a basis for blanket denial.

You also refer to section 19.85(1)(c) and (f), which authorizes exemptions from the open meetings law for the following purposes:

> (c) Considering employment, promotion, compensation or performance evaluation data of any public employe over which the governmental body has jurisdiction or exercises responsibility.
>
> . . . .
>
> (f) Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

Once again, these provisions evince a legislative sensitivity to personnel matters, but it is clear that they do not constitute blanket exemptions from the open records law. Section 19.35(1), states in pertinent part:

> [T]he exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record *only if the authority or legal custodian under s. 19.33 makes a spe-*

cific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

With respect to section 19.85(1)(f), it is important to note that it is not enough to be considering some personal information. It must also be found that the information is such that if made public it "would be *likely* to have a *substantial adverse* effect" on the person's reputation. "Reputation" is what the community thinks about a person. Although there may be situations where the release of information regarding one's age, sex, ethnic background or handicapped status could satisfy this requirement, it will be very rare. Certainly it cannot be presumed as a general matter.

My conclusion to this point with respect to your first question is that there is no state statutory basis for a blanket exclusion of public records relating to a public employe's date of birth, sex, ethnic heritage or handicapped status.

As to federal law, there are express provisions requiring confidentiality of handicap information obtained by the state in connection with job applications. 29 C.F.R. § 32.15(a) starts out by prohibiting the state from even asking about handicap status, but section 32.15(b) goes on to allow the state to "invite" such information if it is made clear that the response is voluntary and the information will be used solely for affirmative action purposes. Furthermore, section 32.15(d) provides: "Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that [limited exceptions follow]." In my opinion this constitutes an exception to the public records law under section 19.36(1), and handicap information obtained as described must be kept confidential.

Federal regulations also contemplate some limitations on access to sex and ethnic information gathered and kept for the purpose of affirmative action programs. 29 C.F.R. § 1607.4B provides:

> *Applicable race, sex, and ethnic groups for recordkeeping.* The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Span-

ish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), below.

Although the statement could be stronger, it appears the intent of this provision is to limit the use of sex and ethnic information for purposes relating to equal opportunity programs. In my opinion, it would be reasonable for a custodian to decide that in order to insure that the records are not used improperly they must not be made generally available to the public under the public records law.

I have found no similar restrictions on access to age-related information obtained in connection with the Age Discrimination Act of 1967. 29 U.S.C. §§ 621-34 and 29 C.F.R. § 1627. Therefore, federal law does not provide a basis for limiting access to such information under the open records law. Also, note that birth records kept by state and local registrars are generally available to the public. Sec. 69.23, Stats. This indicates a legislative determination that birth date information is not the sort of sensitive information which might be kept confidential under the public records law.

Your second question is:

2. If you determine that no statutory limitations exist, what common law limitations may exist? Does the application of a balancing test such as that described in *State ex rel. Youmans v. Owens,* 28 Wis. 2d 672, 682, 137 N.W. 2nd 470 (1965), result in any limitations on public access?

One characteristic of the common law on open records is that it does have limitations, and the limitations are embodied in the statement of the common law balancing test which has been expressed as follows: "[One] must balance the harm to the public interest from public examination of the records against the benefit to the public interest from opening these records to examination, giving much weight to the beneficial public interest in open public records." *State*

ex rel. Bilder v. Delavan Tp., 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983).

Appropriately, it is the responsibility of the custodian to apply the balancing test. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 682, 137 N.W.2d 470 (1965), 139 N.W.2d 241 (1966). The custodian is in the best position to identify and weigh conflicting interests. Remember, however, that there is a presumption in favor of access. I take this to mean that if counterbalancing interests are about even, the custodian should decide in favor of disclosure.

From information provided by you it appears that the major concerns about disclosure of an employe's birth date, sex, ethnic heritage and handicapped status is that it is personal information and could be used in undesirable ways by a requester. Specifically, there is a concern that the information could be used to target categories of people for unsolicited communications. There is also a concern that the information could be used to focus future discrimination.

You must evaluate these concerns for yourself, but I can give you some guidance based on existing legal authorities. First, it is well established that the requester's motives are not material. Sec. 19.35(i), Stats.; *Youmans*, 28 Wis. 2d at 677. Observing this rule, our office has opined that private entities, including those with commercial purposes, may have access to birth records (58 Op. Att'y Gen. 67 (1969)), lists of students awaiting a particular program in a Vocational, Technical and Adult Education District School (61 Op. Att'y Gen. 297 (1972)) and mailing lists compiled by state agencies (68 Op. Att'y Gen. 231 (1979)), even though disclosure may result in unsolicited communications.

As for the fear of using the information for future discrimination, I can only point out that our supreme court was not receptive to such a generalized assertion in *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 421, 432, 279 N.W.2d 179 (1979). You must evaluate this fear based on your expertise but it is my opinion that the mere fear that some information *might* be used in a discriminatory way at some time is not sufficient to generally decline access to all the information all the time.

Your third question has two parts:

3. a) What effect does the pre-existing pledge of confidentiality given by the University to its employes, limiting use to "statistical and reporting purposes only," have on the limitations, if any, described in your answers to questions #1 and #2, and further on my subsequent re-release of such information? ....

b) Does the language used on the current state service application form (Rev. 4/83), quoted above, also constitute a pledge of confidentiality? This question arises because, if the information is made available to the public at large, it would not be possible to guarantee compliance with the statement that the information will be used for affirmative action and will not be used for discrimination.

Along with your questions you refer to a September 13, 1977, unpublished attorney general's opinion. It involved a request to the University to provide the names and addresses of all nonwhite University employes. The University resisted on the ground that ethnic heritage information had been solicited from and disclosed by employe candidates based on the understanding that it would be kept confidential and used only for statistical and reporting purposes in connection with the affirmative action program. I will quote from the opinion at length since it was not published.

[An earlier] ... opinion of the Attorney General goes on to list the three criteria which are considered in determining whether a particular pledge of confidentiality comes within the exception to the public right of full access. First, there must be a clear pledge of confidentiality. Second, the pledge should be made in order to obtain the information. Third, the pledge must be necessary to obtain the information. If the pledge fulfills these criteria, then the custodian, before he can withhold records, must make the further determination that the harm to the public interest that would result from permitting inspection outweighs the public interest in allowing full access to the records.

From the information made available, it appears that the University has made a clear pledge of confidentiality to the minority persons, that the pledge was made in order to obtain the information, and that the pledge was necessary to obtain the information. The fact that only 40 of 1,000 minority employes on the Madison

campus were agreeable to be identified by name and address seems to confirm the assertion that the University would not be able to perform its statistical reporting responsibilities to the federal government without the pledge of confidentiality.

The remaining question, then, is whether the University's interest in maintaining confidentiality outweighs Senator Swan's apparent interest in making the names available to his committee and the public. This brings us to your responsibility, as the custodian of the records, to weigh the relative public interests involved, that is, the interests of the University in maintaining the confidentiality of the names and addresses as against Senator Swan's responsibility as chairman of the Senate Committee on Governmental and Veterans Affairs. As the record presently stands, we know two things in regard to the needs of Senator Swan's committee. First, that they intend to do a study on the state's affirmative action program and desire the names and addresses of all minorities employed by the University System. Secondly, we know that Senator Swan's committee has denied his request that a subpoena be issued to the University for the records containing the names and addresses in question. In view of this fact and in the absence of any further specifics as to why the names and addresses of the minority employes are needed for the study, as opposed to the statistical information offered, it is my opinion that a court would support the determination of the University that the public interest in nondisclosure outweighs any public interest in disclosure.

Accordingly, I am of the opinion that under the present state of the record, you are not under an obligation to disclose to Senator Swan the ethnic heritage of specific employes by name and address where this information was received from the employe under a pledge of confidentiality.

In response to your questions, I see no reason to change this earlier opinion. If the confidential information is provided to you by the University it is the University's obligation to preserve the confidentiality by binding you to a similar pledge which you must honor. As stated in 57 Op. Att'y Gen. 187, 191 (1968): "The law seems clear that information of a confidential nature gained by one administrative branch of the government from another may be used in prepara-

tion for proper internal matters, but should not be disclosed to the public."

In the second part of your third question you ask whether the following language in the state employment application form constitutes a legally cognizable pledge of confidentiality: "Date of Birth, Sex, Ethnic and Handicapped Status Information is for affirmative action purposes. It will not be used to discriminate against any applicant."

In contrast, the language used by the University and the subject of the September 13, 1977, unpublished opinion, was as follows: "Heritage Code information requested only if and after a person is employed and will be used only for statistical and reporting purposes, including required reports to the federal government."

While I advised that the University language is a sufficiently clear pledge to satisfy the criteria set forth in earlier opinions, I cannot say the same about the language in the state application form. There is no express statement that the information will be used solely for affirmative action purposes thus necessarily implying that it will be otherwise confidential. Indeed, I doubt that a prospective employer could honor such a pledge with respect to "date of birth and sex" information.

Your fourth question is:

4. What, if any limitations on access to this information apply to:

a.) Myself, as Secretary of DER, when requesting said information from the agencies in regard to their employes;

b.) Other state agencies when requesting said information from DER which is not specific to employes of their own agency; or

c.) A representative of the Governor, when requesting such information on state employees from DER?

Given your responsibilities regarding development and evaluation of affirmative action programs, it is my opinion you have access to whatever information you need to carry out those responsibilities. Sec. 230.04(9) and (10), Stats.

Access by other state agencies and the Governor's office to person specific handicap information obtained in connection with a job application appears to be limited by 29 C.F.R. § 32.15(d), which reads as follows:

> Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:
>
> (1) Employing officials may obtain the information after making a conditional decision to make a job offer to the applicant or the applicant was placed conditionally in a job pool or placed conditionally on an eligibility list.
>
> (2) Supervisors and managers may be informed regarding restrictions on the work or duties of qualified handicapped persons and regarding necessary accommodations;
>
> (3) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and
>
> (4) Government officials investigating compliance with the Act shall be provided information upon request.

Access to sex and ethnic origin information should be restricted to the extent it is necessary to ensure the "records are not used improperly." 29 C.F.R. § 1607.4B.

Your fifth question is:

> 5. What limitations, if any, exist on DER's or any other state agencies' ability to establish, when requesting said information, a pledge of confidentiality which may be successfully enforced? I refer you here to Attachments F and G which outline the University's position that, particularly since there is no state law requiring employes or applicants to provide this information, such a pledge is necessary to ensure the provision of accurate information for purposes of affirmative action and nondiscrimination reporting.

The essential elements for an enforceable pledge of confidentiality are set forth in my answer to your third question. In short, if a clear pledge of confidentiality is made in exchange for information, if the information could not be obtained but for the pledge and if public

interest in maintaining confidentiality outweighs the public interest in access to the information, the pledge would effectively exclude the information from disclosure under the open records law.

BCL:RWL

PUBLIC RECORDS; TAXATION; Fees charged for furnishing copies of public records are subject to sales tax. Fees charged for records searches and for certifying copies of records are not subject to sales tax. OAG 9-84

February 17, 1984

LINDA REIVITZ, *Secretary*
Department of Health and Social Services

You request my opinion on whether the fee charged for furnishing copies of public records is subject to Wisconsin's sales tax.

In my opinion such fees are subject to sales tax.

Section 77.52, Stats., imposes a sales tax on, among other things, the sale of tangible personal property. By virtue of the definition of "sale of tangible personal property" found in section 77.51(4)(h), the furnishing of copies of records for a fee makes the transaction subject to the sales tax. *See Harold W. Fuchs Agency, Inc. v. Dept. of Revenue,* 91 Wis. 2d 283, 282 N.W.2d 625 (1979) (gross receipts of photocopy machines are taxable).

Section 19.35(3)(a) provides that the fee charged for reproduction of public records may not exceed the "actual, necessary and direct cost ... unless a fee is otherwise specifically established ... by law."

The sales tax imposed by section 77.52 is not part of the fee for furnishing copies of records. Thus, the charge of the sales tax in addition to the actual cost of furnishing copies cannot be excessive within the meaning of section 19.37(4), which provides a penalty for charging excessive fees for furnishing copies of public records.

You also ask whether a charge made by a public custodian for a search for records would be subject to Wisconsin's sales tax law. Since I find no provision for taxing charges made in connection with

these searches, it is my opinion that any fee charged for such search is not subject to a sales tax.

Searching records is not the furnishing of tangible personal property and thus fees charged for such searches are not subject to a sales tax. *See Janesville Data Center, Inc. v. Dept. of Revenue,* 84 Wis. 2d 341, 267 N.W.2d 656 (1978). The same reasoning applies to certifications of copies of public records. Fees for certifying would not be subject to the sales tax but fees for providing the certified copy would be.

If the record custodian does not charge a fee for the provision of copies of records, a sales tax cannot be imposed because there is a failure of consideration requisite under section 77.51(4)(h). Thus, when the custodian waives the fee for reproduction, the sales tax, in effect, is waived. But the record custodian may not waive the sales tax if a fee is charged for reproduction.

While the current law dictates the conclusion that fees charged for furnishing copies of public records are subject to sales tax, I find it somewhat anomalous that members of the public must pay tax on fees for providing copies of records which are already public property. I therefore am recommending to the Legislature that the law be changed to exempt the furnishing of copies of public records from the imposition of Wisconsin's sales tax.

BCL:WHW

HOSPITALS; LAW ENFORCEMENT; LICENSES AND PERMITS; PUBLIC RECORDS; REGULATION AND LICENSING, DEPARTMENT OF; The public records law permits the Department of Regulation and Licensing to refuse to disclose records relating to complaints against health care professionals while the matters are merely "under investigation"; good faith disclosure of the same will not expose the custodian to liability for damages; and prospective continuing requests for records are not contemplated by the public records law. OAG 10-84

February 17, 1984

BARBARA NICHOLS, *Secretary*
Department of Regulation and Licensing

You have asked for my opinion regarding access under the open records law to certain investigative files in your custody.

Your Department and the various licensing and regulatory boards created in your Department are responsible for the regulation and licensing of a variety of professions. You are presently concerned with the boards that oversee health care providers, namely the Dentistry Examining Board, Medical Examining Board, Board of Nursing and Pharmacy Examining Board. You state that a major newspaper has requested a current list and monthly update of all pending investigations before those boards.

Pursuant to section 440.20, "[a]ny person may file a complaint before any examining board and request any examining board to commence disciplinary proceedings against any permittee, registrant or license or certificate holder."

Section RL 2.03(7) of the Wisconsin Administrative Code defines "informal complaint" as follows:

> "Informal complaint" means any written information submitted to the division [of enforcement] or any board by any person which requests that a disciplinary proceeding be commenced against a licensee or which alleges facts, which if true, warrant discipline. "Informal complaint" includes requests for disciplinary proceedings as specified in s. 440.20, Stats.

You state that most informal complaints come from sources "lacking sufficient expertise to evaluate the appropriateness of the professional practice alleged or the legality of the conduct." All informal complaints are subject to an initial screening pursuant to section RL 2.035 of the Wisconsin Administrative Code, which reads as follows:

> All informal complaints received shall be referred to the division for filing, screening and, if necessary, investigation. Screening shall be done by the board, or, if the board directs, by a board member or the division. In this section, screening is a preliminary

review of complaints to determine whether an investigation is necessary. Considerations in screening include, but are not limited to:

(1) Whether the person complained against is licensed;

(2) Whether the violation is a fee dispute;

(3) Whether the matter alleged, if taken as a whole, is trivial; and

(4) Whether the matter alleged is a violation of any statute, rule or standard of practice.

You state that as a practical matter this provision is used only as a broad jurisdictional screen and matters are routinely placed "under investigation" without any preliminary evaluation of the merits. Therefore, a very high percentage of informal complaints are identified in department records as being "under investigation."

The Division of Enforcement conducts investigations of all persons and entities identified as "under investigation." If the investigation discloses a violation of law a formal complaint may be drafted and a disciplinary proceeding commenced by the filing of a Notice of Hearing with the respective board office and the designated hearing examiner. The threshold burden for issuance of a formal complaint varies from board to board. The Medical Examining Board must make a finding of probable cause after the investigation is substantially completed and before a formal complaint can issue and a disciplinary proceeding can be commenced. Other boards do not have this specific probable cause requirement for issuance of a formal complaint. Instead, the decision to issue a formal complaint is controlled by the professional and ethical constraints of the prosecuting attorney and the respective board. Formal complaints are not issued until the investigation has been substantially completed and a violation of law identified. If after a hearing on the allegations of the formal complaint the board determines that a violation of law has occurred, it may reprimand, suspend, revoke or limit the license of the licensee.

The investigations conducted by the Division of Enforcement result in a substantial number of the informal complaints "under investigation" being closed without commencement of any formal

disciplinary proceeding. The majority of these cases are closed because the investigation did not result in the collection of evidence sufficient to form a basis for prosecution. More specifically, 98% of the Dentistry Board, 82% of the Medical Board, 92% of the Pharmacy Board and 59% of the Board of Nursing investigations completed between January 1, 1983, and July 31, 1983, were closed without commencement of formal disciplinary proceedings.

You also state that matters "under investigation" are treated differently so that the apparently less serious allegations or weaker cases may remain "under investigation" for longer periods of time, thus possibly creating a false impression as to the severity or extent of an alleged violation if the information were publicized.

You state the following with respect to the rights and interests of persons under investigation:

> The licensee has no meaningful legal recourse to challenge his status as "under investigation" during the pendency of the investigation. The Department's action at this phase of the administrative process is probably not reviewable in any legal forum.
>
> Physicians, dentists, pharmacists and nurses have significant reputational interests to protect. Their professional and economic success and well being are directly related to the image they maintain in both the public and private sectors. A professional will not make a referral to another professional who he or she suspects may be incompetent. Similarly, a member of the public will not seek health care from an individual who he or she perceives as possessing questionable skill and knowledge.

You ask:

1. Under the facts and circumstances herein stated, does public records law prohibit the Department from disclosing a record identifying a licensee under investigation prior to the issuance of a formal complaint and Notice of Hearing on the ground that the disclosure would be likely to have a substantial adverse effect upon the reputation of the licensee which would outweigh the public interest in disclosure?

2. Under the facts and circumstances herein stated, does public records law permit the Department to not disclose a record

identifying a licensee under investigation prior to the issuance of a formal complaint and Notice of Hearing on the ground that the disclosure would be likely to have a substantial adverse effect upon the reputation of the licensee which would outweigh the public interest in disclosure?

3. What liability, if any, does the records custodian incur if he or she makes a good faith but incorrect decision to disclose a record in response to a public records request? To what extent, if any, do Wis. Stats. secs. 895.50(2)(c) and 895.50(3) provide immunity from liability for a records custodian who makes a good faith but incorrect decision to disclose a record in response to a public records request?

4. What obligation, if any, does the Department have under the public records law to honor prospective requests for monthly updates of records not in the possession of the agency at the time the request is made?

As to questions 1 and 2, it is my opinion that the public records law does not prohibit disclosure but does permit nondisclosure under the facts and circumstances described.

In order to find a prohibition against disclosure there must be a specific statutory provision which establishes the prohibition. Sec. 19.36(1), Stats. I am aware of none pertaining to the records in question.

However, section 19.35(1) provides:

> The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

Section 19.85(1)(b) and (f) authorize closed meetings for the following purposes:

> (b) Considering dismissal, demotion, *licensing or discipline of any* public employe or *person licensed by a board* or commission *or the investigation of charges against such person,* or considering the

grant or denial of tenure for a university faculty member, and the taking of formal action on any such matter; provided that the faculty member or other public employe or person licensed is given actual notice of any evidentiary hearing which may be held prior to final action being taken and of any meeting at which final action may be taken. The notice shall contain a statement that the person has the right to demand that the evidentiary hearing or meeting be held in open session. This paragraph and par. (f) do not apply to any such evidentiary hearing or meeting where the employe or person licensed requests that an open session be held.

. . . .

(f) Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the *investigation of charges against specific persons* except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

It is my opinion that the tentativeness of matters "under investigation" in your Department would justify nondisclosure until it is decided whether to commence disciplinary proceedings. In particular, I am struck by the fact that matters are placed "under investigation" with minimal if any preliminary evaluation of the merits and a very small percentage of the informal complaints ultimately result in formal proceedings. I am also persuaded that the reputational interests at stake are predictably substantial and that improvident public disclosure that investigations are pending would have an undue adverse effect on professional reputations in the vast majority of cases where formal disciplinary proceedings are ultimately deemed unwarranted.

I agree with your opinion that these circumstances are different from those involved in *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979). The supreme court held that the daily arrest list, or "blotter," kept by a police department is open to inspection. The court said:

Information concerning the operations of the police department in making arrests and the charges upon which arrests are made is vital to the democratic system; and presumptively, by

> statute, the records are to be open. While in some cases involving police functions there is an overriding public interest in preserving secrecy (*e.g.*, in the investigation of pending or proposed criminal charges), no overriding public-interest concern is discernible when the executive act of arrest has been completed. An arrest is the exercise of the government's power to deprive an individual of freedom. The government is required to have probable cause whenever it deprives an individual of personal liberty, and it is offensive to any system of ordered liberty to permit the government to keep secret its reason for depriving an individual of liberty.

Breier, 89 Wis. 2d at 438.

Although dicta, the court distinguishes between pending investigations and cases where probable cause has been found and an arrest made based thereon. In the former situation the court anticipates that while an investigation is in flux private reputational interests as well as law enforcement interests will outweigh the general public interest in access to public records.

Also, the court in *Breier* expressly declined to decide whether there is public access to "rap sheets" which contain arrest records of individuals. But the court did say that the public policy reasons for the disclosure or nondisclosure of "rap sheet" records may differ markedly from the reasons which led the court to rule the police blotter accessible. *Breier*, 89 Wis. 2d at 424.

These statements by the court reveal a sensitivity to reputational interests of persons under investigation and indicate it may very well be proper to keep investigative files confidential until the investigation is substantially completed. This sensitivity is also reflected in Supreme Court Rule 22.24 relating to investigations of attorneys and section 757.93 relating to investigations of judges.

The court's statements in *Breier* do not expressly sanction the nondisclosure of investigative files, but they serve to suggest that such a position is not patently indefensible and may be entirely appropriate. This indicates to you that it would not be unreasonable to decide to keep your pending investigation files confidential.

Attendant to a decision to keep pending investigation files confidential is an obligation to ensure that investigations are conducted

expeditiously and that the decision to close the investigation or pursue disciplinary action is made without unnecessary delay. It would not be justified to broadly characterize inactive files as pending investigations so as to foreclose public access.

I also want to make very clear that this opinion relates only to pending investigation files. Once an investigation is completed and the decision whether to pursue disciplinary action is made, there may no longer be sufficient reasons for keeping the file confidential. Specifically, the concern for a premature and probable adverse effect on the reputation of a licensee being "under investigation" is allayed when the file also discloses that the investigation found no basis for pursuing disciplinary action. It may still be justified in some cases to decline to disclose some or all of an investigative file even after the investigation is resolved. However, these determinations should be rare and must be made on a case-by-case basis.

As to your third question, it is my opinion that if a custodian makes a good faith decision to disclose a public record, the custodian would be generally immune from liability by virtue of the principle of public officer immunity as described in *Lister v. Board of Regents*, 72 Wis. 2d 282, 300, 240 N.W.2d 610 (1976), and specifically immune from liability for invasion of privacy by virtue of section 895.50(2)(c). If information relating to a matter "under investigation" is disclosed, you should nevertheless stress that it is inappropriate to draw any adverse conclusions from the mere pendency of the investigation.

As to your fourth question regarding prospective continuing requests for monthly updates, it is my opinion that the open records law does not contemplate that such a request be honored. The right of access applies only to extant records, and the law contemplates custodial decisions being made with respect to a specific request at the time the request is made. Secs. 19.32(2) and 19.35(1)(a), (h) and (4), Stats.

BCL:RWL

IMPLIED CONSENT LAW; WORDS AND PHRASES; The taking of a blood sample pursuant to the Wisconsin Implied Consent Law is not a procedure in connection with the performance of a drug or alcohol abuse prevention function nor is the acquired blood sample itself a patient record. The confidentiality requirements set out in 42 U.S.C. § 290dd-3 and 21 U.S.C. § 1175 have no application to such a procedure. OAG 11-84

February 28, 1984

JOHN D. OSINGA, *District Attorney*
Portage County

Hospitals which receive federal funding for alcohol and drug abuse treatment programs are required by federal law to preserve the confidentiality of patient records relating to such programs. The Wisconsin Implied Consent Law, section 343.305, Stats., requires a hospital to comply with the request of a law enforcement officer to cooperate in the administration of chemical tests to determine the presence of intoxicants in the blood of a person under arrest. A blood test is one of the chemical tests permitted by statute and that procedure begins with the assistance of local medical personnel. I understand that the person under arrest is normally taken to a local hospital where a blood sample is withdrawn. That sample is then given to the arresting officer who transmits it to the Wisconsin Laboratory of Hygiene for analysis. You indicate that in certain circumstances hospitals have withdrawn a blood sample as requested but have refused to provide it to the arresting officer on the theory that to do so would be to reveal a patient record in violation of federal law. It is my opinion that the federal law requiring confidentiality of patient records has no application to the taking of a blood sample pursuant to section 343.305. Federal law does not require nor does it justify a refusal by a hospital to provide to the arresting officer the blood sample taken.

The Public Health Service Act, Pub. L. 98-24, 42 U.S.C. § 290dd-3 (formerly 42 U.S.C. § 4582) restricts disclosure of certain patient records:

(a) Disclosure authorization. Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained

> in connection with the performance of any program or activity relating to alcoholism or alcohol abuse education, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e), be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

Such records may be disclosed upon the written consent of the patient, 42 U.S.C. § 290dd-3(b)(1), or pursuant to a court order based upon a showing of good cause, 42 U.S.C. § 290dd-3(b)(2)(C). Moreover, the federal statute prohibits the use of such records in a criminal prosecution except as authorized by court order, 42 U.S.C. § 290dd-3(c). The Federal Drug Abuse Office and Treatment Act of 1972, 21 U.S.C. § 1175, enacts essentially an identical requirement of confidentiality with respect to patient records maintained in connection with drug abuse programs which receive federal funds.

The secretary of Health and Human Services has issued the following regulations intended to interpret the terms of the foregoing statutory requirements. 42 C.F.R. § 2.11 (1982) provides:

> (i) Patient. The term "patient" means any individual (whether referred to as a patient, client, or otherwise) who has applied for or been given diagnosis or treatment for drug abuse or alcohol abuse and includes any individual who, after arrest on a criminal charge, is interviewed and/or tested in connection with drug or alcohol abuse preliminary to a determination as to eligibility to participate in a treatment or rehabilitation program.
>
> . . . .
>
> (o) Records. The term "records" includes any information, whether recorded or not, relating to a patient, received or acquired in connection with the performance of any alcohol abuse or drug abuse prevention function, whether such receipt or acquisition is by a program, a qualified service organization, or any other person.

The foregoing definitions are extremely broad and one could argue that they expand the coverage of the law beyond that which is clearly indicated by the text of the federal statute. I should note that the above regulations are interpretive in nature rather than substan-

tive, 42 C.F.R. § 2.5(a) (1982) and 42 C.F.R. § 2.61-1(a) (1982). The regulations thus represent the legal interpretation of the secretary of Health and Human Services as to the meaning of the federal statutes. *State v. Amoco Oil Co.*, 97 Wis. 2d 226, 241, 293 N.W.2d 487 (1980). That interpretation may well be persuasive but it does not have the binding effect of law which substantive regulations do have. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Swanson v. Health and Social Services Dept.*, 105 Wis. 2d 78, 88, 312 N.W.2d 833 (Ct. App. 1981).

I understand that the refusal to provide the blood sample has arisen in situations where hospital personnel believe that the arrested person may be eligible for participation in a drug or alcohol abuse treatment program. In such circumstances hospital personnel have retained the blood sample and demanded that the officer obtain the written consent of the arrested individual or a court order. That demand is, however, based upon what I believe are several fundamental misinterpretations of the applicable federal statutes and regulations.

The situation presented is that of an individual under arrest and in the custody of a law enforcement officer who is brought to the hospital in order that physical evidence, a blood sample, might safely be removed from his body. The purpose of the procedure is solely to preserve physical evidence which is subject to biological degradation. That limited procedure involves no testing or analysis, no treatment or rehabilitation. *Cf. State v. Henry*, 111 Wis. 2d 650, 332 N.W.2d 88 (Ct. App. 1983). Any record created in the course of that procedure is not made "in connection with the performance of any program or activity" relating to drug or alcohol abuse treatment.

More importantly, the blood sample which is the focus of your inquiry is not in any sense a "record." It is simply physical evidence which is needed in order to conduct certain chemical testing. A report of the eventual chemical analysis of the blood sample would probably be a record as would be a description of the procedure by which the sample was taken. The arresting officer is not, however, concerned with records which the hospital may or may not prepare. The officer simply wishes to retain control of certain physical evidence in order to arrange for the chemical testing authorized by statute. The interpretive regulations issued by the secretary of Health and Human Services define "record" to include "any information ...

received or acquired in connection with the performance of any alcohol abuse or drug abuse prevention function." 42 C.F.R. § 2.11(o) (1982). Even under that expansive definition, however, the blood sample in question is not a "record." A record is that which describes something else. The blood sample describes nothing but is simply physical evidence which may in turn be described in a record. It is not itself a record within the meaning of the federal law and thus is not subject to the confidentiality requirement.

The definition of "patient" set out at 42 C.F.R. § 2.11(i) (1982), includes one who is interviewed or tested to determine eligibility to participate in a treatment program. That definition could conceivably extend to an individual brought to a hospital for the withdrawal of a blood sample where hospital personnel do initiate an interview or undertake other testing such as additional blood tests. Even if one accepted this anticipatory definition of "patient," however, that would still not bring the blood sample in question within the definition of "record" and thus would not impose the rule of confidentiality as to that sample.

There has been thus far limited judicial interpretation of the federal statutes in question and I am aware of no decision which considers the precise facts posed in your inquiry. In at least two decisions, however, state appellate courts have refused to extend the confidentiality requirement to information that arguably was within the broad definition of "record" set out at 42 C.F.R. § 2.11(o) (1982). In the decision of *State v. White,* 169 Conn. 223, 363 A.2d 143 *cert. denied,* 423 U.S. 1025 (1975), the Connecticut Supreme Court considered a revocation of probation which had been based upon the appellant's failure to follow through in a drug treatment program. The appellant had been required, as a condition of probation, to enroll in a drug abuse treatment program and had done so initially. The court which had revoked the probation had done so after hearing the testimony of a staff member from that program who had advised probation authorities orally and in writing that the appellant had been absent from the program without permission. The Connecticut Supreme Court ruled that such information was not a "record" within the meaning of 21 U.S.C. § 1175 and thus was not subject to the confidentiality restrictions. *White,* 363 A.2d at 150. In the decision of *State v. Bethea,* 35 N.C. App. 512, 241 S.E.2d 869 (1978), the Court of Appeals of North Carolina reviewed a convic-

tion based upon evidence that the defendant had, within a drug treatment facility, obtained and sold methadone to a police informant. The evidence offered at trial included the methadone that had been sold and testimony that the substance had been poured from a bottle, the label of which identified both the defendant and his physician. The court of appeals rejected a challenge based upon the federal confidentiality requirement and ruled that the conviction was not based upon any "record" within the meaning of the federal law. It should be noted that the appellant in *Bethea* was a patient who was actively participating in a drug treatment program at the time the crime was committed. By contrast, the individual brought to a hospital for a blood test is only a "patient" by virtue of the questionably expansive interpretation set out at 42 C.F.R. § 2.11(i) (1982). In any event, the *Bethea* decision clearly indicates that neither the blood sample taken pursuant to section 343.305, nor a label identifying the source of that sample would be covered by the federal confidentiality requirement.

Presumably, the officer who receives the requested blood sample from the hospital employe will be able to offer competent testimony at trial describing the procedure by which the sample was taken and the subsequent chain of custody. In some situations, however, it may be necessary to subpoena the hospital employe in order to establish those facts. There exists substantial authority for the proposition that the federal confidentiality requirement does not apply to that which is observed by a staff member even when the observation occurs in the course of participating in a treatment program, *State v. Keleher*, 5 Kan. App. 2d 400, 617 P.2d 1265 (1980); *Bethea; White*. The federal confidentiality requirement clearly has no more application when the observation relates to something not part of a treatment program and when it involves one who only may later enter such a program. So long as the testimony to be elicited relates directly to the blood sample taken pursuant to section 343.305, that testimony is not subject to the federal confidentiality requirement set out at 42 U.S.C. § 290dd-3 and 21 U.S.C. § 1175. By the same token, the foregoing federal statutes do not preclude the issuance of a subpoena to elicit testimony relating directly to the requested blood test.

The restriction upon disclosure of patient records set out in the foregoing federal statutes obviously is intended to encourage individuals to seek treatment and to protect those who do enter rehabili-

tation programs. The restriction essentially speaks to the subjective intent of the individual needing treatment and attempts to encourage participation in a therapeutic program. That goal is not in any sense served by extending the confidentiality requirement to the factual situation posed in your inquiry. Arrest upon a criminal charge is what caused the individual to be at the hospital and the individual is at that point in the custody of an officer. In a legal sense, the individual has consented to the test procedure but that consent is clearly a product of the compulsion created by section 343.305. It cannot be said that the individual has freely chosen to accompany the arresting officer to the hospital. This situation is very different from that of an individual free to choose or to avoid a treatment program. The voluntary interest that the federal law seeks to encourage does not exist in this situation and thus there is no reason to invoke the confidentiality requirement.

The implied consent law seeks ultimately to deter alcohol and drug abuse at least with respect to the operation of motor vehicles. In a very real sense that goal is parallel to that of the federal confidentiality requirement. Both are intended, one by deterrent and the other by protection, to curb alcohol and drug abuse. The existence of the sanctions imposed by the Implied Consent Law serve to encourage an individual to seek precisely the type of treatment program that the federal law is intended to protect. It would be altogether inconsistent to interpret the federal requirement in a manner that would needlessly frustrate the legitimate, vital interest that the state has in preventing the use of a motor vehicle by one under the influence of an intoxicant.

The terms of the applicable federal statute, the interpretive regulations and the basic purpose of the law all indicate clearly that the taking of a blood sample pursuant to the Wisconsin Implied Consent Law is not a procedure in connection with the performance of a drug or alcohol abuse prevention function nor is the acquired blood sample itself a patient record. The confidentiality requirements set out in 42 U.S.C. § 290dd-3 and 21 U.S.C. § 1175 have no application to such a procedure.

BCL:DTF

ELECTIONS; PUBLIC OFFICIALS; Statutes and rules which restrict the partisan activities of some employes and officeholders do not offend the first amendment even if they result in the employes or officeholders being prohibited from participating in the party caucuses which choose delegates to the National Convention. OAG 13-84

April 2, 1984

THOMAS A. LOFTUS, *Chairperson*
Assembly Organization Committee

The Committee on Assembly Organization has asked whether state statutes and administrative rules which require that certain state employes be nonpartisan are constitutionally infirm in light of state and national Democratic Party Rules which limit participation in caucuses to select delegates to the National Convention to voters "only who publicly declare their party preference and have their preference publicly recorded." Rule 2A Delegate Selection Rules for the 1984 Democratic National Convention (Party Rules). In my opinion, the statutes and rules are constitutional.

The Supreme Court specifically has held that the Democratic Party may limit participation in the process which leads to selection of delegates to the National Convention. *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 120-22 (1981). The Court recognized that a political party's choice of determining the makeup of a state's delegation to the National Convention is constitutionally protected. *Democratic Party of U.S.*, 450 U.S. at 124. The *Democratic Party* case involved the consideration of Rule 2A of the Delegate Selection Rules for the 1980 Democratic National Convention. The 1984 rule is identical to the 1980 rule considered in the *Democratic Party* case. There can be no doubt that the Democratic Party may constitutionally restrict participation in its delegate selection process.

State statutes require that employes of certain agencies be "nonpartisan." For example, employes of the Elections Board, section 5.05(4), Stats., Legislative Council, section 13.91, the Legislative Reference Bureau, section 13.92, the Revisor of Statutes, section 13.93, the Legislative Audit Bureau, section 13.94 and the Legislative Fiscal Bureau, section 13.95, must be nonpartisan. Other stat-

utes require members of commissions or boards to be nonpartisan. *E.g.*, secs. 15.62, 66.068(1) and 66.433(4), Stats. A few statutes depend on party affiliation to determine membership. *E.g.*, secs. 15.61 and 62.13(1), Stats. Finally, some rules prohibit the political activity of certain employes, *e.g.*, Rule 12 of the *Code of Judicial Ethics*, 36 Wis. 2d 252, 153 N.W.2d 873 (1967), which states that a judge "shall not be a member of any political party or participate in its affairs, caucuses, promotions, platforms, endorsements, conventions, or activities." You question whether these statutes and rules are constitutionally infirm in light of the Supreme Court's decision in the *Democratic Party* case.

Various elections in Wisconsin are commonly referred to as "nonpartisan" elections. Nothing prohibits candidates in these elections from having party affiliations, however. The elections are "nonpartisan" only because no party designation appears on the ballot. *E.g.*, sec. 5.60(1)(a) and (3)(a). Officeholders elected in these "nonpartisan" elections are not prohibited from participating in party activities. This opinion addresses only those statutes and rules which involve partisan activity by officeholders or employes.

Before considering the constitutional question, however, it is necessary to determine whether the statutory prohibitions upon partisan activity encompass participation in the Democratic party delegate selection process. There is no definition of "nonpartisan" in the statutes. The only case considering the term "partisan" in Wisconsin is of little assistance. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 692-94, 239 N.W.2d 313 (1976). I must conclude, however, that any prohibition upon partisan activities in the statutes listed above must necessarily include participation in a selection process which requires the participants to "publicly declare their party preference and have their preference publicly recorded." Rule 2(A). Although participation in the selection process does not require party membership or the payment of fees, publicly stating a preference for one party and participating in that party's selection of delegates must be considered "partisan." *See State ex rel. La Follette v. Democratic Party*, 93 Wis. 2d 473, 487-88, 287 N.W.2d 519 (1980). If such activity were not prohibited as partisan activity, the requirements that employes of the agencies listed above be nonpartisan would have little force. I conclude, therefore, that participation in the delegate

selection process would be partisan activity and would violate the nonpartisan requirements of the statutes listed above.

In *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), the Court upheld Oklahoma's restrictions on political activity against charges that the law was overbroad and vague. That law provided *inter alia* that no employe covered by the Act shall "be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office ...." Employes were also prohibited from taking part in the management or affairs of any political party. 413 U.S. at 603-04. The Court held that the law was neither vague nor overbroad and was constitutional on its face. 413 U.S. at 616.

The Court in *Broadrick* did not consider or discuss the state's right to restrict partisan political conduct of state employes because the appellants conceded that such restrictions served valid and important state interests. 413 U.S. at 606. Therefore, although *Broadrick* did not directly hold that states can restrict partisan political membership without offending the first amendment, the Court's decisions under the Hatch Act and the Court's treatment of the issue in *Broadrick* compel the conclusion that evenhanded restrictions on partisan political activity of state employes may be imposed without offending the first amendment. *See Pruitt v. Kimbrough,* 536 F. Supp. 764 (N.D. Ind. 1982).

Unfortunately, Rule 2A of the Democratic Party will result in the disenfranchisement of some state office holders and employes. That harsh result, however, does not invalidate sound state law.

BCL:AML

HISTORICAL SOCIETY, STATE; OPEN MEETING; WORDS AND PHRASES; The Historic Sites Foundation, Inc., created under the provisions of chapter 181, Stats., by the Board of Curators of the State Historical Society of Wisconsin acting in their individual capacities, is a private corporation and as such is not subject to the requirements of the open meetings law, section 19.81, Stats. OAG 14-84

April 9, 1984

RICHARD A. ERNEY, *Director*
State Historical Society

You have requested my opinion as to whether the Historic Sites Foundation, Inc. (HSF), is a governmental body subject to the requirements of the open meetings law.

The answer to your question is no.

Section 19.81(2), Stats., provides: "To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law."

Accordingly, under section 19.81(2) it is necessary to determine whether the HSF is a governmental body. Section 19.82(1) defines the term "governmental body" as "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."

From the above definition it is obvious that the only classifications relevant to your question are: (1) a public body corporate and politic created by constitution, statute, ordinance, rule or order, and (2) a quasi-governmental corporation. The answer to your question is based on the conclusion that the HSF does not fall within either classification.

In order to more fully appreciate the rationale of this opinion, some understanding of the history of the HSF is necessary.

During the fall of 1959 a special committee of the Board of Curators of the State Historical Society of Wisconsin (Society), known as the Sites Management Committee, met to consider the creation of an organization to manage the Circus World Museum at Baraboo. The Board recognized that the Society itself had no statutory authority to create a corporation. Instead, a corporate foundation was created

in the manner passed upon and described in 46 Op. Att'y Gen. 83 (1957). That opinion stated in part:

> Your first question reads as follows: "Does the act of incorporating the proposed nonprofit corporation require any act on the part of 'The Regents of The University of Wisconsin'?"
>
> The answer is "No." The corporation would be formed by friends of the university and not by any act on the part of the regents. The regents in their official capacity have no statutory authority to create a corporation. If individual members of the board wanted to be incorporators, it would have to be done in their individual capacities.

46 Op. Att'y Gen. at 84.

Thus, the HSF was patterned after the corporate foundations created by the University of Wisconsin System. The creation and use of such foundations have been recognized, accepted and approved by the court. *Glendale Development v. Board of Regents,* 12 Wis. 2d 120, 106 N.W.2d 430 (1960). The court specifically noted:

> This court has repeatedly held that nonstock, nonprofit corporations organized by friends of the university for its benefit, could do things which neither the state nor the university could do directly, that such corporation is not an arm or agency of the state and does not engage the state in work of internal improvement or create a state debt. *Loomis v. Callahan* (1928), 196 Wis. 518, 220 N. W. 816; *State ex rel. Wisconsin University Bldg. Corp. v. Bareis* (1950), 257 Wis. 497, 44 N. W. (2d) 259; *State ex rel. Thomson v. Giessel* (1953), 265 Wis. 185, 60 N. W. (2d) 873; *State ex rel. Thomson v. Giessel* (1954), 267 Wis. 331, 65 N. W. (2d) 529; and *State ex rel. Thomson v. Giessel* (1955), 271 Wis. 15, 72 N. W. (2d) 577. As to creating a state debt, see *State ex rel. Thomson v. Giessel* (1955), 271 Wis. 15, 72 N.W.(2d) 577.

Glendale, 12 Wis. 2d at 133-34.

Since *Glendale* it has become increasingly clear that foundations, building corporations and independent bodies politic and corporate are not considered by the court as state governmental bodies. *See Wisconsin Solid Waste Recycling Auth. v. Earl,* 70 Wis. 2d 464, 235 N.W.2d 648 (1975); *State ex rel. Warren v. Nusbaum,* 59 Wis. 2d 391, 208 N.W.2d 780 (1973).

The issue presented, then, is whether the Legislature intended to include within the open meetings law, by its definition of the term "governmental body," corporate entities that heretofore have not been treated by the court as governmental bodies.

The reference in section 19.81(2) to public bodies corporate and politic created by law relates to those corporations that are created directly by the Legislature or indirectly through enabling legislation. Examples of corporations that fall within this statutory definition are the Wisconsin Solid Waste Recycling Authority, Wisconsin Housing Finance Authority and the now extinct Armory Board. *See* secs. 232.02 and 234.02, Stats.; *Majerus v. Milwaukee County,* 39 Wis. 2d 311, 159 N.W.2d 86 (1968).

The HSF and, apparently, the numerous foundations of the University of Wisconsin System, as noted in 46 Op. Att'y Gen. 83 (1957) and as discussed in *Glendale,* were not created by the Legislature but were created by private citizens under the general corporation laws. Moreover, the HSF could not possibly be considered a body politic. *See Watkins v. Milwaukee County Civil Service Comm.,* 88 Wis. 2d 411, 418, 276 N.W.2d 775 (1979); *Burhop v. The City of Milwaukee, impleaded, etc.,* 21 Wis. 259 (1866).

Accordingly, it is my opinion that nonstock corporations created by statute as bodies politic, such as the Wisconsin Solid Waste Recycling Authority and the Wisconsin Housing Finance Authority, clearly fall within the term "governmental body" as defined in the open meetings law and are subject to the provisions of the open meetings law. The HSF and similar nonstock corporations do not fall within the classification under discussion because: (1) they were not created by the Legislature or by rule, etc., but were created by private citizens, and (2) they are not bodies politic.

Section 19.81(2) also expressly includes quasi-governmental corporations within its definition of a governmental body. There are no reported Wisconsin decisions that define the term "quasi-governmental." The word "quasi" is defined in *Webster's New Collegiate Dictionary* 700 (7th ed. 1977) as: "1) having some resemblance ... by possession of certain attributes" and, "2) having a legal status only by operation or construction of law and without reference to intent." In *State v. Wisconsin Telephone Co.,* 91 Wis. 2d 702, 284 N.W.2d 41 (1979), it was held that the ordinary and common meaning of words

may be established by the definition in a recognized dictionary. Using the dictionary definition there seems to be little doubt but that the nonstock body politic corporations created by the Legislature to perform essentially governmental functions are quasi-governmental corporations. Corporations such as the Wisconsin Solid Waste Recycling Authority and Wisconsin Housing Finance Authority were essentially created to achieve legitimate governmental functions by means that could not be employed by state agencies because of constitutional restraints.

In *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976), the court was concerned with whether a corporation created by congress (the Federal Home Loan Mortgage Corporation) was subject to the Freedom of Information Act. 5 U.S.C. § 552. The court concluded that because of the extent of the government's control over the corporation it was a quasi-federal entity subject to the Freedom of Information Act. *Also see Eastern Service Corp. v. C.I.R.*, 650 F.2d 379 (2nd Cir. 1981).

The activities of the Wisconsin Solid Waste Recycling Authority and Wisconsin Housing Finance Authority are largely controlled by statute. Thus, these corporations and similar entities fall within the definition of a quasi-governmental corporation.

In contrast, the functions of the HSF cannot possibly be considered governmental. It exercises no sovereign power and does not engage in activity that is dependent on or controlled by delegation from the Legislature. The functions pursued by the HSF under its articles and by-laws are the same functions that any private nonstock corporation could engage in. Its powers are derived from the general laws of the state. The HSF is a private corporation with no governmental attributes. While the members of the Board of Curators are also directors of the HSF, they hold and administer the position of director as private citizens not as state officials.

It is therefore my opinion that the HSF is not subject to the requirements of the open meetings law.

BCL:CAB

CREDIT UNIONS; INSURANCE; Credit unions' authority to engage in the sale of insurance is limited to credit life and credit accident and sickness insurance. OAG 15-84

April 17, 1984

RICHARD OTTOW, *Commissioner*
Credit Unions

You have asked whether credit unions may sell insurance in addition to credit life insurance or credit accident and sickness insurance.

Section 186.36, Stats., provides: "Any agent who is an officer or employe of a credit union may pay the whole or any part of his commissions from the sale of credit life insurance or credit accident and sickness insurance to the credit union."

Although this statute relates specifically only to fee-splitting and to sales of credit life and credit accident and sickness insurance, in my opinion it is intended to limit the kind of insurance that may be sold by an officer, director or employe of a credit union. The statute is titled "Sale of insurance in credit unions," and the titles of statutes may properly be considered in giving them meaning. *See Pure Milk Products Coop v. NFO*, 64 Wis. 2d 241, 253, 218 N.W.2d 564 (1974). Two additional considerations foreclose the possibility that this statute is silent as to whether other forms of insurance can be sold in connection with credit union activity.

First, parsing the permissible fee-splitting from the permissible sales is extremely difficult as a practical matter. Indeed, the administrative rules require an employe licensed to sell insurance to give all commissions to the credit union in order to avoid a conflict of interest. Secs. CU 58.01 and 58.02 Wis. Adm. Code. Because fee-splitting and the authority to sell operate so closely in tandem, it is most unlikely the Legislature in section 186.36 meant to address fee-splitting in one kind of insurance sale but to leave the sale of other insurance unregulated.

Second, at the time this statute was enacted, the law banned fee-splitting between credit unions and licensed intermediaries in *all* insurance sales, although banks and others were excepted from this ban. *See* sec. 201.53(4) and (5), Stats. (1969). Section 186.36, created

by chapter 318, Laws of 1969, added another exception to the fee-splitting ban, but was limited to credit life and credit accident and sickness insurance. *See* ch. 243, sec. 63, Laws of 1973.

At the time of passage, therefore, the legislative intent was to enable credit unions to receive commissions only from the sale of credit life and credit accident and sickness insurance. I am aware that subsequently the Legislature relaxed its restrictions on who must be licensed and therefore who may participate in fee-splitting in insurance sales generally. *See, e.g.*, ch. 38, Laws of 1981. But legislative intent is an historic fact to be determined at a point in time, *see Berns v. Wisconsin Employment Relations Comm.*, 99 Wis. 2d 252, 265, 299 N.W.2d 248 (1980), and in this case the controlling time is the date section 186.36 was enacted. This statute, then, limits credit unions to credit life and credit accident and sickness insurance.

I am unaware of any other enactments that broaden the restrictive scope of section 186.36. Section 186.113(10) created by chapter 193, section 24, Laws of 1971, provides that a credit union has "all powers necessary and proper" to carry out its purposes. In my view, such general language is insufficient to effectively repeal the specific restraints implicit in section 186.36. Moreover, the supreme court refused to permit general concepts favoring business competition and the trends toward flexibility among the financial institutions to overturn specific legislative restrictions. In holding that savings and loan associations could not offer NOW accounts, the court said that even if the result is "unduly restrictive and retrogressive, statutory barriers to the continued expansion of commercial practices must be removed by the legislature." *Wis. Bankers Ass'n v. Mut. Savings & Loan*, 96 Wis. 2d 438, 454, 291 N.W.2d 869 (1981).

In considering whether the restrictive terms of section 186.36 are overcome by any other legislation, I also have reviewed section 186.012(4) which empowers you, upon approval of the credit union review board, to authorize credit unions to exercise any right enjoyed by federally chartered credit unions under federal law. I have construed this statute as designed to promote federal-state parity so long as it "is not a change in fundamental legislative policy." 71 Op. Att'y Gen. 195, 199 (1982). Inasmuch as section 186.36 constitutes a basic legislative policy to restrict credit unions to involvement with the sale of credit life and credit accident and sickness insurance, the federal-state parity provision cannot be treated as

authorization to engage in the sale of other forms of insurance even if federally chartered credit unions may do so under federal law. This kind of change must come from the Legislature itself, not from the commissioner or the credit union review board. *See Wis. Bankers Ass'n.*

Accordingly, in my opinion credit unions have no authority to engage in the sale of insurance other than credit life and credit accident and sickness insurance.

BCL:CDH

LIBRARIES; Contract provision requiring payment as between Federated Library Systems of a fee for use of each system's facilities by nonresidents does not result in failure "to honor valid borrowers' cards of all public libraries in the system by all public libraries in the system" within the meaning of section 43.24(2)(d)2., Stats. OAG 16-84

May 18, 1984

RALPH E. SHARP, JR., *Corporation Counsel*
Dodge County

You indicate that Dodge County Library Service, which is organized as a municipal library pursuant to section 43.52, Stats., and is in part funded by the county library tax pursuant to section 43.64, and its participating municipal libraries located within Dodge County are members of the Mid-Wisconsin Federated Library System which is organized pursuant to section 43.19 and has its headquarters in Fond du Lac. The Waukesha County Federated Library System has the Oconomowoc Public Library as one of its members. Because of location, population concentration and school attendance, many Dodge County citizens have occasion to utilize the Oconomowoc Public Library. In the past, Dodge County Library Service has contracted with the Oconomowoc Public Library to pay a per capita fee for use of such library by Dodge County citizens. The Waukesha County Federated Library System has proposed to contract with the Mid-Wisconsin Federated Library System for a per capita user fee to be paid for use of each system's library facilities by citizens residing

in the other system. The fee would be paid by each system and not by the respective user. You indicate that the two systems are adjacent.

You inquire:

> Does a federated library system which enters into a service contract with another federated library system requiring the payment as between systems of a per capita fee for use of each system's library facilities by citizens residing within the boundaries of the other system "fail to honor valid borrowers' cards of all public libraries in the system by all public libraries in the system" within the meaning of sec. 43.24(2)(d)2., Stats?

I am of the opinion that it does not.

I agree with your initial conclusion that both federated library systems as agencies or joint agencies of the county or counties involved have only such powers as are expressly conferred by statute or necessarily implied from the powers expressly given. *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 689, 307 N.W.2d 227, 228 (1981). *Dane County v. H&SS*, 79 Wis. 2d 323, 329-30, 255 N.W.2d 539, 543 (1977). However, federated library systems have substantial expressly conferred and necessarily implied powers. Section 43.19(2) provides:

> (a) A federated public library system whose territory lies within a single county shall be deemed an agency of the county. A federated public library system whose territory lies within 2 or more counties shall be deemed a joint agency of those counties, but constitutes a separate legal entity for the following purposes: to have the exclusive custody and control of all system funds; to hold title to and dispose of property; to construct, enlarge and improve buildings; to make contracts; and to sue and be sued.
>
> (b) A federated public library system board shall have the powers of a library board under ss. 43.58 to 43.62 with respect to system-wide functions and services. The local library boards shall retain responsibility for their public libraries in all other areas.

Section 43.17(6) provides: "COOPERATIVE SERVICES. A public library system may contract with another such system or with other libraries or resource centers to provide and receive library services."

Section 43.24 sets forth the standards for payment of state aid to library systems and for qualifying for and maintaining eligibility for such aid. Subsection (2)(b) provides that in order to maintain eligibility for state aid a system "must meet the service criteria specified under pars. (c) to (g)." Paragraphs (d) and (e) provide in part:

> (d) Each system shall provide the following services by the end of the 2nd year of operation:
>
> 1. Complete library service as provided at the headquarters library or at the resource library if different from the headquarters library to any resident of the system on the same terms as the service is available to residents of the headquarters community.
>
> 2. The honoring of valid borrowers' cards of all public libraries in the system by all public libraries in the system.
>
> (e) Each system shall provide the following services by the end of the 3rd year of operation:
>
> . . . .
>
> 3. Service agreements with all adjacent library systems.

Subparagraph (e)3. is concerned with service agreements between systems, while subparagraphs 1. and 2. of paragraph (d) are concerned with service to be extended *within* a given system. A system is not required to extend to all borrowers of a system with which it contracts identical services or on the same terms as it furnishes such services to residents within boundaries of the system.

Section 43.52(2) is not directly applicable to a federated library system but provides in part:

> Every public library shall be free for the use of the *inhabitants of the municipality* by which it is established and maintained, subject to such reasonable regulations as the library board prescribes in order to render its use most beneficial to the greatest number. The library board may exclude from the use of the public library all persons who wilfully violate such regulations.

We need not determine here whether the words "free for the use of" means without cost in a financial sense or whether it means available to all inhabitants of the municipality. *Compare Board of Education v. Sinclair*, 65 Wis. 2d 179, 222 N.W.2d 143 (1974) and *Gregory's Book Store, Inc. v. Providence Public Library*, 46 R.I. 283, 127 A. 150

(1925). The "free for the use of" language is however limited to "*the inhabitants of the municipality* by which it is established and maintained" and such free use need not be granted to inhabitants of another municipality to which library services are extended under section 43.60(1) and (2), which provide:

> (1) The library board of any municipality may, by contract or upon such conditions and regulations as it prescribes, extend the use of the public library to nonresidents of the municipality, or exchange books either permanently or temporarily with any other library.
>
> (2) The library board of any municipality may, by agreement with any other municipality, provide for the loaning of books from its public library, singly or in traveling libraries, to the residents of the other municipality. The other municipality may levy a tax and appropriate money annually to meet its obligations under the agreement.

Subsection (1) would permit contracts between a library board and the governing board of another municipality, or contracts between a library board and individual nonresidents. Subsections (1) and (2) do not require that a library board, when contracting with nonresidents or municipalities, extend services to all nonresidents on the same terms as it furnishes such services to residents within the boundaries of the municipality by which it is established or maintained.

The proposed contract provides for reimbursement for use by a nonresident within the system as follows:

> Library users are required to conform to the rules and regulations of the library and the system from which they borrow materials and to pay promptly all delinquency charges which may accrue against them. The same rules, regulations, fine and fee schedules shall apply to local borrowers and intersystem borrowers.

This provision would be in substantial compliance with the eligibility criteria in section 43.24(2)(d)2. set forth above. The per capita user fee in the proposed contract would be paid by the respective system and not by the user. In my opinion its inclusion would not make a system, otherwise eligible, ineligible for state aid under section 43.24. Failure to enter into some type of reasonable service

agreement with "all adjacent library systems" as required by section 43.24(2)(e)3. would jeopardize eligibility for state aid.

BCL:RJV

MILWAUKEE, CITY OF; ORDINANCES; Common Council of City of Milwaukee has power by reason of Wisconsin Constitution article XI, section 3, and section 62.03(2), Stats., to enact charter ordinance adopting section 62.09(13)(a), which provides that the chief of police shall have command of the police force of the city under the direction of the mayor and that it is the duty of the chief to obey all lawful written orders of the mayor or common council. OAG 17-84

May 22, 1984

ANTHONY S. EARL, *Governor*

You request my opinion whether a charter ordinance enacted by the common council of the City of Milwaukee adopting section 62.09(13)(a), Stats., pursuant to section 62.03(2) would be legally enforceable in light of section 62.50(23), as amended by 1983 Wisconsin Act 179 which, as to subsection (23), became effective March 28, 1984.

It is my opinion that it would.

Section 62.09(13)(a), a part of the general charter law, provides in part: "The chief of police shall have command of the police force of the city under the direction of the mayor. It is the duty of the chief to obey all lawful written orders of the mayor or common council."

The City of Milwaukee Police Department is currently governed by section 62.50 which is specifically applicable to police departments of all cities of the first class "however incorporated." Subsection (23), as amended, provides:

> DUTIES OF CHIEF. The chief engineer of the fire department and the chief of police of a 1st class city, shall be the head of their respective departments. The chief of police shall preserve the public peace and enforce all laws and ordinances of the city. The chiefs shall be responsible for the efficiency and general good conduct of the department under their control. The board may review

the efficiency and general good conduct of the departments. A chief shall act as an advisor to the board when the board reviews his or her department. The board may issue written directives to a chief based on a review of the chief's department. The chief receiving a directive shall implement the directive unless the directive is overruled in writing by the mayor. Each of the chiefs shall maintain and have custody of all property of their respective departments, including but not limited to, all books, and records, which shall be available and subject to inspection by the board.

See Breier v. Balen, 114 Wis. 2d 237, 338 N.W.2d 304 (1983), and 71 Op. Att'y Gen. 60 (1982) for a discussion of the powers of the Police and Fire Commission under former section 62.50(23) with respect to rulemaking and its limited control over the chief of police. Former section 62.50(23), describing the duties of the chief of police, was added to the statutes by chapter 151, Laws of 1977. Section 10 of chapter 151 states that the new section 62.50 was a renumbered version of the old section 959-46d. Section 959-46d., enacted in 1911, constitutes a portion of the Milwaukee City Charter, which was incorporated into the statutes prior to 1921. *See State ex rel. Kuszewski v. Board of F. & P. Comm.,* 22 Wis. 2d 19, 22, 125 N.W.2d 334 (1963). The Legislative Reference Bureau comments to 1977 Senate Bill 261 state that the 1977 legislation was aimed at returning the Milwaukee City Charter to the printed statutes, at least those portions of the charter relating to police and fire departments in first class cities.

1983 Wisconsin Act 179 also amended section 62.50(1m) relating to policy review and amended and recreated section 62.50(3), a portion of which does not become effective until ninety days after March 28, 1984. It is concerned with rulemaking powers. The effect of these revisions is to remove the police chief's authority to independently prescribe rules for the government of the members of the department and to reassign that rulemaking authority to the board. Under section 62.50(3), the board is also authorized to delegate rulemaking authority to the chief, and may subsequently review, modify or suspend any rule prescribed by the chief. It is important that the authority for rulemaking has been shifted from the chief to the board, since this means that the board now oversees the general operation of the police department. Section 62.50(23) also provides that the board may review the overall efficiency of the department,

and may issue directives to the chief based on their review. The chief must act as an advisor to the board during the review, and is obligated to implement the directives unless they are overruled in writing by the mayor. This procedure is in addition to the annual review previously required by the law. As amended, section 62.50(1m) empowers the board to prescribe general policies and standards for the police and fire departments. It also allows the board to inspect any property of the departments required for a review. This is in contrast to the former provisions of old section 62.50(23) which placed custody and control over all departmental property with the police chief and did not provide for board inspection of books, records or other property.

Section 62.09(13)(a), the other statutory section in question, has been in the statutes since 1889. Up until 1921, it applied to all classes of cities. After 1921, first class cities such as Milwaukee could choose whether or not they wished to be governed by section 62.09(13)(a). Though the language of the section has changed somewhat and the section has been renumbered, the idea that the chief of police has "command of the police force" but serves "under the direction of the mayor" has survived to the present.

Thus, there has already been a period (from 1911 to 1921) when the principles of both sections 62.09(13)(a) and 62.50(23) have coexisted in the statutes. Even after 1921 when the predecessor to section 62.50(23) was dropped from the printed statutes, the section remained in force.

In my opinion, the Milwaukee Common Council could, by reason of Wisconsin Constitution article XI, section 3, and section 62.03(2), act by charter ordinance to adopt section 62.09(13)(a). Section 62.03(2) provides that a city of the first class "may adopt by ordinance this subchapter or any section or sections thereof, which when so adopted shall apply to such city." In *State ex rel. Cortez v. Bd. of F. &. P. Comm.*, 49 Wis. 2d 130, 181 N.W.2d 378 (1970), it was held that the Milwaukee Common Council could act pursuant to section 62.03(2) to adopt section 62.13(5)(b), which was less than a section, by charter ordinance.

Section 62.50 was created subsequent to the enactment of section 62.03. In enacting and amending the former, the Legislature is presumed to have been aware of the provisions in section 62.03(2). It did

not see fit to except any of the provisions of section 62.50 from its scope. In my opinion the provisions of sections 62.09(13)(a) and 62.50(23), as amended, are not necessarily in conflict with each other. They can be construed in harmony. In fact, section 62.09(13)(a) (general charter law) appears quite consistent with provisions of the Charter Ordinances of the City of Milwaukee presently in effect, particularly sections 3.01, 22.05 and 22.12, Milwaukee City Charter (1977). Section 3.01 provides in part: "The mayor shall be the chief executive officer, and the head of the fire department and of the police of the city ...." Section 22.05 provides: "The mayor or common council may direct the chief of police to detail any of the policemen to perform such official duties as he or they deem proper ...." Section 22.12 provides: "[T]he chief of police of said cities, shall be the head of their respective departments and shall have power to regulate said departments and prescribe rules for the government of its members." In my opinion the power of the chief to prescribe rules for department members is now limited by section 62.50(3) as recreated by 1983 Wisconsin Act 179 and that such power resides primarily in the board. Any provision in section 22.12 of the Milwaukee City Charter must yield to provisions in section 62.50(3).

If a charter ordinance were enacted, the chief of police would continue to be the day-to-day working head of the police department. The mayor, as chief executive officer, would have broad administrative power over the chief of police and police department. That is the "traditional" or "historical" division of responsibilities between the chief of police and mayor of the City of Milwaukee even after the advent of the fire and police commission. *See State ex rel. Davern v. Rose,* 140 Wis. 360, 366, 122 N.W. 751, 753 (1909).

This conclusion is also supported by section 62.09(8)(a) and (d) which further shows that the Legislature intended to distinguish between the authority, duties and powers of the mayor as "chief executive officer" and the police chief as "head" of the police department. If a charter ordinance were adopted, the chief's command of the police force would be "under the direction of the mayor" and it would be such officer's duty to "obey all lawful written orders of the mayor or common council." Sec. 62.09(13)(a), Stats. Note that section 62.50(23) requires the chief of police to "enforce all laws and

ordinances of the city." That would include a charter ordinance adopting section 62.09(13)(a).

BCL:RJV

MEDICAL AID; NURSING HOMES; PUBLIC ASSISTANCE; A county health facility may not charge for non-medical assistance services given to medical assistance patients in excess of medical assistance rates without violating section 49.49, Stats. OAG 19-84

June 1, 1984

THOMAS A. SCHROEDER, *Corporation Counsel*
Rock County

The Rock County Health Care Center (Center) currently bills the medical assistance program for out-of-county clients at the rate allowed by the state. At the same time the Center contracts with out-of-county 51.42 boards for payment for costs above the medical assistance rate for Day Services-Medical, which is a separately certified program for out-of-county chronically mentally ill patients. You ask whether the receipt of money pursuant to these contracts constitutes supplementation in violation of section 49.49, Stats.

Rock County operates the Center which is a nursing home facility certified under chapter 32 of the Wisconsin Administrative Code. This facility serves both medical assistance (Federal Title XIX) beneficiaries and private pay patients. Depending upon their individual needs, residents are certified for various levels of care. Those residents who are medical assistance recipients have their maximum reimbursement rate established, according to the appropriate level of care, by the state pursuant to section 49.45(6m).

In order to participate in the medical assistance program, a provider of health care services must enter into an agreement with the state agency administering the medical assistance program to accept the reimbursement schedule established by the agency for services to medical assistance clients. For the purposes of this opinion request, the term "supplementation" will be used to refer to the practice by which providers augment this reimbursement rate by billing other sources.

The Center also operates two separately certified units. In addition to providing nursing home services, these units also have a specialized program designated as Day Services-Medical, which requires an additional level of certification from the Department of Health and Social Services of the State of Wisconsin. These specialized units are basically behavioral modification programs and are geared for chronically mentally ill persons with periodic behavioral outbursts who have been treatment failures in the normal nursing home setting.

For some time, clients have been sent by outside counties to reside at the Center to participate in the Day Services-Medical program. All of these clients are eligible for medical assistance. The Center bills the medical assistance program directly for these clients from other counties at the rate allowed by the state. The Center also has entered into contracts with the community mental health boards established under section 51.42 from these other counties. Pursuant to these contracts, the Center agrees to provide Day Services-Medical, and the board agrees to pay an amount of money which is designed to cover the Center's cost in excess of the medical assistance reimbursement rate. These contracts have been a prerequisite to admitting out-of-county patients into this program.

You indicate that the Division of Community Services within the Department of Health and Social Services has concluded that the Rock County Health Care Center's contracting arrangements with these 51.42 boards for reimbursement in addition to the medical assistance rate constitutes supplementation which is improper. This conclusion obviously could create a problem with existing contractual arrangements and future plans for the Center and its clients.

At the same time, it appears that the Division of Community Services has suggested an alternative arrangement. It was suggested that a contract between individual county boards could be negotiated to arrange for payment of services where the cost exceeds the medical assistance reimbursement pursuant to section 66.30. Section 66.30 allows for intergovernmental cooperation and provides in pertinent part:

> (2) In addition to the provisions of any other statutes specifically authorizing cooperation between municipalities, unless such statutes specifically exclude action under this section, any munici-

pality may contract with other municipalities, for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law .... This section shall be interpreted liberally in favor of cooperative action between municipalities.

In your opinion request, you properly conclude that section 66.30 would authorize counties to enter into the contracting arrangement suggested. However, you also note that the existence of this power to contract does not address the issue of the propriety or legality of the apparent supplementation.

The federal medical assistance regulations provide at 42 C.F.R. § 447.15 that the "State Plan must provide that the Medicaid agency must limit participation in the Medicaid program to providers who accept, as payment in full, the amounts paid by the agency [sec. 1902(a)(4) of the Act] plus any deductible, coinsurance or copayment required by the plan to be paid by the individual." This regulation states only a very narrow exception to the principle that a provider must accept no more than the state-established reimbursement rate.

Section 49.45 deals with the administration of the medical assistance program in Wisconsin and states under subsection (14) that "[n]o provider may impose upon a recipient charges in addition to payments received for services under this section or impose direct charges upon a recipient in lieu of obtaining payment under this section."

This statute is inapplicable to your opinion request because the proposed charges are not imposed upon a recipient. Although a close question is presented, it also is arguable that the above-quoted federal regulation prohibits only supplementation procured from recipients rather than from other sources. However, it is unnecessary to resolve that issue because of the clear and unambiguous language contained in section 49.49(4), which provides:

Prohibited Charges. No person, in connection with the medical assistance program when the cost of the services provided to the patient is paid for in whole or in part by the state, may:

(a) Knowingly and wilfully charge, for any service provided to a patient under a medical assistance program, money or other

consideration at a rate in excess of the rates established by the state.

(b) Knowingly and wilfully charge, solicit, accept or receive, in addition to any amount otherwise required to be paid under a medical assistance program, any gift, money, donation or other consideration, other than a charitable, religious or philanthropic contribution from an organization or from a person unrelated to the patient, as a precondition of admitting a patient to a hospital, skilled nursing facility, or intermediate care facility, or as a requirement for the patient's continued stay in such a facility.

(c) Violators of this subsection may be fined not more than $25,000 or imprisoned for not more then 5 years or both.

The 51.42 boards would not be making a charitable, religious or philanthropic contribution within the meaning of subsection (4)(b), nor would these boards qualify as "a person unrelated to the patient." Other than that, subsection (4)(b) admits of no exceptions. Any person who charges, solicits, accepts or receives any form of remuneration in addition to the amount otherwise required to be paid violates this subsection and, therefore, is subject to the penalties provided under subsection (4)(c).

Section 49.49 is specifically patterned after 42 U.S.C. § 1396h(d), which reads almost identically. Both provisions were passed in 1977, thereby leading me to believe that the federal statute formed the model legislation upon which the state criminal provision is based. Moreover, certain federal funding for medical assistance fraud control was contingent upon adoption and implementation of these provisions.

There is little reported legislative history behind 42 U.S.C. § 1396h(d). Therefore, it is not absolutely clear whether this section was aimed at preventing contractual arrangements such as those which are the subject of this opinion. In the absence of any clear legislative history, however, it is necessary to follow the clear wording of the statute. As Wisconsin's medical assistance funding is contingent upon strict compliance with the federal medicaid provisions, a different interpretation of section 49.49 (*i.e.*, one that contravenes the plain wording of the comparable federal statute) could possibly jeopardize the state's federal funding.

It is my opinion that the Center contracts with the out-of-county 51.42 boards for payment for costs above the medical assistance rate for Day Services-Medical for out-of-county chronically mentally ill patients result in supplementation as that term is used within this opinion. Even if the contracting parties were the Rock County Board and an outside county board acting pursuant to section 66.30, the arrangement still would constitute supplementation and lead to possible prohibited charges under section 49.49(4).

You also ask whether certain past deficits incurred at this nursing home can be made up through "county appropriations." I decline at this time to answer this additional question in the absence of more facts and your conclusion based upon the reasoning and authorities required from district attorneys and corporation counsel in 62 Op. Att'y Gen. Preface (1973). In all other respects, your request fully met or exceeded the requirements under those 1973 guidelines for which you should be highly commended.

BCL:DPJ

LEGISLATION; MUNICIPALITIES; TAXATION; Section 74.80(2), Stats., does not permit a county or municipality to enact an ordinance which would make the one-half of one percent per month penalty apply on a retroactive basis to the date the tax first became delinquent. OAG 20-84

June 25, 1984

TIMOTHY F. CULLEN, *Chairperson*
Senate Organization Committee

Pursuant to section 165.015(1), Stats., the Committee on Senate Organization requests my opinion on the following question:

> Does section 74.80(2) of the statutes, as amended by section 1268 of 1983 Wisconsin Act 27, permit a county, city, village or town to enact an ordinance which would make the one-half of one percent per month penalty apply on a retroactive basis to the date the tax first became delinquent even though such date may have been many months or years prior to the effective date of the ordinance?

In my opinion it does not.

Section 1268 of 1983 Wisconsin Act 27 became effective July 2, 1983. The text from the act sets forth both the old and new language as follows:

74.80(2)(*a*) 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~~ up to 0.5% per month or fraction of a month, in addition to the interest under sub. (1), on any overdue or delinquent real estate taxes and special assessments. The ~~ordinance~~ governing body of any city, village or town may, by ordinance, impose a penalty of up to 0.5% per month or fraction of a month, in addition to the interest under sub. (1), on any overdue or delinquent personal property taxes.

(b) Any ordinance enacted under par. (a) may specify that the penalty under this subsection shall apply to any real estate taxes and special assessments, or to any personal property taxes, 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, or to any personal property taxes, that become overdue or delinquent on or after January 1, 1982. 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).

The six percent penalty authorized under former section 74.80(2) was discussed in 71 Op. Att'y Gen. 189 (1982). That opinion stated that a county could impose a flat six percent or less penalty by ordinance, that it was a one time penalty, that it was not to be calculated at one-half of one percent per month and that an ordinance could provide: (1) that such penalty applies to delinquent taxes that were delinquent on the date of enactment of the ordinance or had become delinquent on some previous date; (2) that such penalty applies to delinquent taxes as they become due after enactment of the ordinance; and (3) that such penalty applies only as to delinquent taxes which became delinquent after January 1, 1982, or some later date. The opinion did not state that the six percent penalty could be retroactively applied or that an ordinance could be retroactive in any

manner. The penalty would only be applicable to taxes which *were then delinquent* or which would become delinquent in the future. It was a one time charge and the fact that the taxes *had been* delinquent at an earlier date did not make application of the penalty retroactive.

The 1983 Legislature saw fit to broaden the statute to enable a town, city or village to impose a penalty by ordinance on delinquent personal property taxes. The Legislature also changed the penalty from a one time "6% or less" amount to "a penalty up to 0.5% per month or fraction of a month in addition to the interest under sub. (1) on any overdue or delinquent real estate taxes and special assessments." In my opinion there is no limit on the number of months to which the penalty can apply but the rate of the penalty may not be more than 0.5% per month.

In my opinion the statute does not permit enactment of an ordinance which would have retroactive effect. The penalty can only be applied prospectively. The number of months since the date the tax first became delinquent and which had accrued prior to the date of enactment of the ordinance cannot be utilized for purposes of computing the penalty. In *State v. Joe Must Go Club,* 270 Wis. 108, 115, 70 N.W.2d 681, 684 (1955), it is stated: "In any event, we are dealing with a penal statute and this court has often stated that statutes imposing penalties must be strictly construed and doubtful questions thereunder are to be resolved favorably to those from whom the penalties are sought to be recovered." In *United States Fire Ins. Co. v. E.D. Wesley Co.,* 105 Wis. 2d 305, 319, 313 N.W.2d 833, 840 (1982), it is stated:

> The general rule in Wisconsin is that legislation is presumptively prospective unless the statutory language clearly reveals either expressly or by necessary implication an intent that the statute apply retroactively. *State v. ILHR Department,* 101 Wis. 2d 396, 403, 304 N.W.2d 758 (1981), citing *Hunter v. Sch. Dist. Gale-Ettrick-Trempealeau,* 97 Wis. 2d 435, 442-43, 293 N.W.2d 515 (1980).
>
> This court recently reiterated: "The general rule of statutory construction is that statutes are to be construed as relating to future and not to past acts." *Gutter v. Seamandel,* 103 Wis. 2d 1, 17, 308 N.W.2d 403 (1981).

The court has held that legislation providing for penalties and interest with respect to the collection of delinquent taxes should not be applied retroactively where the Legislature did not expressly so provide. *See* discussion in *Munkwitz R. & I. Co. v. Diederich Schaefer Co.*, 231 Wis. 504, 507, 286 N.W. 30, 31 (1939).

The Legislature did leave the date of January 1, 1982, in paragraph (b) when it amended former section 74.80(2). This office has previously construed the predecessor statute, which contained substantially the same language within the same sentence and which included that date, as not permitting retroactive imposition of the penalty. 71 Op. Att'y Gen. 189 (1982). The date is used immediately after the words "that *become* overdue on or delinquent on or after." Become is a linking verb and is used in the statute in its present tense rather than in the past tense, "became" or "have become." Section 990.001(3) provides that in the construction of statutes, "the present tense of a verb includes the future when applicable. The future perfect tense includes the past and future tenses." The language used in 1983 Wisconsin Act 27 which amended section 74.80(2) contains no language evidencing an intent on the part of the Legislature that an ordinance could impose a penalty on a retroactive basis. The final result of the legislation is that penalties on overdue taxes which do not remain overdue for long periods may well be less than the one time six percent penalty formerly permitted. However, where a proper ordinance is passed and becomes effective, penalties may exceed the six percent figure where the period of delinquency extends over many months or years. In my opinion the statute does not permit nor did the Legislature intend that this cumulative effect of the penalty could be retroactively applied to the date in some year past on which the taxes first became overdue, whether that date be in 1975, 1976, 1977, 1978, 1979, 1980, 1981 or even on or after January 1, 1982, which was previous to the enactment of the ordinance.

BCL:RJV

CRIMINAL LAW; HEALTH AND SOCIAL SERVICES, DEPARTMENT OF; PRISONS AND PRISONERS; The Department of Health and Social Services has authority to supervise defendants conditionally released under section 971.17(2), Stats., if the court orders such supervision as a condition of release. The period of supervision, when added to the time defendant has spent in the treatment institution, cannot exceed the maximum term of imprisonment as defined in section 971.17(4). Such maximum term must be calculated as if consecutive sentences had been imposed. The Department lacks authority to supervise defendants released under section 971.17(4). OAG 24-84

July 23, 1984

LINDA REIVITZ, *Secretary*
Department of Health & Social Services

You have asked several questions about the proper interpretation of section 971.17, Stats., which deals with criminal defendants found not guilty by reason of mental disease or defect. That statute is set forth in full below:

> 971.17 Legal effect of finding of not guilty because of mental disease or defect. (1) When a defendant is found not guilty by reason of mental disease or defect, the court shall order him to be committed to the department to be placed in an appropriate institution for custody, care and treatment until discharged as provided in this section.
>
> (2) A reexamination of a defendant's mental condition may be had as provided in s. 51.20(16), except that the reexamination shall be before the committing court and notice shall be given to the district attorney. The application may be made by the defendant or the department. If the court is satisfied that the defendant may be safely discharged or released without danger to himself or herself or to others, it shall order the discharge of the defendant or order his or her release on such conditions as the court determines to be necessary. If it is not so satisfied, it shall recommit him or her to the custody of the department.
>
> (3) If, within 5 years of the conditional release of a committed person, the court determines after a hearing that the conditions of

release have not been fulfilled and that the safety of such person or the safety of others requires that his conditional release be revoked, the court shall forthwith order him recommitted to the department, subject to discharge or release only in accordance with sub. (2).

(4) When the maximum period for which a defendant could have been imprisoned if convicted of the offense charged has elapsed, subject to s. 53.11 and the credit provisions of s. 973.155, the court shall order the defendant discharged subject to the right of the department to proceed against the defendant under ch. 51. If the department does not so proceed, the court may order such proceeding.

According to your letter, there is some disagreement within the Department of Health and Social Services (Department) regarding what authority the Department has to supervise defendants who have been released from the treatment institution and how to calculate the maximum period of imprisonment under subsection (4). Your specific questions, as restated, are:

1. If a defendant is released from the institution pursuant to section 971.17(2), does the Department have authority to supervise the defendant if the court specifies supervision as one of the conditions of his release?

2. If the Department has authority to supervise a defendant conditionally released under subsection (2), is the supervision period always five years as specified in subsection (3), or does the supervision period end when the maximum period described in subsection (4) is reached?

3. If a defendant never achieves release through the reexamination process prescribed in subsection (2), could his release under subsection (4) be followed by a period of departmental supervision until a maximum discharge date?

4. Where a defendant has committed more than one offense, should the maximum period of imprisonment described in subsection (4) be calculated as if the defendant would have received consecutive or concurrent sentences?

Question 1

Under subsection (2), the court has three options following a reexamination hearing for a defendant previously committed upon a finding of not guilty by reason of mental disease or defect. If the court is satisfied that the defendant can be released from the institution without posing a danger to himself or others, the court has two choices: it can completely discharge the defendant from custody and supervision or it can order his release "on such conditions as the court determines to be necessary." The third option is recommitting the defendant to the custody of the Department if the court is not satisfied that discharge or conditional release could be accomplished without endangering the safety of the defendant or others.

Although subsection (2) does not explicitly provide that a conditionally released defendant can be subjected to departmental supervision such as occurs in a parole situation, it is my opinion that the Department has authority to supervise such persons if the court presiding over the reexamination hearing determines that such a condition is necessary.

The general rule is that an administrative agency has only those powers which are expressly conferred upon it or which may fairly be implied from the statutes under which it operates. *Brown County v. H&SS Department,* 103 Wis. 2d 37, 48, 307 N.W.2d 247 (1981); *Peterson v. Natural Resources Board,* 94 Wis. 2d 587, 592, 288 N.W.2d 845 (1980); *State (Dept. of Admin.) v. ILHR Dept.,* 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977). The specific powers of the Department are enumerated in section 46.03. Subsection (5) requires the Department to perform the following duties in the area of mental hygiene:

> (5) Mental hygiene. (a) Execute the laws relating to the custody, care and treatment of mentally ill, mentally infirm and mentally deficient persons, inebriates and drug addicts. It shall examine all institutions, public and private, authorized to receive and care for such persons, and inquire into the method of government and the management of persons therein, and examine into the condition of buildings, grounds and other property connected with any such institution and into matters relating to its management.

(b) Direct the psychiatric field work, aftercare and community supervision and exercise such powers in relation to prevention as the department deems appropriate.

In my opinion, the broad grant of power which the above statute vests in the Department includes the authority to supervise defendants conditionally released under section 971.17(2), especially since section 46.03(5)(b) charges the Department with directing "aftercare and community supervision" of the mentally ill, mentally infirm and mentally deficient. My conclusion rests not only on this general grant of power but is also buttressed by the specific authority granted the Department by section 51.37(9) which reads as follows:

51.37 Criminal commitments; central state hospital or mental health institutes.

. . . .

(9) If in the judgment of the director of central state hospital, Mendota mental health institute, Winnebago mental health institute or the Milwaukee county mental health center, any person who is committed under s. 971.14 or 971.17 is not in such condition as warrants his or her return to the court but is in a condition to receive a conditional transfer or discharge under supervision, the director shall report to the department, the committing court and the district attorney of the county in which the court is located his or her reasons for such judgment. If the court does not file objection to the conditional transfer or discharge within 60 days of the date of the report, the director may, with the approval of the department, conditionally transfer any person to a legal guardian or other person, subject to the rules of the department.

In essence, the above provision authorizes the Department, upon the recommendation of the institution director, to conditionally release a defendant committed under section 971.17 without going through the reexamination procedure set forth in section 971.17(2), if the committing court does not object within the statutorily prescribed time. Conditional release under section 51.37(9) is "subject to the rules of the department."

You have advised that the rules which the Department applies to section 971.17 defendants conditionally released under section 51.37(9) are the same rules it applies to probationers and parolees, such as those rules found in chapters HSS 31 and 328 of the Wiscon-

sin Administrative Code. Thus, section 971.17 defendants who are conditionally released pursuant to section 51.37(9), although not technically on parole, are treated in the same manner as parolees and may be required to report to a probation and parole agent. Since the Department has explicit authorization to supervise section 971.17 defendants who have been conditionally released at the behest of the institution director, it would be anomalous to conclude that the Department lacks the authority to also supervise defendants conditionally released by order of the court pursuant to section 971.17(2). Because statutes dealing with the same subject matter should be construed harmoniously, *see State v. Kay Distributing Co., Inc.*, 110 Wis. 2d 29, 37, 327 N.W.2d 188 (Ct. App. 1982), I conclude that the Department has authority to supervise[1] defendants who are conditionally released pursuant to section 971.17(2) if the court determines such supervision is a necessary condition of release.

Question 2

You next ask whether the supervision period for defendants conditionally released under subsection (2) is always five years, as provided in subsection (3), or whether the supervision period must end when the maximum period described in subsection (4) is reached. It is my opinion that subsection (4) is controlling and that the Department has no authority to supervise defendants once the maximum period for which they could have been imprisoned, as that period is defined in subsection (4), has been reached.

In construing a statute, one must consider each of its parts in connection with every other part so as to produce a harmonious whole. *Milwaukee County v. ILHR Dept.*, 80 Wis. 2d 445, 454 n.14, 259 N.W.2d 118 (1977); *State v. Wachsmuth*, 73 Wis. 2d 318, 323, 243 N.W.2d 410 (1976). The only way to harmonize subsections (3) and (4) is to require that the period of supervision following a conditional release, when added to the time the defendant has already spent in custody, cannot exceed the maximum period of imprisonment as defined in subsection (4). Thus, if the maximum period of imprisonment as defined in subsection (4) is ten years, and the defen-

[1] Such defendants are not regarded as being in the Department's custody under section 971.17(2), however, since that section employs the word "custody" to denote physical control.

dant is conditionally released after spending six years in an institution, then the conditional release period can only be four years.

Permitting the supervisory period to extend for five years regardless of the maximum period the defendant could have been confined had he been convicted of the offense charged would render subsection (4) of the statute meaningless in some cases. For example, if a defendant charged with battery under section 940.19(1) was found not guilty by reason of mental disease or defect, confined in an institution for six months, and then conditionally released for an additional five years, that defendant would be subject to control for five and one-half years, while a conviction for the same offense would only have netted him a maximum of nine months in jail, minus the credit due under sections 53.11 and 973.155, Stats. Such an interpretation would work an absurd result, thereby violating an elementary principle of statutory construction. *See State v. Christensen,* 110 Wis. 2d 538, 543 n.6, 329 N.W.2d 382 (1983); *State v. Britzke,* 108 Wis. 2d 675, 681, 324 N.W.2d 289 (Ct. App. 1982), *aff'd,* 110 Wis. 2d 728, 329 N.W.2d 207 (1983).

Question 3

Your third question is whether a defendant who is discharged under subsection (4) can be subjected to an additional period of departmental supervision until he reaches what you refer to as a "maximum discharge date." You note parenthetically that because the maximum period of imprisonment defined in subsection (4) is calculated by crediting the defendant with good time under section 53.11, which also contains a provision for forfeiture of good time, the question has arisen whether the Department has authority to supervise the conduct of a defendant following his release pursuant to section 971.17(4). The answer is no.

For a defendant convicted of a crime, the mandatory release date is calculated by reducing the sentence actually imposed by the credit earned under sections 53.11 and 53.12 as well as the credit due under section 973.155. Sec. 53.11(7), Stats. Even after the mandatory release date is reached, however, such a defendant remains on parole until his maximum discharge date, *i.e.,* the date he would have been released had he not received credit under sections 53.11 and 53.12. *Id.* Thus, when you refer to "maximum discharge date," I assume you are referring to the date on which the defendant's sentence

would have elapsed had he received the maximum sentence for the crime with which he was charged but had he not been given credit under section 53.11.

A convicted defendant who is released on mandatory parole is still subject to departmental supervision until he reaches his maximum discharge date. The same is not true of a defendant found not guilty by reason of mental disease or defect, however. Upon violation of prison regulations, the former category of defendants is subject to forfeiture of good time previously granted or earned. However, section 53.11(2) is inapplicable to persons found not guilty under section 971.17(1) because such persons are not confined in prisons but in institutions which do not even come under the control of the Division of Corrections. In fact, you advise that persons committed to forensic institutions after being acquitted by reason of mental disease or defect are not given conduct reports and do not suffer loss of good time for misbehavior.

Although the Legislature has decreed that defendants found not guilty by reason of mental disease or defect are entitled to good time credit under section 53.11, the Legislature has not seen fit to subject them to loss of that credit.[2] Since there is no statutory authorization for supervising a defendant who has been discharged under section 971.17(4), the Department is without authority to do so. If the Department believes that such a defendant still poses a danger to himself or others, it can institute proceedings against the defendant under chapter 51.

Question 4

Your final question concerns the proper way to calculate the maximum term of imprisonment described in section 971.17(4) where the defendant is found to have committed multiple offenses. Specifically,

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[2] In 70 Op. Att'y Gen. 170, 171 (1981), where I concluded that the credit provision of section 971.17(4) should not be applied retroactively, I stated as follows: "A final consideration in support of the conclusion described in this response relates to the practical application of the statute. The purpose of the statute is to provide an incentive for appropriate behavior. Statutory good time can be lost by disciplinary proceedings. Therefore, to grant it retroactively would defeat its purpose, since no adjustment could be made for disciplinary infractions which, had the statute been in effect at the time, might have resulted in a loss of a certain amount of good time." Since persons confined to state mental institutions pursuant to section 971.17 are not subject to the loss of good time credit granted under section 53.11, the above-quoted language implying the contrary is hereby withdrawn.

you ask whether the maximum term of imprisonment in multiple-offense cases should be calculated as if the defendant would have received concurrent or consecutive sentences. In my opinion, the language of the statute requires that the maximum period of imprisonment in multiple-offense situations be calculated by assuming the imposition of consecutive sentences.

Subsection (4) requires that the defendant be discharged "[w]hen the maximum period for which [he] could have been imprisoned if convicted of the offense charged has elapsed, subject to s. 53.11 and the credit provisions of s. 973.155." In multiple-offense situations, the sentencing court has power to make all of the sentences consecutive to one another, if it so desires. *See* sec. 973.15(2), Stats. Thus, the maximum term for which a defendant could have been imprisoned if he had been convicted of multiple offenses rather than found not guilty by reason of mental disease or defect must be computed by adding together each maximum sentence he could have received and then subtracting the credit to which he is due under sections 53.11 and 973.155.

BCL:MMM

COMPATIBILITY; SALARIES AND WAGES; SHERIFFS; In a county having no undersheriff, a person elected and serving as sheriff vacated office by accepting office of town supervisor during his term but is entitled to compensation paid and can continue to exercise duties of sheriff until successor is elected or appointed and qualifies. OAG 25-84

September 24, 1984

DARWIN L. ZWIEG, *District Attorney*
Clark County

You request my opinion on three questions which are related to the following circumstances which you represent as factual. One David Bertz was elected Sheriff of Clark County at the November 1982 general election for a statutory two-year term ending the first Monday in January 1985. He was sworn in and qualified prior to his election in April 1983 as supervisor of the Town of Hewett in Clark County. He accepted the latter office and served therein until

resigning as town supervisor on or about May 12, 1984, after having been advised that Wisconsin Constitution article VI, section 4(3) provides: "Sheriffs shall hold no other office ...." You state that Clark County has abolished the office of undersheriff.

Your questions as restated and renumbered and my answers are:

1. Did David Bertz vacate the office of sheriff by accepting the office of town supervisor during the term for which he was elected?

The answer is yes. He can, however, continue to perform the duties of the office until his appointed or elected successor qualifies.

2. If Bertz did vacate the office of sheriff when he accepted the office of town supervisor, is he entitled to the salary paid him as sheriff after acceptance of the office of town supervisor?

The answer is yes, if he performed the duties in good faith and there was no other claimant for such office.

3. Would the fact that Bertz held the office of sheriff at the time he assumed the office of town supervisor have any effect on the validity of town resolutions and ordinances he voted upon?

The answer is no. He was not ineligible to the office of town supervisor but served in a *de jure* capacity therein.

A sheriff is a constitutional officer chosen by the electors of the county for a two-year term. Wis. Const. art. VI, § 4(1). The regular term commences on the "first Monday next succeeding his election and shall continue 2 years and until his successor qualifies." Sec. 59.12, Stats. A sheriff is removable by the Governor for cause after hearing and where a vacancy exists, the power to appoint a successor is with the Governor. Wis. Const. art. VI, §§ 4(4) and (5); secs. 17.09(5) and 17.21(1), Stats.

The recent revision of the town laws, 1983 Wisconsin Act 532, does not become effective until January 1, 1985. The applicable law with respect to town supervisor is found in present sections 60.19, 60.20 and 60.21 which clearly establish the position of supervisor as an office. Since the position of town supervisor is an office, it is con-

stitutionally incompatible with the office of sheriff by reason of Wisconsin Constitution article VI, section 4(3). The common law as to compatibility of offices was in force in the territory of Wisconsin at the time the Constitution was adopted and continues in force until altered or suspended by the Legislature. Wis. Const. art. XIV, § 2. That rule is that the acceptance, by an incumbent of one office, of another office incompatible with the first *ipso facto* absolutely vacates the first, and the incumbent's title is thereby terminated without any act or proceeding. *State ex rel. Stark v. Hines,* 194 Wis. 34, 215 N.W. 447 (1927). This principle was approved in *Martin v. Smith,* 239 Wis. 314, 326, 1 N.W.2d 163 (1941).

By accepting the office of town supervisor at the time he already held the office of sheriff, Bertz vacated the office of sheriff in the sense that he gave up all right and title to it. Section 17.03(10) is applicable, and provides:

> Any public office ... shall become or be deemed vacant upon the happening ....
>
> . . . .
>
> (10) ... [O]f any other event which is declared by any special provision of law to create a vacancy.

He had *de jure* status at least until the time he accepted the incompatible office of supervisor. Upon accepting the incompatible office he at least continued as *de facto* sheriff. *State ex rel. Thompson v. Gibson,* 22 Wis. 2d 275, 125 N.W.2d 636 (1963). The Supreme Court has stated that, as a general rule, all that is required to make an officer *de facto* is that the individual claiming the office be in possession of it, performing its duties and claiming to be entitled to such office under color of an election or appointment. *State ex rel. Reynolds v. Smith,* 22 Wis. 2d 516, 522, 126 N.W.2d 215 (1964). *Walberg v. State,* 73 Wis. 2d 448, 463, 243 N.W.2d 190 (1976). "If the offices exist *de jure,* then it is the settled doctrine of the Supreme Court as well as of other courts that all persons who are in the exercise of the duties of such offices by color of law are officers *de facto,* and their acts are valid." *Cole v. The President and Trustees of The Village of Black River Falls,* 57 Wis. 110, 113-14, 14 N.W. 906 (1883). "While the right to hold an office when tenure is based only on a de facto status may be attacked directly, the officer's acts are valid as to the public, and third parties

and cannot be attacked collaterally." *Burton v. State Appeal Board,* 38 Wis. 2d 294, 304, 156 N.W.2d 386 (1968).

His act of resigning the office of supervisor would not restore any right to the office of sheriff in such individual if there were an undersheriff, or as against a successor appointed by the Governor. In 67 C.J.S. *Officers* § 32 (1978), it is stated: "One who vacates an office by acceptance of an incompatible office is not restored to the first by resignation from the second." The office is vacant in the sense that the Governor has power to appoint a successor pursuant to section 17.21(1).

Acts of a person apparently in possession of an office by color of authority and performing the duties of the offices in good faith are valid. *Silgen v. Fond du Lac,* 225 Wis. 335, 274 N.W. 256 (1937).

A *de facto* officer may be entitled to the compensation incident to the office where he or she rendered services in good faith and there was no other person who could properly claim the salary. *State ex rel. Elliott v. Kelly,* 154 Wis. 482, 489, 143 N.W. 153, 156 (1913). Where there is no *de jure* officer claiming the office, a *de facto* officer is entitled to the salary of the office when the *de facto* officer has entered upon the duties of the office in good faith and pursuant to apparent authority. *State ex rel. Reynolds v. Smith,* 22 Wis. 2d 516, 522-23, 126 N.W.2d 215 (1964). Bertz probably has at least *de facto* status as a holdover until his successor is appointed or elected and qualifies. He could not foreclose the Governor from exercising power to fill the vacancy, although the title to the office might not be established until after a successor were appointed and such successor sought court action in the nature of *quo warranto* should Bertz refuse to physically vacate the premises.

BCL:RJV

HOME RULE; LIBRARIES; MUNICIPALITIES; The Madison Public Library can charge user fees for any services that fall outside of a library's inherent information-providing functions; services that constitute core "library services" must be provided free of charge to the inhabitants of the municipality; a one-dollar fee can be collected for lending duplicate copies of best seller books. OAG 26-84

August 17, 1984

DR. HERBERT J. GROVER, *State Superintendent*
Department of Public Instruction

The Madison Public Library recently began collecting a number of user fees and reserve charges for various materials and services. These include fees and charges for borrowing best seller books, framed pictures, 16 mm films, 16 mm film projectors, radios, screens, video cassettes and audio cassette players. Also, they include charges and fees for having books and materials put on reserve, and charges for using the meeting rooms in the library. You question the legality of these charges in light of section 43.52(2), Stats., which provides:

> Every public library shall be free for the use of the inhabitants of the municipality by which it is established and maintained, subject to such reasonable regulations as the library board prescribes in order to render its use most beneficial to the greatest number. The library board may exclude from the use of the public library all persons who wilfully violate such regulations.

In my opinion, this section renders only some of Madison Public Library's fees and charges invalid.

In answering your question, it is essential in my opinion to be mindful of the fact that the information explosion of recent years has expanded the library's traditional role as a lender of books. *See Libraries' Financial Squeeze,* 1979 Vol. 11 Editorial Research Reports 803 (1980). The interplay between technology and information has led libraries to venture into new, non-traditional areas such as offering computer services and maintaining and lending various kinds of audio and audiovisual equipment.

The first statutory section setting forth the principle of "free" public libraries, a principle now embodied in section 43.52(2), was enacted in the 1800's. One can logically assume that, at that time, only traditional library services were offered. In interpreting section 43.52(2) and its intended scope, the historical context in which the free library principle was adopted must be considered. *See Berns v. Wis. Employment Relations Comm.,* 99 Wis. 2d 252, 265, 297 N.W.2d 248 (1980). In my opinion the Legislature intended, by means of the phrase "free for the use of," to ensure that patrons within a municipality would be given free access to the physical facil-

ities and the informational materials traditionally associated with a library. In my opinion, the phrase is not so broad as to mean that every new service provided by and every activity occurring within a library must be without charge. This conclusion finds support in *Board of Education v. Sinclair,* 65 Wis. 2d 179, 222 N.W.2d 143 (1974). There, the Wisconsin Supreme Court dealt with a constitutional provision mandating that public schools be "free and without charge for tuition." Wis. Const. art. X, § 3. The Court held that such language did not absolutely prohibit public schools from selling or charging fees for the use of textbooks and other items (pens, pencils, gym suits, band instruments).

While there is no definition of the term "library service" in the Wisconsin statutes, there is an instructive definition in the federal Library Services and Construction Act, 20 U.S.C. §§ 351-364. "Library Service" is defined as "the performance of all activities of a library relating to the collection and organization of library materials and to making the materials and information of a library available to a clientele." 20 U.S.C. § 351a(3). In 1978, the Attorney General of California dealt with the identical issue you have raised. Based on the federal definition of "library service," he formulated a test for determining whether a particular transaction is a "library service" that must be provided for free. I find the test to be a sound one and adopt it as a guideline for applying section 43.52(2). The test is as follows:

> If the transaction involves the satisfaction, with library resources, of a patron's request for information (whether for educational, recreational or entertainment purposes), such transaction is a "library service." Other transactions, not involving the furnishing of information, though carried out by a library, would not be a "library service" .... Perhaps the essential distinction that is operative here, is between those services which are reflective of a library's inherent information providing function and those ancillary services which are not unique to libraries and which can be just as effectively provided in non-library settings. Examples of such nonlibrary services might include the furnishing of meeting rooms, allowing the use of typewriters and copying machines, rental of audiovisual equipment, etc.

61 Op. Att'y Gen. 512 (California 1978).

Applying this guideline to the various charges and fees established by the Madison Public Library, it is my opinion that only the following may be imposed: charges for use of framed pictures, projectors, screens, audio cassette players, AM/FM radios and meeting and lecture rooms. In my opinion these are services which are tangential to a library's inherent information-providing function. The charges for borrowing 16 mm films and for holding materials on reserve are, in my opinion, charges for core "library services" and, as such, are prohibited.

In regard to charging for the borrowing of best seller books, I agree with the reasoning of *Gregory's Book Store v. Providence Public Library*, 46 R.I. 283, 127 A. 150, 151, (1925). There, the court held that a library did not lose state aids, even in view of the statutory phrase "free public library," where it charged for the use of books in its duplicate pay collection. The court stated:

> Most of the books in [the duplicate pay] collection are books recently published, for which there is, for a short time, a considerable demand. Before the unusual demand ceases, the charge for rental usually pays for the cost of the book, which is thereafter placed in the free collection. If the library does not make a charge for the books in the duplicate pay collection, it cannot be expected that the library will continue to maintain this collection, by purchasing several duplicate copies of recent books, to satisfy a temporary popular demand. The result will be that the chances of a person obtaining, within a given time, the free use of a copy of one of these books, will be greatly lessened, and the purpose for which the statute and rule were adopted would be frustrated. Taking a common-sense view of the problem, it must be said that the "free use" of said library, as required by the statute, is secured to the public.

Similarly, it is my opinion that if the Madison Public Library acquires a reasonable number of copies of best seller books (the number it would normally acquire for its permanent collection) and allows these copies to circulate free of charge, then it can justifiably collect the one-dollar fee for lending any additional copies it purchases. This procedure furthers the goal of making best seller books available to the greatest number of patrons possible.

I would like to stress that this opinion is limited to the issue of *access* to library services. It does not extend to the issue of charging patrons for abuses of library privileges, such as collecting fines for overdue or lost books.

Further, I would like to stress that the constitutional "home rule" principle limits the scope of this opinion. In one of my prior opinions, 70 Op. Att'y Gen. 54 (1981), I concluded that a city, by charter ordinance, could rely upon the home rule provisions of Wisconsin Constitution article XI, section 3 and enable municipal libraries to deviate from several seemingly mandatory provisions of chapter 43 to fit local needs. Wisconsin Constitution article XI, section 3 states: "Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village." In *State ex rel. Michalek v. LeGrand,* 77 Wis. 2d 520, 526-27, 253 N.W.2d 505 (1977), the Wisconsin Supreme Court discussed the parameters of the home rule provision, stating:

> In defining what is or is not a matter for such empowerment, which is constitutionally granted to cities and villages in this state "to determine their local affairs and government," our court has outlined three areas of legislative enactment: (1) Those that are "exclusively of state-wide concern"; (2) those that "may be fairly classified as entirely of local character"; and (3) those which "it is not possible to fit ... exclusively into one or the other of these two categories."
>
> As to the third "mixed bag" category of situations, our court has recognized "... that many matters while of 'state-wide concern,' affecting the people and state at large somewhat remotely and indirectly, yet at the same time affect the individual municipalities directly and intimately, can consistently be, and are, 'local affairs' of this [home rule] amendment."

This passage shows that whether "home rule" applies depends upon whether the matter is of local concern or statewide concern.

In my 1981 opinion, I concluded that municipal libraries are primarily of local concern. More specifically, I stated:

> Section 43.52, Stats., *permits,* but does not require, municipalities to establish, equip, and maintain a public library and levy a

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

70 Op. Att'y Gen. at 57.

I concluded in the 1981 opinion that, because municipal libraries are primarily of local concern, a city by charter ordinance could allow such libraries to deviate from provisions of chapter 43 to accommodate local needs. I went on to stress, however, that a local library's membership in a federated or consolidated library system removes this "local concern" characteristic. Citing 63 Op. Att'y Gen. 317, 319 (1974), I stated: "Participation in such a system *by a municipal library* would probably change its status from that which is primarily a local affair." 70 Op. Att'y Gen. at 58. The 1974 opinion had concluded that the statutory sections governing the creation of federated and consolidated systems are enactments of statewide concern. 63 Op. Att'y Gen. at 319.

The Madison Public Library belongs to a federated library system: The South Central Federated Library System. Public library systems (both consolidated and federated), being of statewide concern, operate not under home rule principles but under the supervision of the Department of Public Instruction's Division for Library Services. A number of statutory sections outline the authority that the Division can exercise in regard to public library systems. Section 43.09(2)(a) provides that the Division shall "promulgate necessary standards for public library systems," and that such standards shall be aimed at "ensur[ing] adequate library service." Section

43.13(1)(a) states that "[n]o public library system may be established without the approval of the division." Further, section 43.24(3) provides that state aid shall be available to public library systems, but that such aid shall be conditioned upon the library system conforming to "this chapter [chapter 43] and such rules and standards as are applicable."

It is my opinion, then, that the Division for Library Services is empowered to require the Madison Public Library, by virtue of the Madison Public Library's membership in a federated library system, to adhere to the provisions of chapter 43, including section 43.52(2), as interpreted in this opinion. Libraries not belonging to federated or consolidated systems can choose to exercise powers of "home rule" and are not necessarily bound by this interpretation of section 43.52(2).

BCL:RCB

COUNTY EXECUTIVE; ORDINANCES; County executive's power of partial approval under Wisconsin Constitution article IV, section 23a, extends to any part of a county board resolution or ordinance containing an appropriation. Status of veto power of executives in populous counties discussed in view of court determination in 1959 that section 59.031(6) was unconstitutional and subsequent amendment of the Wisconsin Constitution. OAG 27-84

August 22, 1984

THOMAS A. LOFTUS, *Chairperson*
Assembly Organization Committee

The Assembly Organization Committee requests my opinion on the extent of the appropriation veto power of a county executive under Wisconsin Constitution article IV, section 23a, which was created in November 1962, and, as amended in April 1969, provides:

> *Every resolution or ordinance passed* by the county board in any county shall, before it becomes effective, be presented to the chief executive officer. *If he approves, he shall sign it; if not, he shall return it with his objections,* which objections shall be entered at large upon the journal and the board shall proceed to reconsider the matter. *Appropriations may be approved in whole or in part by*

the chief executive officer and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for in other resolutions or ordinances. If, after such reconsideration, two-thirds of the members-elect of the county board agree to pass the resolution or ordinance or *the part of the resolution or ordinance objected to,* it shall become effective on the date prescribed but not earlier than the date of passage following reconsideration. In all such cases, the votes of the members of the county board shall be determined by ayes and noes and the names of the members voting for or against the resolution or ordinance or the part thereof objected to shall be entered on the journal. If any resolution or ordinance is not returned by the chief executive officer to the county board at its first meeting occurring not less than 6 days, Sundays excepted, after it has been presented to him, it shall become effective unless the county board has recessed or adjourned for a period in excess of 60 days, in which case it shall not be effective without his approval.

The statutory counterpart as to veto power for counties of less than 500,000 is contained in section 59.032(6), Stats., and contains language substantially identical to the constitutional provision. It was enacted in 1969, subsequent to adoption of the constitutional provision above. The veto power for executives in counties having a population over 500,000 is contained in section 59.031(6) which was created by chapter 327, Laws of 1959. Its wording is substantially identical to the constitutional provision. It was held unconstitutional in *State ex rel. Milwaukee County v. Boos,* 8 Wis. 2d 215, 99 N.W.2d 139 (1959), and has not been reenacted.

Your basic question is whether a county executive's power of approval or non-approval is limited to monetary amounts with respect to appropriations or whether such power extends to other portions of a resolution or ordinance containing an appropriation and can thus effect a change in the policy envisaged by the County Board of Supervisors.

I am of the opinion that a county executive has power to approve any part of a resolution or ordinance containing an appropriation and can, therefore, effect a change in policy. Such executive power is

not dissimilar to that of the Governor. In *State ex rel. Kleczka v. Conta,* 82 Wis. 2d 679, 715, 264 N.W.2d 539 (1978), it was stated:

> Under the Wisconsin Constitution, the governor may exercise his partial-veto power by removing provisos and conditions to an appropriation so long as the net result of the partial veto is a complete, entire, and workable bill which the legislature itself could have passed in the first instance.
>
> Unlike the fact situation in *Henry,* the Acting Governor vetoed what is arguably a condition which the Legislature had placed on the appropriation. By so doing, he changed the policy of the law as envisaged by the Legislature. He caused the general fund to be charged with an obligation which the Legislature did not anticipate; and also, it is contended, he accelerated the effective date of the bill. These are policy changes, legislative in nature, which the Constitution authorized him to make.

The court, in effect, stated that the Governor is not "confined to the excision of appropriations or items in an appropriation bill." *Kleczka,* 82 Wis. 2d at 705. Provisos and conditions are not subject to veto if inseparably connected to the appropriation. Once a part objected to is determined not to be inseparable from the appropriation within a bill, a second determination is made whether the remaining parts "constitute, in and by themselves, a complete, entire and workable law ...." *State ex rel. Wisconsin Tel. Co. v. Henry,* 218 Wis. 302, 314, 260 N.W. 486 (1935). The *Kleczka* court recognized the importance of severability at 82 Wis. 2d at 705: "Severability is indeed the test of the Governor's constitutional authority to partially veto a bill ...."

The Governor's power relates to approval "in whole or in part" of "*[a]ppropriation bills*" but also provides that "the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills. If, after such consideration, two-thirds of the members present shall agree to pass the bill, or the part of the bill objected to ... [and if approved by two-thirds of the other house] it shall become a law." Wis. Const. art. V, § 10. An appropriation bill has been defined as a measure before a legislative body authorizing the expenditure of public monies and stipulating the amount, manner and purpose of various items of expenditures.

State ex rel. Finnegan v. Dammann, 220 Wis. 143, 148, 264 N.W. 622 (1936).

It may be argued that the wording of the veto power with respect to the Governor is broader since Wisconsin Constitution article V, section 10 provides: "Appropriation *bills* may be approved in whole or in part by the governor, and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills," whereas Wisconsin Constitution article IV, section 23a provides: "*Appropriations* may be approved in whole or in part ... and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for in other resolutions or ordinances." However, the section contains this additional phrasing: "If, after such reconsideration, two-thirds of the members-elect ... agree to pass the resolution or ordinance *or the part of the resolution or ordinance objected to* ...." I construe this language to extend to power of partial approval to every part of a resolution or ordinance containing an appropriation rather than being limited to a part of an appropriation. An appropriation is "a sum of money set aside or allotted by official or formal action for a specific use." Webster's Third New International Dictionary 106 (4th ed. 1976). The county executive's partial approval provision is substantially similar to the language in the constitutional provision applicable to the Governor. A county board of supervisors does not pass "bills" as the Legislature does nor is it bicameral. A county board adopts ordinances or resolutions. Sec. 59.02, Stats. In my opinion, the words "appropriations" in article IV, section 23a and in sections 59.031(6) and 59.032(6) should be construed as "resolutions and ordinances containing appropriations." Joint Resolution No. 64 (1961) which ordered that the proposed amendment be submitted to the electors at the November 1962 general election provided that the question be stated: "2. Shall Article IV, section 23a, be created to require that in counties with a population of 500,000 or more all resolutions and ordinances of a county board must be submitted to a chief executive officer for his approval or veto?" *See* Volume 1, Laws of Wisconsin 1961 at 728 and Certificate of Secretary of State, Volume 1, Laws of Wisconsin 1963 at 700.

There was no separate reference to "appropriations." The stated question referred only to approval or veto of "resolutions and ordinances."

You also inquire as to the status of the veto power of the county executive in Milwaukee County since section 59.032(6) was held unconstitutional in *Boos* in 1959 and was not reenacted subsequent to the constitutional amendment of article IV, sections 23 and 23a in 1962 so as to be applicable to populous counties or subsequent to 1969 when such provisions were made applicable to all counties.

In my opinion the Milwaukee County Executive possesses the power to approve or object to ordinances or resolutions passed by the county board. In *State ex rel. La Follette v. Board of Supvrs.*, 109 Wis. 2d 621, 628, 327 N.W.2d 161 (Ct. App. 1982), it was held that the veto power of the Milwaukee County Executive was based on the constitutional provision, "[t]hus, the broad veto powers of the county executive, found unconstitutional as a statutory provision, were returned by a constitutional amendment." Thus, such power is based on the constitutional provisions set forth above which were self-executory and did not need statutory implementation.

BCL:RJV

COUNTIES; 51.42 BOARD; Although a multi-county combined 51.42/51.437 board may make cuts in non-emergency services to the residents of a county that does not provide its proportionate share of funding to that board, an individual county may not escape its statutory obligation to provide non-emergency services to its residents under sections 51.42(1)(b) and 51.437(4), Stats., by refusing to make such funding available to the combined board. OAG 28-84

August 22, 1984

JOHN HOGAN, *District Attorney*
Oneida County

You ask whether a tri-county combined 51.42/51.437 board may make cuts in non-emergency services to the residents of a county that does not provide its proportionate share of funding to that board. You state that sufficient funds are available to provide emergency services to persons in all three counties. Apparently, however, the board lacks sufficient funds to continue providing the present level of services through the rest of 1984.

I am of the opinion that a multi-county combined board may make such cuts in services, but that an individual county may not escape its statutory obligation to provide its residents with non-emergency services under sections 51.42(1)(b) and 51.437(4), Stats., by refusing to provide such funding to the combined board.

You state that the combined board has requested the following amounts from its three constituent counties in order to have sufficient operating funds for the balance of 1984:

Forest County	16%	$ 53,979
Vilas County	29%	$ 97,837
Oneida County	55%	$185,552

The Forest County Board of Supervisors has indicated that it will not provide the board with the amount requested.

These 51.42 and 51.437 boards have been combined pursuant to section 59.025(3)(b). Section 51.42(5) provides: "DUTIES OF BOARDS. Within the limits of available state and federal funds and of county funds appropriated to match state funds, boards shall provide for the program needs of persons suffering from mental disabilities, including mental illness, mental retardation, alcoholism or drug abuse, by offering the following [enumerated] services." Section 51.437(9) similarly provides: "DUTIES OF THE BOARD. Within the limits of available state and federal funds and of county funds appropriated to match state funds, the community developmental disabilities services board shall [provide certain enumerated services]."

The autonomy of 51.42 and 51.437 boards was limited by chapter 29, Laws of 1977. By passing such amendments, the Legislature "evince[d] a strong policy of vesting greater fiscal control of human services programs in the county board of supervisors." 69 Op. Att'y Gen. 128, 131 (1980). As amended by chapter 29, Laws of 1977, sections 51.42(5) and 51.437(9) restate the obvious: 51.42 and 51.437 boards may not expend funds in excess of those made available by the county, the state and all other sources. *See generally* 69 Op. Att'y Gen. 128 (1980). Since a combined board cannot expend funds which it does not have, it is logical to expect the board to cut services if it does not receive funding from a particular county. In this case, Forest County apparently has indicated that it will not provide a proportionate share of funding. Under the circumstances, I am of

the opinion that a multi-county combined board is empowered to cut non-emergency services to residents of that county in order to account for this lack of funding. I express no opinion, however, as to what action the Secretary of the Wisconsin Department of Health and Social Services will take with respect to such an arrangement.

A county which does not provide its proportionate share of funding to a multi-county combined board is still subject to the provisions of section 51.42(1)(b), which 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.

Section 51.42(1)(b) obligates each county board of supervisors to provide care for residents who are mentally ill, developmentally disabled, alcoholic or drug dependent. Section 51.42(1)(b) also obligates each county board of supervisors to provide certain emergency services to these four categories of individuals, even if the individuals are not residents of the county. *See* 65 Op. Att'y Gen. 49, 52-54 (1976). These obligations exist regardless of whether the matching funds made available by the Department under section 51.42(8) are sufficient to fully reimburse counties for treating these four categories of individuals. *See* 66 Op. Att'y Gen. 249, 250-52 (1977); 65 Op. Att'y Gen. 49, 53-54 (1976).

You do not indicate whether the funds available to the multi-county combined board are sufficient to provide residents of Forest County with the minimum level of non-emergency services mandated by section 51.42(1)(b). It would be permissible for the county boards of Oneida and Vilas Counties to make appropriations to the combined board in order to provide non-emergency services beyond those minimally required by section 51.42(1)(b) to residents of those counties. However, Forest County may not escape its statutory obli-

gation to provide non-emergency services to its own residents under section 51.42(1)(b) by refusing to provide sufficient funding to the multi-county combined board.

A multi-county combined board is not an independent agency or body corporate. *See* OAG 38-82 dated May 20, 1982 (unpublished). But each county that forms such a board is a quasi-municipal corporation which must satisfy its statutory obligation to provide services under section 51.42(1)(b). No county may evade its statutory obligation to provide services under section 51.42(1)(b) through the simple expedient of refusing to provide sufficient funding to the multi-county combined board.

In closing, I wish to note that, while section 51.42(4)(b) expressly authorizes counties to form multi-county boards, section 51.42(3)(c) provides: "No grant-in-aid may be made to any combination of counties until the counties have drawn up a detailed contractual agreement, approved by the secretary, setting forth the plans for joint sponsorship." It is somewhat surprising that the Department would approve a contract which does not deal with the funding problems you describe. It is even more surprising that your opinion request makes no mention of and contains no analysis of the contract which must exist between the three counties or of the resolution which apparently created the board. These documents may well affect the legal rights of the respective counties. I suggest that the counties involved carefully review the resolution and the contract and, if necessary, amend the contract to take care of the problems you describe.

BCL:FTC

COUNTIES; 51.42 BOARD; PUBLIC OFFICIALS; VETERANS; Persons appointed by county executive and confirmed by county board to County Veterans Service Commission, single county 51.42 board or county institutions board serve for statutory term as stated in years and until their successors are appointed, confirmed and qualified. Persons appointed to vacancies in such positions also serve until their successors are appointed, confirmed and qualified. Difference between personal term of officer and statutory term which pertains to office discussed. OAG 30-84

September 25, 1984

FRANK VOLPINTESTA, *Corporation Counsel*
Kenosha County

You request my opinion with respect to three questions which relate to the terms of office of members of a county veterans service commission appointed pursuant to section 45.12, Stats., a single county section 51.42 board and a county institutions board appointed pursuant to section 46.18(1). You state that Kenosha County has adopted the county executive form of government and that, pursuant to section 59.032(2)(c), appointments to those boards and commissions are "by the county executive" "subject to the confirmation of the county board." You indicate that "[t]erms of office for several boards and commissions in Kenosha County expired December 31, 1983. However, by that expiration date successors to those offices had not been confirmed by the county board. Questions arose concerning the status of the office holders and of the appointed successors."

Section 45.12(1) creates a "County Veteran's Service Commission" in each county to consist of three county residents who are veterans "appointed ... by the county executive ...." Subsection (2) provides that "[t]he county executive ... after the expiration of the terms of those first appointed shall annually on or before the 2nd Monday in December appoint one person as a member for the term of 3 years." Section 45.14 provides: "Such commission shall meet ... *on or before the first Monday of January* in each year and at such other times as may be necessary." In my opinion the *prescribed or statutory term* is three years commencing on the first day of January and ending on the last day of December of the third year. As noted hereafter, the *personal term* of the appointed officer may be longer or shorter than three years depending upon circumstances such as late appointment or confirmation, death, removal and resignation. The statute does not expressly provide that a duly appointed officer holds over until his or her successor is appointed and qualifies.

Section 46.18(1) as amended by 1983 Wisconsin Act 192 provides:

> Every county ... institution ... [in any county under 500,000] shall (subject to regulations approved by the county board) be managed by a board of trustees, electors of the county, chosen by bal-

lot by the county board. At its annual meeting, the county board shall appoint an uneven number of trustees, from 3 to 9 at the option of the board, for staggered 3-year terms ending the first Monday in January. Any vacancy shall be filled for the unexpired term by the county board; but the county chairman may appoint a trustee to fill the vacancy until the county board acts.

Section 51.42(4)(b) provides that a county community mental health, mental retardation, alcoholism and drug abuse board shall consist of not less than nine nor more than fifteen persons. Subparagraph (d) provides:

The term of office of any member of the board shall be 3 years, but of the members first appointed, at least one-third shall be appointed for one year; at least one third for 2 years; and the remainder for 3 years. Vacancies shall be filled for the residue of the unexpired term in the manner that original appointments are made.

This opinion assumes, as you have stated, that the term of office begins on January 1 and ends on December 31. Reference should be made to the 1972, 1975 and any other resolutions of the Kenosha County Board of Supervisors which relate to the establishment of the prescribed or regular (stated in years) term. *See* 65 Op. Att'y Gen. 40 (1976).

Your questions and my answers are:

1. Does an individual appointed or elected to a full term to a board or commission continue to serve beyond his expiration date for a full term and until his successor is qualified.

The answer is yes. None of the offices referred to are elective. Section 46.18(1) does use the words "chosen by ballot by the county board." Such method is the manner in which the county board exercises its power of appointment. *See* discussion in 63 Op. Att'y Gen. 286 (1974). The fact that the offices involved are not elective offices is important since section 17.03(intro.) and (10) as amended and created by 1983 Wisconsin Act 484 provides that:

Any public office is deemed vacant upon the happening of any of the following events, except as otherwise provided:

. . . .

(10) The expiration of the term of the incumbent if the office is elective.

The Legislature was aware of the importance of shared responsibility, as between the Governor and Senate, as to state offices, and county board chairperson, county administrator or county executive and county board as to county offices and did not wish to upset the balance of authority with respect to temporary or provisional appointments. In 63A Am. Jur. 2d *Public Officers and Employes* §§ 167 and 168 (1984), it is stated:

> [167] Apart from any constitutional or statutory regulation on the subject, there seems to be a general rule that an incumbent of an office will hold over after the conclusion of his term until the election and qualification of a successor, and this is true notwithstanding a provision rendering one elected to an office ineligible to succeed himself.
>
> [168] The provision for holding over applies only where a fixed term is annexed to an office. Such a provision may be made applicable to elective as well as appointive officers ....

In 63A Am. Jur. 2d *Public Officers and Employes* § 146 (1984), it is stated:

> Where a term of office that is to be filled by gubernatorial appointment, by and with the advice and consent of the senate, has expired, but the incumbent still continues to discharge his duties, there is no vacancy in the office such as will authorize the governor to fill it by appointment of a successor without the consent of the senate.

The Wisconsin court applied these rules where there was express statutory provision for holdover and in the absence of such provision where senate confirmation was required. *State ex rel. Thompson v. Gibson,* 22 Wis. 2d 275, 289-90, 125 N.W.2d 636 (1964).

With respect to the appointive officers within your inquiry it is my opinion that the mere expiration of the regular or prescribed term of one, two or three years does not create a vacancy within the meaning of section 17.03 to which appointment can be made under section 17.22. In my opinion an incumbent holder of such an office who has been duly appointed and confirmed is entitled to hold over until his or her successor is appointed by the county executive and confirmed

by the county board. Where original appointments are concerned and there is no express provision that the officer hold over until his or her successor is appointed and qualifies, such officer would have at least *de facto* status. *See* 63A Am. Jur. 2d § 595 *Public Officers and Employees* (1984). It has often been said that the law abhors a physical vacancy in a public office. Although expiration of a term does not constitute a vacancy in an appointive office within the meaning of section 17.03, its impending approach and arrival does signal the duty of appointing authorities to act within a reasonable time to appoint or at least to submit a name to the appropriate legislative body for its prompt consideration with respect to confirmation.

2. Does an individual appointed to fill a mid-term vacancy created under section 17.03 of the statutes continue to serve past the expiration date the term for which he was appointed and until such time as his successor is appointed and qualified.

The answer is yes. Section 17.22(1) provides that "[v]acancies in any appointive county offices shall be filled by appointment for *the residue* of *the unexpired term* by the appointing power and in the manner prescribed by law for making regular full term appointments thereto ...." Whereas subsection (1) of section 17.22 makes no express reference to holdover, paragraph (d) of subsection (2), which relates to temporary appointments, does provide "[a] person so appointed shall hold office until his successor is appointed and qualifies ...." Additionally, section 17.28 as amended by 1983 Wisconsin Act 484 provides:

> When officers may hold office. When no different provision is made in respect thereto, any officer who is elected or appointed to fill a vacancy shall qualify in the manner required by law of the officer in whose stead the officer is elected or appointed. An officer who is elected or appointed to fill a vacancy in an elective office shall enter upon the duties of his or her office immediately upon qualification and, if elected, upon certification of the election result, and shall hold office for the residue of the unexpired term. An officer who is appointed to fill a vacancy in an appointive office shall enter upon the duties of his or her office immediately upon qualification and shall hold office for the residue of the unexpired term, if any, and until his or her successor is appointed and qualifies.

3. In order to adhere to a statutory scheme calling for staggered terms does a delay in the appointment of an individual to a board or commission operate to reduce that individual's term of office? For example, if on a 3 person board or commission the statutory scheme called for a vacancy to occur each year and further, that each member is to serve for a 3-year period, what is the term of office for the commissioner whose appointment has been delayed for six months? Does his term of office become 2-1/2 years as opposed to 3 years so as to insure the continuation of staggering 1 year terms?

The answer is that a delay may result in reducing the personal term of the officer involved. In the example you pose such personal term (assuming there is no holding over on his or her part) would be two and one-half years. The prescribed or statutory term *for the office* remains at three years. *See* discussion as to the difference between a term fixed by law which pertains to the given office and the personal term of an incumbent in *State ex rel. Bashford v. Frear*, 138 Wis. 536, 120 N.W. 216 (1909).

BCL:RJV

BLOOD TESTS; SHERIFFS; A sheriff's department may require an officer to take a breathalyzer or blood test if the officer appears to be under the influence of intoxicants or drugs when the officer reports for duty or is on duty. OAG 31-84

September 27, 1984

RICHARD L. HAMILTON, *Corporation Counsel*
Outagamie County

You have requested my opinion as to the legality of the Outagamie County Sheriff's Department conducting blood or breathalyzer tests of employe officers when they report for duty or when they are on duty. You note the potential hazard which may be created if an officer attempts to work while under the influence of intoxicants or drugs. You also express concern about potential county liability.

You have enclosed paragraph "K" of the Outagamie County Sheriff's Manual which, among other things, specifically forbids

employes reporting for or being on duty while under the influence of alcohol or controlled substances, or with the odor of alcohol or controlled substances on their breath. This work rule, however, does not specifically provide for blood or breathalyzer testing of employes.

A sheriff's officer is a member of a highly sensitive agency entrusted with the duty of protecting the community through law enforcement. This includes the enforcement of laws prohibiting the operation of motor vehicles while under the influence of alcohol or other drugs. In the enforcement of such laws, the use of blood and breathalyzer tests has been held not to violate the constitutional provision that one may not be required to testify against himself. *State v. Bunders*, 68 Wis. 2d 129, 132, 227 N.W.2d 727 (1975), and *Schmerber v. California*, 384 U.S. 757 (1966). Blood and breathalyzer tests have general acceptance in the scientific and medical communities. *State v. Trailer Service, Inc.*, 61 Wis. 2d 400, 408, 212 N.W.2d 683 (1973).

In *Div. 241 Amalgamated Transit U. (AFL-CIO) v. Suscy*, 538 F.2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976), the court sustained the constitutionality of a rule which required that public employe bus and train operators submit to blood and urine tests if they were suspected of reporting for duty or being on duty while under the influence of alcohol or drugs. The rule further provided that the tests were to be administered only in hospitals and that no tests could be required unless two supervisory employes concurred in the need for the tests. In explaining its conclusion, the court stated:

> The Fourth Amendment protects an individual's reasonable expectation of privacy from unreasonable intrusions by the state. Whether the individual has a reasonable expectation of privacy and whether the intrusion is reasonable are determined by balancing the claims of the public against the interests of the individual. ... It is clear that a governmental agency can place reasonable conditions on public employment. ... In this case, the CTA has a paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs. In view of this interest, members of plaintiff Union can have no reasonable expectation of privacy with regard to submitting to blood and urine tests. ... Further, the conditions under which the intrusion is made and the manner of taking the samples are reasonable. ...

. . . .

> Certainly the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse.

Suscy, 538 F.2d at 1267 (citations omitted).

In view of the *Suscy* decision, and assuming that blood and breathalyzer tests would be used solely to determine the ability of an officer to perform his or her duties, it is my opinion that the sheriff's department may administer such tests if an officer is on duty or reports for duty and it reasonably appears that the officer is under the influence of intoxicants or drugs. The tests, however, and any action taken as a result of the tests, must be administered in a reasonable manner which assures due process to the officer being tested, which is nondiscriminatory and which is consistent with applicable work rules and labor contracts.

BCL:JWC

FEES; SHERIFFS; Sheriffs may collect the statutory fee for each service or attempted service of process; fees for mileage, however, may only be collected if service is successful. OAG 32-84

October 11, 1984

RALPH E. SHARP, JR., *Corporation Counsel*
Dodge County

You ask two questions concerning the fees a sheriff is entitled to receive in serving a summons.

You first ask whether section 814.70(1), Stats., authorizes a sheriff to charge $8.00 for each attempt at service, as well as each successful service. It does. Section 814.70 states:

> Fees of sheriffs. The sheriff shall collect the following fees:
>
> (1) SERVICE OF PROCESS. For each service or attempted service of a summons or any other process for commencement of an action, a writ, an order of injunction, a subpoena or any other order, $8 for each defendant or person. If there is more than one

defendant or person to be served at a given address, $4 for each additional defendant or person.

The initial inquiry in interpreting any statute is the statute's plain meaning. If the statute is unambiguous, resort to judicial rules of interpretation and construction is not permitted. *State Historical Society v. Maple Bluff,* 112 Wis. 2d 246, 252-53, 332 N.W.2d 792 (1983). The phrase "each service or attempted service" unmistakably requires payment for each attempted service of a summons, whether the service is ultimately successful or unsuccessful.

The predecessor statute to section 814.70 provided the sheriff one-half the usual fees "for attempting to serve." Sec. 59.28, Stats. (1979-80). Although this language could be interpreted as providing only a one time fee for unsuccessful service, present section 814.70(1) has removed any ambiguity. The sheriff is entitled to the full fee for each service or each attempted service.

You next ask whether section 814.70(3)(a) permits payment for mileage for attempted service. I conclude that it does not. That subsection states:

TRAVEL; CIVIL PROCESS. For travel in serving any summons, writ or other process, except criminal warrants:

(a) In counties having a population of less than 500,000, 20 cents for each mile actually and necessarily traveled.

In 53 Op. Att'y Gen. 44 (1964) this office interpreted section 59.28(2) which permitted a fee of 10 cents per mile "for each mile actually traveled going and returning" as permitting a sheriff to charge for mileage only when the sheriff is successful in making service.

Although the Legislature has amended the fees statute since that opinion and specifically amended section 814.70(1) to provide for payment of fees for each attempted service, it has not changed the substance of present section 814.70(3)(a). An attorney general's opinion is entitled to considerable weight when the Legislature amends a statute but makes no change in that part of the statute interpreted by the attorney general. *Town of Vernon v. Waukesha County,* 99 Wis. 2d 472, 479, 299 N.W.2d 598 (Ct. App. 1980). Because the Legislature easily could have provided for payment of mileage for attempted service at the same time that it provided for

payment of full service fees for attempted service, the conclusion expressed in 53 Op. Att'y Gen. 44 is still valid.

BCL:AL

VOCATIONAL, TECHNICAL AND ADULT EDUCATION, BOARD OF; The State Board of Vocational, Technical and Adult Education may by rule require that the record concerning appointment of district board members show compliance with statutory procedural requirements, and the state board may disapprove appointments because of procedural irregularities except those involving the Open Meetings Law. Also, appointment by the appointment committee and approval by the state board is required to move a previously approved candidate from one membership category to another. OAG 33-84

October 15, 1984

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

You have asked a number of questions relating to the appointment of persons to a district vocational, technical and adult education board (district board). Several sections of chapter 38 of the Wisconsin statutes are involved, as well as chapter A-V 2 of the Wisconsin Administrative Code, all of which provide for the composition of a district board and the appointment of district board members. With respect to the composition of a district board, section 38.08(1), Stats., provides:

> (a)1. A district board shall administer the district and shall be composed of 9 members who are residents of the district, including 3 employers who have power to employ and discharge, 3 employes who do not have power to employ or discharge, 2 additional members and a school district administrator.
>
> 2. The employer and employe members of the district board shall be representative of the various businesses and industries in the district. The school district administrator shall be employed by the school board of a school district located in the district. At least 2 of the members of the district board shall be elected officials of a county board of supervisors, common council, village

board of trustees, town board of supervisors or school board, but no 2 members of the district board may be officials of the same governmental unit nor may any district board member be a member of the school board that employs the school district administrator member.

With respect to the appointment of members to a district board, section 38.10 provides:

(1) District board members shall be appointed by an appointment committee [consisting of school board presidents of school districts, or county board chairmen of counties, having territory within the district] ....

. . . .

(2)(a)1. ...

2. The chairperson of the appointment committee shall fix a date ... no later than 60 days after receipt of notification of the vacancy or term expiration, and a time and place for a public hearing and meeting of the appointment committee to approve a representation plan and to appoint district board members ....

. . . .

(c) At the meeting and prior to the appointment of district board members, the appointment committee shall formulate a plan of representation for the membership of the district board. The plan shall give equal consideration to the general population distribution within the district and the distribution of women and minorities within the district. The plan shall form the basis upon which membership of the district board is determined. ...

(d)1. Upon receiving notice of the vacancy or term expiration ... and at least 14 days before publication of the notice required under subd. 3, the appointment committee shall publish a notice announcing the intent to appoint district board members, including the criteria for selection, and soliciting the submission of names and qualifications of candidates.

2. In order to be eligible for consideration for appointment to the district board, a candidate shall submit his or her name and qualifications to the appointment committee within 14 days of the date of publication of the notice under subd. 1.

3. Notwithstanding s. 19.84(3), the appointment committee shall publish a notice of any meeting or public hearing at which the appointment committee will consider the filling of any vacancy on the district board or any other matter pertaining to the appointment of district board members at least 14 days before the meeting or public hearing. The subject matter of the meeting or public hearing as specified in the notice shall contain the names of individuals being considered for appointment. Prior to the meeting at which an appointment is made, the appointment committee shall hold a public hearing at which the names and qualifications of individuals being considered for appointment to the district board shall be discussed. No person may be appointed to a district board by an appointment committee unless his or her name appeared in at least one notice of a public hearing or meeting of the committee.

. . . .

(f) Selection of district board members and approval of a representation plan by the appointment committee shall be by majority vote of a quorum ....

Section 38.10(2)(c) empowers the State Board of Vocational, Technical and Adult Education (state board) to "require that district board appointments comply with the provisions of the plan [of representation]." If an appointment committee cannot reach agreement on a plan of representation or appointment of district board members within thirty days after the committee's first meeting, the state board is required by section 38.10(2)(f) to "formulate the plan of representation and appoint district board members in accordance with the plan." Finally, section 38.04(15), provides that the "[state] board shall, by rule, establish criteria and procedures for the review of the district board member appointments by the [state] board."

Pursuant to this grant of rule-making authority, the state board has promulgated chapter A-V 2 of the Wisconsin Administrative Code. Section A-V 2.04(1)-(3) requires appointment committees to submit a plan of representation, an affidavit of each candidate containing vital information (including the candidate's status as an employer or employe), and a statement explaining how employer and employe members are representative of businesses and industries in the district. Section A-V 2.04(4) enumerates the standards

which the state board applies when reviewing a plan of representation and proposed appointments of district board members.

With the foregoing background regarding the statutory authority of the state board and the administrative rules concerning review of district board member appointments by the state board in mind, I will address the first of your questions which states:

1. When allegations of procedural irregularities on the part of the local appointment committee are made to the state board, and where the record supports the appointments as made by the appointment committee, does the state board have the authority to inquire beyond the evidence submitted to it under sec. A-V 2.04(3)(a) to (c), Wis. Adm. Code, when a complaint is received from a citizen of that VTAE district?

The answer to this question is no. The decision made by the board must be made on the record as defined by section A-V 2.04(1)-(3). Although the state board informally requires appointment committees to submit notices, minutes and other documents dealing with the procedure followed by the committees, the rules of the state board do not presently require that the record submitted to the state board show compliance with the procedural requirements of sections 38.08 and 38.10. In my opinion, in order for the state board to inquire into alleged procedural irregularities by appointment committees, the state board must promulgate a rule requiring that the record show compliance with the procedural requirements of the statutes. This is because section 38.04(15) provides that the state board "shall, *by rule*, establish criteria and procedures for the review of the district board member appointments."

Your second question states:

2. Can the state board reject an appointment based upon a procedural impropriety, e.g., a defective notice at the local level, a violation of the Open Meeting Law, a defective affidavit, etc., or can it only reject an appointment because the appointment on its face based upon evidence and the record submitted to the state board by the appointment committee, does not comply with the provisions of the plan of representation?

Although section 38.10(2)(c) only empowers the state board to "require that district board appointments comply with the provisions of the plan [of representation]," it is my opinion that the grant of rule-making authority contained in section 38.04(15), which authorizes the state board to "establish criteria and procedures for the review of district board member appointments," is broad enough to authorize the state board to disapprove an appointment based upon a procedural impropriety. As noted in response to your first question, however, the board first must promulgate a rule requiring that the record show compliance with the procedural requirements of the statutes.

The state board may disapprove appointments based upon procedural irregularities including, but not limited to, failure of an appointment committee to formulate a plan of representation, failure to publish timely notice of intent to appoint district board members, failure to publish criteria for selection, and failure to hold a public hearing prior to making an appointment. Sec. 38.10(2)(c)-(d), Stats.; *cf. Fraser v. Mulaney*, 129 Wis. 377, 109 N.W. 139 (1906). The state board, however, may not disapprove appointments based upon a violation of the Open Meeting Law, secs. 19.81-19.98, because courts have exclusive authority to weigh the various public interests involved and to void any committee action which violates the law. Sec. 19.97(3), Stats.

Your third question states:

3. Can the state board establish administrative rules allowing it to disapprove appointments based upon procedural improprieties?

For the reasons stated in response to your first question, the answer to your third question is yes.

Your fourth question states:

4. If the state board does not have the authority to disapprove an appointment based upon a procedural defect, then who can challenge this kind of defect when it occurs at the local appointment committee?

The answer to this question is two-fold. First, as noted in response to your second question, except as to violations of the Open

Meetings Law, the state board *does* have authority to disapprove an appointment based upon a procedural defect, provided that the state board promulgates a rule requiring that the record show compliance with the procedural requirements of the statutes. With respect to alleged violations of the Open Meetings Law, challenges may be made in a court action brought by the Attorney General, the district attorney or, if the district attorney refuses to commence an action, by any person who files a verified complaint with the district attorney. Sec. 19.97(3)-(4), Stats.

Your fifth question states:

5. Can an appointment committee shift a candidate, previously approved in a specific category to a different category prior to the effective date of that candidate's term of office, without first removing that candidate from office and then appointing that candidate to a new category and without seeking new state board approval?

The answer to this question is no. Section 38.08(10(a)1. requires that district boards consist of three employers, three employes, two elected officials and a school district administrator. A candidate previously appointed by the committee and approved by the state board in one category cannot be "shifted" to a different category unless the candidate is formally appointed by the appointment committee and formally approved by the state board in the different category pursuant to section 38.10 and the related administrative rules. Appointment and approval are unnecessary, however, with respect to elected official members who move from one qualified public office to another. I cannot comment more specifically on the authority of an appointment committee or the state board to adjust district board membership in order to achieve the required balance between employer and employe members, because such matter presently is in litigation and because it is the policy of the Department of Justice not to render an opinion with respect to matters in litigation.

BCL:JWC

GAMBLING; WORDS AND PHRASES; The Tavern League of Wisconsin is not a "service organization" within the meaning of section 163.90, Stats., so as to be eligible for a raffle license in the State of Wisconsin. OAG 34-84

October 15, 1984

TIMOTHY F. CULLEN, *State Senator*

The Senate Organization Committee has requested my opinion on whether a nonprofit trade association is qualified under section 163.90, Stats., to obtain a raffle license under section 163.92 as a "service organization" when all of the net proceeds of the raffle would be donated to a charitable or other tax exempt organization with no profits of the raffle inuring to the benefit of any of the trade association's officers, directors or members. The question has been raised by the Tavern League of Wisconsin which is interested in using the raffle mechanism to support charitable organizations in local communities or on the state level. In passing, it should be noted that only local organizations are eligible for a raffle license.

Those type of local organizations qualified to conduct a raffle are set forth under section 163.90 and, pertinent to this discussion, include service organizations and "any organization to which contributions are deductible for federal or state income tax purposes." The Tavern League of Wisconsin itself, and most or all trade associations, would not qualify under the second category even though the proceeds eventually might find their way to an organization which might so qualify.

The term "service organization" is not defined in chapter 163 or in any administrative rule. Section 990.01(1) provides that: "All words or phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning."

There is no evidence that the term "service" was used in a technical sense in chapter 163 or that it was assigned or expected to carry a peculiar or legal meaning. I invite your attention to this relevant dictionary definition: "service club ... 1 : a club of business and professional men or women concerned esp. with the community welfare

and usu. forming part of a national or international organization." Webster's Third New International Dictionary 2076 (3rd ed. 1976).

It is my opinion that the Tavern League of Wisconsin does not qualify as a service organization.

Since the inception of the bingo and raffle programs, the Bingo Control Board has been frequently called upon to determine what constitutes a qualified service organization within the meaning of the appropriate statutes. The practical administrative construction of a statute by an agency charged with the task of applying it is entitled to great weight and will not be set aside unless clearly contrary to legislative intent. *A.O. Smith Corp. v. ILHR Department,* 88 Wis. 2d 262, 267, 276 N.W.2d 279 (1979).

Any applicant who has been denied a license by the Department of Regulation and Licensing may demand in writing a hearing before the board concerning the applicant's qualifications. Sec. 163.95, Stats. As with any other decision by an administrative agency or board, an aggrieved party has a right to judicial review under chapter 227. Therefore, the proper procedure, if any doubt still exists, is for the Tavern League of Wisconsin to so apply and exhaust its administrative and judicial remedies.

It is of no legal significance that the recipient or recipients of the net proceeds might qualify as organizations to which contributions are deductible for federal or state income tax purposes. Under section 163.90, these organizations themselves would be eligible to receive a license and conduct a raffle. However, this does not mean that any other organization could receive a license and conduct the raffle in the name of the ultimate recipients.

BCL:DPJ

FOSTER HOMES; HEALTH AND SOCIAL SERVICES, DEPARTMENT OF; Statutes do not provide authority to the Department of Health and Social Services to approve privately operated secure detention facilities for juveniles and county board and county board of public welfare are without power to purchase secure detention services from a private operator. OAG 36-84

October 15, 1984

KENNETH J. BUKOWSKI, *Corporation Counsel*
Brown County

You request my opinion whether Brown County, through its County Board of Supervisors or County Board of Public Welfare, can contract with a private operator for secure detention of juveniles.

You advise that Brown County does not have a separate secure detention facility and presently utilizes a portion of its county jail as a secure detention facility as authorized by section 48.209, Stats., and chapter HSS 346 Wis. Adm. Code. You indicate that the county is seeking an alternative to the use of the county jail in view of an expected federal regulation which would limit aids to counties which fail to remove children from confinement in jails or other facilities shared with adult prisoners.

Section 48.205, Children's Code, sets forth the criteria necessary for holding a child in physical custody. The criteria are applicable to the intake worker and all other persons responsible. Section 48.207 sets forth the places where a child may be held in nonsecure custody and includes the home of a parent or guardian, home of a relative, "licensed" foster home, "licensed" group home, nonsecure facility operated by a "licensed" child welfare agency, a "licensed" private or public shelter care facility, a hospital, etc. Section 48.208 sets forth the criteria for holding a child in a secure detention facility. Section 48.209 provides in part:

> Subject to the provisions of s. 48.208, a county jail may be used as a secure detention facility if the criteria under either sub. (1) or (2) are met:
>
> (1) There is no other secure detention facility *approved* by the department or a county which is available ....

Section 48.02(16) and (17) provides:

> (16) "Secure detention facility" means a locked facility *approved* by the department under s. 46.16 for the secure, temporary holding in custody of children.

(17) "Shelter care facility" means a nonsecure place of temporary care and physical custody for children, *licensed* by the department under s. 48.66.

Under present statutes shelter homes and foster homes are *licensed* by the Department of Health and Social Services, whereas jails and secure detention facilities are *approved* by that department. *See* secs. 46.16(2), 46.17(1), 48.02(16) and (17) and 48.227, Stats. I am advised by a representative of the Division of Corrections that the Department has not approved any privately operated secure detention facility in Wisconsin.

In my opinion a county does not have power to contract with a private operator for the secure detention of juveniles. A county board has only such powers as are expressly conferred upon it by statute or necessarily implied from those expressly given. *Dodge County v. Kaiser,* 243 Wis. 551, 11 N.W.2d 348 (1943); *Maier v. Racine County,* 1 Wis. 2d 384, 84 N.W.2d 76 (1957); *Town of Vernon v. Waukesha County,* 102 Wis. 2d 686, 307 N.W.2d 227 (1981). There is no statute which expressly or by implication grants a county board or a county board of public welfare power to contract with a private operator even if we assume that such facilities could be operated by private operators. For reasons hereinafter stated, it is my opinion that a secure detention facility cannot be operated by a private entity.

As a state administrative agency, the Department of Health and Social Services has only those powers as are expressly conferred or necessarily implied from the statutory provisions under which it operates. *Brown County v. H&SS Department,* 103 Wis. 2d 37, 307 N.W.2d 247 (1981). Any reasonable doubt as to the implied powers of an agency should be resolved against the existence of such authority. *Kimberly-Clark Corp. v. Public Service Comm.,* 110 Wis. 2d 455, 329 N.W.2d 143 (1983).

Section 46.16(1) provides that the Department shall investigate and supervise all "curative, reformatory and penal institutions ... all detention homes and shelter care facilities for children ...." Subsection (2) provides for licensing and issuance of permits to foster homes, child care centers, day nurseries and nursery schools but does not mention secure detention facilities. Subsections (2), (3), (4), (5) and (6) are concerned with visitation of and inspection of places

licensed under (2), of county homes, and places where persons convicted or suspected of crime, including juveniles, are kept. Section 46.17(1) provides that the Department shall fix reasonable standards for certain county buildings including "jails and lockups, juvenile detention homes and shelter care facilities." Section 46.20(1) provides that two or more counties may jointly establish a "juvenile detention home." Section 48.227 refers to privately operated runaway homes licensed under sections 48.48 or 48.75. Section 48.225 refers only to *counties* as potential operators of *secure* detention facilities and provides: "The department shall assist *counties* in establishing detention homes under s. 48.22 by developing and promulgating a state-wide plan for the establishment and maintenance of suitable detention facilities reasonably accessible to each court." Section 48.22(1)(a), (5) and (7) provides:

> (1)(a) The county board of one county may establish a secure detention facility or a shelter care facility or both or 2 or more counties may join together and establish a secure detention facility or a shelter care facility or both in accordance with ss. 46.16 and 46.20.
>
> . . . .
>
> (5) A county board, or 2 or more county boards jointly, may contract with privately operated shelter care facilities or home detention programs for purchase of services. The county board may delegate this authority to county social services departments.
>
> (7) No person may establish a shelter care facility without first obtaining a license under s. 48.66.

Subsection (5) does not include secure detention facilities as services which a county may purchase from a private operator. In a case involving the Children's Code the Court applied the maxim, *expressio unius est exclusio alterius* and stated: "[I]f the legislature did not specifically confer a power, 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). I am aware that section 48.22(3)(a) and (b), which relates to counties having a population less then 500,000, uses the term "public secure detention facilities and public shelter care facilities." I view the use of the word "public" as it relates to secure detention facilities as redundant, a bill drafter's surplusage, since there is no mention of privately operated secure

detention facilities in that section or any other statutory provision of which I am aware. Note that while the words "public shelter care facilities" are used in subsection (3)(a), the words "privately operated shelter care facilities" are used in subsection (5). I conclude that the Legislature did not intend that the department approve privately operated secure detention facilities for juveniles.

The statutes provide that any secure detention facility used by a county must be approved by the Department of Health and Social Services. The statutes do not expressly, or by necessary implication, allow the department to approve privately operated facilities for that purpose, or for the county or its board of public welfare to contract for such services with a private operator. Therefore, the county cannot use a privately operated facility. If it becomes necessary to remove juveniles from the secure detention facility which is presently part of the county jail in order to prevent loss of federal funding, the county has a number of options to attempt to gain continued federal funding. It can proceed to establish a secure detention facility separate from such jail, it can establish a facility jointly with one or more other counties or it can contract with another county which has established a secure detention facility.

BCL:RJV

SCHOOLS AND SCHOOL DISTRICTS; STATE AID; School districts may obtain adjustments in state aid payments whether their equalized valuation is changed either as a result of a reassessment of or a finding of exemption of manufacturing property. A final order or decision of the Tax Appeals Commission or a final order or judgment of a court can be a final redetermination under the Act. A decision of the Board of Assessors is not sufficient to support a request for adjustment in state aid. OAG 38-84

November 12, 1984

DORIS J. HANSON, *Secretary*
Department of Administration

You have asked several questions concerning 1983 Wisconsin Act 372. Because analysis of the issues requires repeated reference to the text of the Act, the pertinent parts of the Act are set out in full:

SECTION 2. 70.57(2) of the statutes is created to read:

70.57(2) If the tax appeals commission or a court makes a final determination on the assessment of property subject to taxation under s. 70.995 that is higher or lower than the previous assessment, the department of revenue shall recertify the equalized value of the school district in which the property subject to taxation under s. 70.995 is located.

SECTION 3. 121.09 of the statutes is created to read:

121.09 State aid adjustment; redetermination of assessment. (1) If, on or after July 1, 1980, the tax appeals commission or a court makes a final redetermination on the assessment of property subject to taxation under s. 70.995 that is lower than the previous assessment, the school board of the school district in which the property is located may, within 4 years after the date of the decision or judgment, file the decision of the tax appeals commission or the judgment of the court with the secretary of administration, requesting an adjustment in state aid to the school district. If the secretary of administration determines that the decision or judgment is final and that it has been filed within the 4-year period, the state shall pay to the school district in the subsequent fiscal year, from the appropriation under s. 20.255(2)(ac), an amount equal to the difference between the state aid computed under s. 121.08 for the school year commencing after the year subject to the valuation recertification, using the school district's equalized valuation as originally certified, and the state aid computed under s. 121.08 for that school year using the school district's equalized valuation as recertified under s. 70.57(2).

The Act also provides, in section 121.09(2), Stats., that redeterminations which result in higher assessments cause a proportionate withholding of state aid to the school district in the next year.

This legislation permits a school district to recoup some of the revenues lost as a result of a lowering of the assessed value of manufacturing property in that school district. A determination that manufacturing machinery or equipment is either exempt from property taxes or over assessed can have profound effects on a school district's revenues. The drafting notes to 1983 Wisconsin Act 372 indicate that manufacturing property was reassessed in the Kimberly School District. As a result of that reassessment, the total valuation of property in the Kimberly School District was decreased by 12.96%. Similarly, the valuation of property in the Jefferson School District decreased by slightly over 4% after particular property was determined to be exempt.

1983 Wisconsin Act 372 is a means of adjusting state aid to a school district to compensate for changes in valuation. Unfortunately, the Act's pellucidity of purpose is not reflected by precision in phraseology. This lack of precision makes it necessary to interpret the statute.

The purpose of statutory construction is to discern the intent of the Legislature. *Kollasch v. Adamany*, 104 Wis. 2d 552, 313 N.W.2d 47 (1981). The intention of the statute should govern over any literal or technical meaning of language used. *City of Madison v. Town of Fitchburg*, 112 Wis. 2d 224, 332 N.W.2d 782 (1983).

You first ask whether a determination that certain property is exempt from taxation under section 70.11(27) is included in the phrase "redetermination on the assessment of property subject to taxation under s. 70.995 that is lower than the previous assessment." Section 70.995 does not make any property subject to taxation. Section 70.995 simply provides that the Department of Revenue rather than the local assessor shall assess manufacturing property.

All property, including manufacturing property, is subject to taxation unless specifically exempted. Sec. 70.01, Stats. Certain property is exempt under various provisions of section 70.11. If the Act were to be read literally, therefore, there could never be a final redetermination on the assessment of properties subject to taxation under section 70.995 because there is no property subject to taxation under section 70.995. Such an interpretation, however, would make the Act a nullity. It should never be presumed that any part, much less all, of a statute is meaningless. *Associated Hospital Service v.*

Milwaukee, 13 Wis. 2d 447, 109 N.W.2d 271 (1961). I conclude, therefore, that the phrase "property subject to taxation under s. 70.995 ..." must be interpreted as "property subject to assessment under sec. 70.995 ...." *See, e.g.,* sec. 70.32(3), Stats.

Our inquiry does not end here, however, because there is no agreed upon definition of "assessment." In particular, there is a question whether exempt property is assessed or "subject to assessment." Various statutes distinguish between assessment and exemption. Section 70.12 provides that "[a]ll real property not expressly exempt from taxation shall be entered upon the assessment roll in the assessment district where it lies." Section 70.337(4) states that if a property tax exemption is denied or terminated "the assessor shall enter the property on the next assessment roll" implying that exempt property is not on the assessment roll and therefore has not been assessed. Section 70.995(7)(c) requires that in addition to assessing all taxable manufacturing property "the department of revenue shall also ... value all machinery and specific processing equipment exempt under s. 70.11(27)." The statutes, therefore, could lead to the conclusion that property which is exempt from taxation is not "subject to assessment" and is therefore not included in the Act.

The decision in *Heileman Brewing Co. v. City of La Crosse,* 105 Wis. 2d 152, 312 N.W.2d 875 (Ct. App. 1981) can be read as supporting this view. In that case the court held that the phrase "amount or valuation" in section 70.995(8)(c) did not include questions of exemption. Exemption issues, the court held, must be brought in circuit court. Questions of amount or valuation, that is assessment questions, can be brought before the Board of Assessors and the Tax Appeals Commission.

The court in *Heileman,* however, was not interpreting the word "assessment." Furthermore, the court was deciding a procedural, not a substantive issue. I believe the holding in *Heileman* must be limited to the narrow issue presented in that case and therefore is not determinative of the issue here.

Interpreting "assessment" in the Act in a narrow and technical sense would create anomalous results: a school district which lost revenue because the assessment on a major manufacturing property was lowered could be reimbursed; if the same property were determined to be exempt the school district could not be reimbursed. The

effect is the same; the school district loses revenues. I must conclude, therefore, that the Legislature intended to reimburse school districts which lose revenue as a result of property being found exempt as well as those school districts which lose revenue because assessments are lowered.

The last sentence of section 121.09(1) reinforces this conclusion. That sentence uses the phrase "school district's equalized valuation." The equalized valuation of a school district would be affected by either lower assessments or exemptions. Furthermore, in most instances the questions of assessment and exemption are inextricably intertwined. For example, in *Ladish Malting Co. v. Dept. of Revenue,* 98 Wis. 2d 496, 297 N.W.2d 56 (Ct. App. 1980), it was determined that certain structures were exempt from property taxes because they were manufacturing property, not buildings. That determination of exemption, however, would not mean the property upon which the structures were located was exempt. Therefore, the overall assessment on that parcel of property would be lowered as a result of the finding of exemption. A finding of exemption often lowers an assessment rather than totally removing property from the assessment roles.

Section 70.995 recognizes that questions of assessment and exemption are linked by requiring, in section 70.995(c), the Department to value all property which is exempt under section 70.11(27) when it is assessing all taxable manufacturing property. Quite clearly, it is impossible to assess property for tax purposes without first determining what parts of that property are exempt from taxation. Therefore, although the distinction between assessment and exemption may be necessary and useful in some areas, I must conclude that the Legislature did not intend to make such a distinction in 1983 Wisconsin Act 372. School districts should be eligible for aid adjustments whether their equalized valuation is changed as the result of a lowering of assessments or findings of exemption. In particular, the Jefferson School District, whose equalized valuation was lowered as a result of the *Ladish Malting Co.* case is entitled to an adjustment in its state aids.

The application of the Kimberly School District is based on a final order of the circuit court, dated April 2, 1981, which was the result of a stipulation rather than any decision by the court. The Act requires the school district to file the "decision" of the Tax Appeals

Commission or the "judgment of the court" and provides for payment if you determine that the decision or judgment is final and has been filed within the four-year period. The statutes distinguish between an order and a judgment, *e.g.*, sections 806.06 and 806.07. An action may end, however, either through final judgment or final order and either is appealable. Sec. 808.03(1), Stats. I believe the words "final redetermination" in the Act rather than the technical terms "decision," "order" or "judgment" should govern your decisions. A school district should be eligible for adjustments whether the final determination is a final judgment or a final order.

Neither the Act nor other statutes require that a final order or final judgment be the result of an actual court decision. An order or judgment which results from a stipulation is as enforceable and valid as any other. Certainly the effect on the school district's equalized valuation is the same.

You state that the Algoma School District has provided you with a final decision of the Tax Appeals Commission for the tax year 1977 but no decision from either the Commission or a court for tax years 1978 and 1979. You question, therefore, whether the district is eligible for aid adjustments for the latter two years. I have reviewed the materials you submitted and find a decision from the Tax Appeals Commission, a decision and order in Docket No. 29-MR-77, dated December 23, 1981. This Docket involved the petitioner's 1977 taxes. There is also an order dated June 7, 1982, in Docket No. 119-MR-78 signed by the chairman of the Tax Appeals Commission modifying the assessment of the petitioner's property for the year 1978 based on a stipulation. There is another order in Docket No. 12-MR-79 dated May 24, 1982, signed by the chairman of the Tax Appeals Commission affirming the determination of the State Board of Assessors for the petitioner's 1979 taxes.

Actions before the Tax Appeals Commission may be decided by either decision or order. Sec. 73.015(1), Stats. As noted above, whether that decision or order is the result of a stipulation or a contested hearing is immaterial for the purposes of the Act. Therefore, if the Algoma School District meets the other requirements of the Act, it is eligible for an adjustment in its state aids.

You last question the application of the Beloit School District indicating there is an order from the Tax Appeals Commission for

the 1980 assessment but none for 1981. You question this application because the 1981 assessment is a determination by the Board of Assessors and the 1980 order results from a stipulation. For the reasons given above, the fact that the 1980 order is a result of a stipulation is immaterial.

The 1981 determination of the State Board of Assessors, however, is not sufficient under the statute. The statute most specifically refers to the Tax Appeals Commission or a court. The Board of Assessors is an entity quite distinct from the Tax Appeals Commission. Sec. 70.995(8), Stats. Decisions of the Board of Assessors may be appealed to the Tax Appeals Commission. Sec. 70.995(8)(a), Stats. Although it could logically be argued that a decision to accept the Board of Assessors' determination is no different from entering into a stipulation at the level of the Tax Appeals Commission, the Legislature has specifically required that the matter be brought at least as far as the Tax Appeals Commission. The school district is not eligible for a recomputation of school aids for the year 1981.

BCL:AML

COUNTY BOARD; NURSING HOMES; The county board, not the board of trustees, determines the disposition of a bequest made to a county institution operated pursuant to section 46.18, Stats. The county board, acting pursuant to sections 59.07(101) and 59.75, may authorize the county treasurer to place such a bequest in long-term investments, with the income from such investments to be expended at the institution. OAG 39-84

November 15, 1984

BENJAMIN SOUTHWICK, *Corporation Counsel*
Richland County

You indicate that Pine Valley Manor is an institution operated by Richland County pursuant to section 46.18, Stats. You also state that:

> Some time ago a Richland County resident, now deceased, specified in her Last Will and Testament that one-half of the residual of her estate should go "to Pine Valley Manor". The Will was entirely silent as to the use to which the monies, which amount to

over $50,000.00, were to be put except to state that the money (liquid assets) was to go "to Pine Valley Manor".

You ask two questions concerning the handling of this bequest. One question is, "which body governs the disposition of the decedent's testamentary gift, the Board of Supervisors of Richland County or the Board of Trustees of Pine Valley?"

I am of the opinion that the Board of Supervisors determines how such a bequest will be utilized.

Section 46.18 provides in part:

> Trustees of county institutions. (1) TRUSTEES. Every county home, infirmary, hospital, tuberculosis hospital or sanatorium, or similar institution, or house of correction established by any county whose population is less than 500,000 shall (subject to regulations approved by the county board) be managed by a board of trustees, electors of the county, chosen by ballot by the county board. ...
>
> . . . .
>
> (11) COUNTY APPROPRIATION. The county board shall annually appropriate for operation and maintenance of each such institution not less than the amount of state aid estimated by the trustees to accrue to said institution; or such lesser sum as may be estimated by the trustees to be necessary for operation and maintenance.

Under section 46.18(1), the power granted to the trustees is limited to the day-to-day management of the institution, and such power is expressly limited by other statutes and may be further limited by regulations of the county board. *See* 47 Op. Att'y Gen. 315, 316 (1958); 44 Op. Att'y Gen. 284, 285 (1955); 39 Op. Att'y Gen. 330, 331 (1950).

The general rule is that "the finances of the institution are in control of the county board except so far as they are limited by statute." 21 Op. Att'y Gen. 59, 63 (1932). Section 46.18 does not expressly authorize the trustees to accept bequests. In this case, a specific statute is therefore controlling. Section 59.07(17) authorizes the county board to "[a]ccept donations, gifts or grants for any public governmental purpose within the powers of the county." Moreover, sections 46.18(11) and 59.07(5) clearly indicate that the authority to make budgetary decisions for county institutions resides with the

county board, as opposed to the trustees. Because this statutory scheme indicates that budgetary decisions are initially a policy matter vested in the county board, I conclude that the trustees' management function does not extend to the acceptance or disposition of the $50,000 bequest.

You also indicate that it has been suggested that the $50,000 bequest be placed in long-term investments, with the income to be expended at Pine Valley Manor. You therefore ask whether, absent the existence of a sinking fund for a long-term capital project at Pine Valley Manor, the bequest must be expended in the budget year in which it is received.

I am of the opinion that the bequest need not be expended in the budget year in which it is received and that the bequest may be placed in long-term investments.

It is true that surplus public monies generally may not be set aside for capital improvements unless the municipality has established a sinking fund and made a determination that the monies in that fund will be spent on a specific capital project. *See Barth v. Monroe Board of Education,* 108 Wis. 2d 511, 322 N.W.2d 694 (Ct. App. 1982); *Fiore v. Madison,* 264 Wis. 482, 59 N.W.2d 460 (1953); *Immega v. Elkhorn,* 253 Wis. 282, 34 N.W.2d 101 (1948). The rationale of these cases is that a sinking fund may not be established in the absence of an "effective determination, undertaking or commitment to incur any binding obligation for ... building." *Immega,* 253 Wis. at 282.

I am not persuaded that *Immega* is applicable to the fact situation you describe. First, *Immega* applies only to capital projects. Second, *Immega* and subsequent cases were not intended to extinguish "the power to run local affairs in the manner sound businesses are run." *See Barth,* 108 Wis. 2d at 518. Finally, the will itself specifies that the bequest be used for a specific purpose -- the funds must be spent at Pine Valley Manor. Thus, acceptance of the bequest pursuant to section 59.07(5) is tantamount to earmarking the funds for a specific purpose. In addition, sections 59.07(101) and 59.75 specifically permit the county board to authorize the county treasurer to invest funds under certain carefully enumerated conditions. The county board also has the authority to use all or part of the principal for expenditures at Pine Valley Manor. I therefore conclude that, if it chooses to do so, the county board may utilize these statutes to place

all or part of the bequest in long-term investments, with the income to be expended at Pine Valley Manor.

Finally, you note in your request that the decedent "could have specified in her Last Will and Testament that the money be invested and that the income be used for a certain purpose," from which you tentatively conclude that "in absence of her having done so, the money may not be so utilized." As I have indicated, it is my opinion that this bequest could be invested in a manner which is consistent with sections 59.07(5), 59.07(101) and 59.75. However, you may want to seek the assistance of the probate court if you believe that such a procedure may not be consistent with the terms of the will or the terms of the final decree. *See Estate of Larson,* 257 Wis. 579, 44 N.W.2d 535 (1950).

BCL:FTC

MUNICIPALITIES; ORDINANCES; PUBLIC UTILITIES; Section 66.60(16) authorizes cities owning their own electric companies to pass ordinances allowing unpaid charges for furnished electricity to be placed on the tax bill of the receiving property; section 66.069(1)(b) cannot be construed to authorize such ordinances. OAG 40-84

November 29, 1984

JAMES T. FLYNN, *Lieutenant Governor, Secretary*
Department of Development

You have asked whether section 66.069(1)(b), Stats., authorizes municipalities owning their own electric companies to cause unpaid electrical bills to become property tax liens against the property to which the power was furnished, regardless of who used the electrical power. Apparently several municipalities have enacted ordinances to this effect, citing section 66.069(1)(b) as the basis for the ordinances. You report that these ordinances have caused concern among owners of rental property who are being held responsible for paying the delinquent electrical bills of their tenants. In my opinion municipalities have no power under section 66.069(1)(b) to enact ordinances of this sort, but do have such power under section 66.60(16).

Though the higher courts in Wisconsin have not addressed the issue, courts from many other states have ruled that explicit statutory authorization must exist before a public utility (or a municipality by means of an ordinance) can impose liability for utility charges upon anyone besides the user or the person who contracted for the service. *See Annot.*, 19 A.L.R.3d 1227, 1232-34 (1968). The need for specific statutory authorization has become the conventional rule. 12 McQuillin *Municipal Corporations* § 35.38 (1970). I find no such explicit authorization in section 66.069(1)(b). In pertinent part, section 66.069(1)(b) provides:

> On October 15 in each year notice shall be given to the owner or occupant of all lots or parcels of real estate to which water has been furnished prior to October 1 by a water utility operated by any town, city or village and payment for which is owing and in arrears at the time of giving such notice. ... On November 16 the officer or department issuing the notice shall certify and file with the clerk a list of all lots or parcels of real estate, giving the legal description thereof, to the owners or occupants of which notice of arrears in payment were given as above specified and which arrears still remain unpaid, and stating the amount of such arrears together with the added penalty thereon as herein provided. Each such delinquent amount, including such penalty, shall thereupon become a lien upon the lot or parcel of real estate to which the water was furnished and payment for which is delinquent, and the clerk shall insert the same as a tax against such lot or parcel of real estate.

Looking at section 66.069 in its entirety, it is apparent that "water utility" as used in subsection (1)(b) is not a generic term for utilities in general. Subsections (1)(a), (1)(c), (2)(c), (2)(d) and (2)(e) refer to public or municipal utilities. Subsection (1)(b), (1)(d) and (2)(b) refer to "water utilities" or water plants. Subsection (2)(a) refers to "water, light or power plant." Thus, section 66.069 specifies when it refers to utilities in general and when it refers to a specific utility. Therefore, section 66.069(1)(b), which refers to a "water utility," grants no special rights to cities owning electric companies.

An earlier attorney general's opinion, 22 Op. Att'y Gen. 375 (1933), focused upon the legislative history behind section 66.069(1)(b) (which was numbered 66.01(11) at the time the 1933 opinion was written; renumbering occurred in chapter 362, Laws of

1947). Before 1933, section 66.069(1)(b) did apply to utilities besides water utilities. The last sentence of the section read: "This section shall apply also to other public utility service as far as practicable." This last sentence was removed from the statutes by chapter 102, Laws of 1933, leaving the section applicable only to water utilities. The 1933 opinion concluded:

> The delinquent bills for electric service furnished by a municipal utility which become delinquent prior to the passage of ch. 102, Laws 1933, but after the last tax roll was made up, cannot be placed upon the tax roll made up after November 1, 1933, and collected as a delinquent tax against the property to which the service was furnished.

22 Op. Att'y Gen. at 376. After 1933, then, delinquent electric bills could not become liens upon property under section 66.069(1)(b).

However, twelve years after the Legislature removed the phrase "other public utility service" from section 66.069(1), the Legislature enacted section 66.60(16). *See* ch. 269, Laws of 1945. In my opinion, section 66.60(16) created authorization for liens of this sort. Section 66.60(16)(a) reads:

> In addition to all other methods provided by law, special charges for current services rendered may be imposed by the governing body by allocating all or part of the cost to the property served. Such may include, without limitation by enumeration, snow and ice removal, weed elimination, street sprinkling, oiling and tarring, repair of sidewalks or curb and gutter, garbage and refuse disposal, sewer service and tree care.

Section 66.60(16)(b) creates a lien procedure in regard to these "charges for current services rendered." It provides: "If not paid within the period fixed by the governing body, such a delinquent special charge shall become a lien ... as of the date of such delinquency, and shall automatically be extended upon the current or next tax roll as a delinquent tax against the property ...." In my opinion, the phrase "charges for current services rendered" is broad enough to encompass charges for electricity provided by municipally-owned electric companies. Though electric services are not specifically listed, the Legislature added to section 66.60(16) the phrase "without limitation because of enumeration." I find no legally significant difference between such services as garbage and refuse

disposal, sewer service, tree care and electric service provided by an electric utility owned by a municipality. Thus, I conclude that section 66.60(16) represents sufficient statutory authorization for the kinds of ordinances that you are questioning.

BCL:RCB

CIVIL SERVICE; PUBLIC OFFICIALS; Classified state employes whose positions are federally funded in whole or in part, and who are not covered by a collective bargaining agreement, are entitled to leaves of absence in order to run for partisan political office and cannot be compelled to resign. Leaves of absence for such employes are governed generally by the terms of applicable collective bargaining agreements. OAG 41-84

December 13, 1984

HOWARD FULLER, *Secretary*
Department of Employment Relations

You ask three questions concerning classified state employes who run for partisan political office and who are subject to the Hatch Act, 5 U.S.C. §§ 1501-1508. First, you ask:

1. If a classified state employe is in a position which is wholly federally funded and which is not covered by a collective bargaining agreement, must the employe resign to run for partisan political office because of the Hatch Act, or may the employe simply take a leave of absence without pay as provided in sec. 230.40(2), Stats.

The answer to your first question is that such an employe is not required to resign in order to run for partisan political office, but may take a leave of absence without pay in order to do so.

The Hatch Act prohibits a state officer or employe, whose principal employment is federally financed, from running for partisan political office. 5 U.S.C. §§ 1501-1503. Violation of the Hatch Act can result in the withholding of federal funds in an amount equal to twice the annual rate of pay which the officer or employe was receiving at the time of the violation. 5 U.S.C. § 1506(a).

The Hatch Act is enforced by the United States Civil Service Commission, 5 U.S.C. §§ 1504-1507, and has been interpreted by the Commission to apply to state employes even when they are on a leave of absence without pay. In Wisconsin, however, the Legislature has enacted section 230.40(2), Stats., which provides that a classified state employe "shall be given a leave of absence" to run for partisan political office.

In 63 Op. Att'y Gen. 217 (1974), the attorney general interpreted section 16.35(2) [the predecessor of section 230.40(2)] and answered the precise question you have asked:

> The issue presented by your request is whether a state agency may proscribe partisan political activity to state employes covered by the Hatch Act even though the legislature approves of such conduct when the procedures of sec. 16.35(2) and (4) are followed. It is my opinion that an agency may not adopt such a policy.
>
> In rendering this opinion, I am cognizant of the potential loss of federal funds if covered employes are found in violation .... [T]he legislature has formally redefined the balance between an agency's interests and the employe's interests by specifically allowing leaves of absence for such activity. ... [An] employe today certainly may take leave to run for office and no policy of an agency could be upheld that allowed for his discharge because of it.

63 Op. Att'y Gen. at 219.

Contrary to your suggestion, this opinion is not in conflict with 67 Op. Att'y Gen. 316 (1978). In the latter opinion, after discussing the provisions of the Hatch Act and the provisions of state law, I stated that where both federal and state laws apply, "the more stringent must be observed." 67 Op. Att'y Gen. at 320. In making that statement, in the context of the issue which you raise, I meant simply that state law cannot immunize the state from loss of federal funds which may result from the violation of the federal law. I did not mean to suggest that the prohibition of partisan political activity contained in the Hatch Act could empower a state agency to ignore the provisions of section 230.40(2).

In the interim, between the two opinions, the Legislature simply renumbered section 16.35(2) as section 230.40(2), without amendment. Ch. 196, sec. 61, Laws of 1977. This reinforces my conclusion that despite the potential loss of federal funds, the Legislature has determined that classified state employes who run for partisan political office must be given a leave of absence and cannot be compelled to resign.

As your second question, you ask whether the answer to your first question would be different if the employe's position were only partially, rather than wholly, federally funded. The answer is "no." Although the Hatch Act applies to state officers or employes whose principal employment is financed "in whole or in part" by federal funds, 5 U.S.C. § 1501(4), section 230.40(2) authorizes leaves of absence for *all* classified state employes, regardless of the source of funding for their positions. *Cf.* 63 Op. Att'y Gen. at 219.

As your third question, you ask whether the answers to your first and second questions would be different if the employe was covered by a collective bargaining agreement negotiated under the State Employment Labor Relations Act, sections 111.80-111.97. The answer to this question depends principally upon the terms of the collective bargaining agreement.

Section 111.93(2) provides that civil service statutes, like section 230.40(2), do not apply to employes included in certified bargaining units. Further, section 111.93(3) provides that a collective bargaining agreement supersedes civil service statutes related to conditions of employment, "whether or not the matters contained in such statutes are set forth in such labor agreement." Consequently, if a collective bargaining agreement contains provisions concerning leaves of absence to run for partisan political office, such provisions are controlling.

On the other hand, if the agreement is silent concerning such leaves of absence, the decision whether to grant a leave rests in the discretion of the state agency involved. In making such decision, however, the agency must consider such factors as the state's duty to bargain concerning conditions of employment and its corollary duty to refrain from instituting unilateral changes, absent any waiver by the union. The agency also should consider that the Legislature expressly has authorized unrepresented employes to take leaves of

absence to run for partisan political office, section 230.40(2), thereby creating the potential for unfairness (and perhaps even the denial of constitutionally-guaranteed equal protection) if represented employes were to be denied leaves of absence to run for partisan political office. In view of such considerations, I trust that most agencies will grant such leaves to represented employes.

BCL:DCR

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AUTOMOBILES AND MOTOR VEHICLES

License

Imprisonment or suspension of license under section 345.47(1)(a) and (b), Stats., does not eliminate the liability of a defendant for payment of the $150 surcharge provided for in section 346.655. The county does not become liable for the surcharge if not paid. An application for an occupational license is not a special proceeding requiring the payment of clerk's fees under section 814.61(1). OAG 6–84 24

Traffic offenses

Imprisonment or suspension of license under section 345.47(1)(a) and (b), Stats., does not eliminate the liability of a defendant for payment of the $150 surcharge provided for in section 346.655. The county does not become liable for the surcharge if not paid. An application for an occupational license is not a special proceeding requiring the payment of clerk's fees under section 814.61(1). OAG 6–84 24

BLOOD TESTS

Sheriffs department; breathalyzer or blood tests

A sherriff's department may require an officer to take a breathalyzer or blood test if the officer appears to be under the influence of intoxicants or drugs when the officer reports for duty or is on duty. OAG 31–84 104

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Interstate Compact on the Placement of Children

The Interstate Compact on the Placement of Children does not apply to the Appleton ABC Program, Inc. OAG 53–83 is withdrawn. (Unpub.) OAG 18–84

Records of child-placing agencies

If the Department of Health and Social Services does not wish to designate a child-placing agency licensed under section 48.60, Stats., to conduct searches under sections 48.432(4)(b) and 48.433(6)(b), the child-placing agency has no enforceable right to be so designated. Whether or not there is such a designation, the Department of Health and Social Services has an absolute right of access to the case records of the licensed child-placing agency for purposes of the search program under sections 48.432 and 48.433. (Unpub.) OAG 22–84

Records of child support

The Department of Health and Social Services should be granted access to otherwise confidential records because that access is necessary to complete a legislatively mandated study. (Unpub.) OAG 23–84

CHIROPRACTERS

Clarification of 68 OAG 319 (1979)

The conclusion in 68 Op. Att'y Gen. 316 (1979), that a physician has authority under the Medical Practices Act to advise a patient whether or not continued chiropractic care is necessary deals solely with physician-patient relationships, and is not to be construed as providing guidance or direction in situations where such a relationship does not exist. (Unpub.) OAG 12–84

CIRCUIT COURT

Garnishment actions

In garnishment actions, a clerk of circuit court is not authorized to collect the deposit and disbursement fees set forth in section 814.61(12)(a), Stats., unless the garnishee has paid money into court and obtained a court order directing the clerk of courts to deposit the money in a safe depository. State agencies are not required to pay the fees outlined in section 814.61 (except for the filing fee in section 814.61(1)), nor are they required to pay the fee for filing a garnishment action under section 814.62(1). OAG 2–84 3

CIVIL SERVICE

Hatch Act *see* Political activites

Political activities

Classified state employes whose positions are federally funded in whole or in part, and who are not covered by a collective bargaining agreement, are entitled to leaves of absence in order to run for partisan political office and cannot be compelled to resign. Leaves of absence for such employes are governed generally by the terms of applicable collective bargaining agreements. OAG 41–84 131

Statutes and rules which restrict the partisan activities of some employes and officeholders do not offend the first amendment even if they result in the employes or officeholders being prohibited from participating in the party caucuses which choose delegates to the National Convention. OAG 13–84 51

CLERK OF COURT

Certified copy of record

The alphabetical index which the register in probate must maintain pursuant to section 851.72(5) is not a court record and thus is open to public access under sections 59.14(1) and 19.31. The index may not, however, contain results of proceedings under chapters 55 and 880.

The $4.00 search fee of section 814.66(1)(j) applies only when a person fails to furnish the docket or file number or when a search is conducted to ascertain the existence or non-existence of a record.

The charge for a one page certified copy from the register in probate or clerk of court is comprised of an initial $3.00 certifying fee and a $1.00 per page fee and is thus $4.00. OAG 4–84 16

COMPATIBILITY

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In a county having no undersheriff, a person elected and serving as sheriff vacated office by accepting office of town supervisor during his term but is entitled to compensation paid and can continue to exercise duties of sheriff until successor is elected or appointed and qualifies. OAG 25–84 83

Town Supervisors

In a county having no undersheriff, a person elected and serving as sheriff vacated office by accepting office of town supervisor during his term but is entitled to compensation paid and can continue to exercise duties of sheriff until successor is elected or appointed and qualifies. OAG 25–84 83

CONFIDENTIAL REPORTS

Child support records

The Department of Health and Social Services should be granted access to otherwise confidential records because that access is necessary to complete a legislatively mandated study. (Unpub.) OAG 23–84

Public records

Information on sex, ethnic background and handicapped status obtained through state employment applications for affirmative action purposes is exempt from disclosure under the public records law, but birth date information is not. OAG 7–84 26

CORPORATION COUNSEL

51.42/51.437 Board

Section 51.42(5)(h)7 permits multicounty 51.42/51.437 board to retain private legal counsel only where the corporation counsel of each county, or district attorney of each county not having a corporation counsel, notifies the board that he or she is unable to provide specific services in a timely manner. Litigation, as used in section 59.44(3), applies only to civil court proceedings and does not include grievance proceedings or proceedings before an administrative agency. OAG 3–84..... 8

COUNTIES

51.42/51.437 Board

Although a multi-county combined 51.42/51.437 board may make cuts in non-emergency services to the residents of a county that does not provide its proportionate share of funding to that board, an individual county may not escape its statutory obligation to provide non-emergency services to its residents under sections 51.42(1)(b) and 51.437(4), Stats., by refusing to make such funding available to the combined board. OAG 28–84 96

COUNTIES *(Continued)*

51.42/51.437 Board *(Continued)*

Section 51.42(5)(h)7 permits multicounty 51.42/51.437 board to retain private legal counsel only where the corporation counsel of each county, or district attorney of each county not having a corporation counsel, notifies the board that he or she is unable to provide specific services in a timely manner. Litigation, as used in section 59.44(3), applies only to civil court proceedings and does not include grievance proceedings or proceedings before an administrative agency. OAG 3–84 8

Institution board member, appointment of

Persons appointed by county executive and confirmed by county board to County Veterans Service Commission, single county 51.42 board or county institutions board serve for statutory term as stated in years and until their successors are appointed, confirmed and qualified. Persons appointed to vacancies in such positions also serve until their successors are appointed, confirmed and qualified. Difference between personal term of officer and statutory term which pertains to office discussed. OAG 30–84 99

Wisconsin Conservation Congress; expenses of attendees

Counties lack statutory authority to pay the expenses of private citizens or county board members who attend meetings of the Wisconsin Conservation Congress; 51 Op. Att'y Gen. 327 (1972) discussed and adhered to. (Unpub.) OAG 29–84

COUNTY BOARD

Nursing home bequest

The county board, not the board of trustees, determines the disposition of a bequest made to a county institution operated pursuant to section 46.18, Stats. The county board, acting pursuant to sections 59.07(101) and 59.75, may authorize the county treasurer to place such a bequest in long-term investments, with the income from such investments to be expended at the institution. OAG 39–84 125

Ordinance concerning residence of county employes

County board has power to adopt ordinance requiring all county employes, including those employed by the Handicapped Childrens Education Board (HCEB) pursuant to section 115.86(5), Stats., to maintain residence within the county. However, HCEB rather than county board has power to appoint such personnel and to remove them. Exercise of such power may be limited by civil service ordinance or labor contract. OAG 1–84 1

COUNTY CORPORATION COUNSEL

Duties discussed in relation to district attorney

Duties of corporation counsels of different counties discussed where county department of social services, on behalf of persons over whom it has legal custody, requests the Department of Social Services of another county, within which such person resides, to institute a chap-

COUNTY CORPORATION COUNSEL *(Continued)*

Duties discussed in relation to district attorney *(Continued)*

ter 55 proceeding for protective placement in the court of the county of residence. (Unpub.) OAG 35–84

COUNTY EXECUTIVES

Veto powers

County executive's power of partial approval under Wisconsin Constitution article IV, section 23a, extends to any part of a county board resolution or ordinance containing an appropriation. Status of veto power of executives in populous counties discussed in view of court determination in 1959 that section 59.031(6) was unconstitutional and subsequent amendment of the Wisconsin Constitution. OAG 27–84 92

CREDIT UNIONS

Insurance, sales of

Credit unions' authority to engage in the sale of insurance is limited to credit life and credit accident and sickness insurance. OAG 15–84. 58

CRIMINAL LAW

Mental disease or defect

The Department of Health and Social Services has authority to supervise defendants conditionally released under section 971.17(2), Stats., if the court orders such supervision as a condition of release. The period of supervision, when added to the time defendant has spent in the treatment institution, cannot exceed the maximum term of imprisonment as defined in section 971.17(4). Such maximum term must be calculated as if consecutive sentences had been imposed. The Department lacks authority to supervise defendants released under section 971.17(4). OAG 24–84 76

DISTRICT ATTORNEY

Duties discussed in relation to corporation counsels

Duties of corporation counsels of different counties discussed where county department of social services, on behalf of persons over whom it has legal custody, requests the Department of Social Services of another county, within which such person resides, to institute a chapter 55 proceeding for protective placement in the court of the county of residence. (Unpub.) OAG 35–84

51.42/51.437 Board

Section 51.42(5)(h)7 permits multicounty 51.42/51.437 board to retain private legal counsel only where the corporation counsel of each county, or district attorney of each county not having a corporation counsel, notifies the board that he or she is unable to provide specific services in a timely manner. Litigation, as used in section 59.44(3), applies only to civil court proceedings and does not include grievance proceedings or proceedings before an administrative agency. OAG 3–84..... 8

DISTRICT VOCATIONAL, TECHNICAL AND ADULT EDUCATION BOARD
see **VOCATIONAL, TECHNICAL AND ADULT EDUCATION BOARD**

EMPLOYER AND EMPLOYE

Public records

Public records relating to employe grievances are not generally exempt from disclosure under the public records law, and nondisclosure must be justified on a case-by-case basis. OAG 5–84 20

School district

Multiple year contract renewal provisions under section 118.24(1) and (lm), Stats., do not apply to personnel and curriculum administrators and their assistants. (Unpub.) OAG 37–84

FEES

Garnishment actions

In garnishment actions, a clerk of circuit court is not authorized to collect the deposit and disbursement fees set forth in section 814.61(12)(a), Stats., unless the garnishee has paid money into court and obtained a court order directing the clerk of courts to deposit the money in a safe depository. State agencies are not required to pay the fees outlined in section 814.61 (except for the filing fee in section 814.61(1)), nor are they required to pay the fee for filing a garnishment action under section 814.62(1). OAG 2–84 3

Public records

The alphabetical index which the register in probate must maintain pursuant to section 851.72(5) is not a court record and thus is open to public access under sections 59.14(1) and 19.31. The index may not, however, contain results of proceedings under chapters 55 and 880.

The $4.00 search fee of section 814.66(1)(j) applies only when a person fails to furnish the docket or file number or when a search is conducted to ascertain the existence or non-existence of a record.

The charge for a one page certified copy from the register in probate or clerk of court is comprised of an initial $3.00 certifying fee and a $1.00 per page fee and is thus $4.00. OAG 4–84 16

51.42/51.437 BOARD

Appointments to

Persons appointed by county executive and confirmed by county board to County Veterans Service Commission, single county 51.42 board or county institutions board serve for statutory term as stated in years and until their successors are appointed, confirmed and qualified. Persons appointed to vacancies in such positions also serve until their successors are appointed, confirmed and qualified. Difference between personal term of officer and statutory term which pertains to office discussed. OAG 30–84 99

Legal counsel

Section 51.42(5)(h)7 permits multicounty 51.42/51.437 board to retain private legal counsel only where the corporation counsel of each county, or district attorney of each county not having a corporation

51.42/51.437 BOARD *(Continued)*

Legal counsel *(Continued)*

counsel, notifies the board that he or she is unable to provide specific services in a timely manner. Litigation, as used in section 59.44(3), applies only to civil court proceedings and does not include grievance proceedings or proceedings before an administrative agency. OAG 3–84 8

Multi-County Boards

Although a multi-county combined 51.42/51.437 board may make cuts in non-emergency services to the residents of a county that does not provide its proportionate share of funding to that board, an individual county may not escape its statutory obligation to provide non-emergency services to its residents under sections 51.42(1)(b) and 51.437(4), Stats., by refusing to make such funding available to the combined board. OAG 28–84 96

FOSTER HOMES

Detention facilities privately operated not approved

Statutes do not provide authority to the Department of Health and Social Services to approve privately operated secure detention facilities for juveniles and county board and county board of public welfare are without power to purchase secure detention services from a private operator. OAG 36–84 115

FUNDS

Construction of State facilities on leased land

It is constitutional for the Legislature to authorize funds to be borrowed and expended for construction of state patrol training facilities on leased land. (Unpub.) OAG 8–84

GAMBLING

Tavern League of Wisconsin

The Tavern League of Wisconsin is not a "service organization" within the meaning of section 163.90, Stats., so as to be eligible for a raffle license in the State of Wisconsin. OAG 34–84 114

GARNISHMENT

Circuit court clerk

In garnishment actions, a clerk of circuit court is not authorized to collect the deposit and disbursement fees set forth in section 814.61(12)(a), Stats., unless the garnishee has paid money into court and obtained a court order directing the clerk of courts to deposit the money in a safe depository. State agencies are not required to pay the fees outlined in section 814.61 (except for the filing fee in section 814.61(1)), nor are they required to pay the fee for filing a garnishment action under section 814.62(1). OAG 2–84 3

HATCH ACT
see **CIVIL SERVICE**, Political activities

HEALTH AND SOCIAL SERVICES, DEPARTMENT OF

Child-placing agencies, case records

If the Department of Health and Social Services does not wish to designate a child-placing agency licensed under section 48.60, Stats., to conduct searches under sections 48.432(4)(b) and 48.433(6)(b), the child-placing agency has no enforceable right to be so designated. Whether or not there is such a designation, the Department of Health and Social Services has an absolute right of access to the case records of the licensed child-placing agency for purposes of the search program under sections 48.432 and 48.433. (Unpub.) OAG 22–84

Child support records

The Department of Health and Social Services should be granted access to otherwise confidential records because that access is necessary to complete a legislatively mandated study. (Unpub.) OAG 23–84

Defendants, supervision of

The Department of Health and Social Services has authority to supervise defendants conditionally released under section 971.17(2), Stats., if the court orders such supervision as a condition of release. The period of supervision, when added to the time defendant has spent in the treatment institution, cannot exceed the maximum term of imprisonment as defined in section 971.17(4). Such maximum term must be calculated as if consecutive sentences had been imposed. The Department lacks authority to supervise defendants released under section 971.17(4). OAG 24–84 76

Detention facilities privately operated

Statutes do not provide authority to the Department of Health and Social Services to approve privately operated secure detention facilities for juveniles and county board and county board of public welfare are without power to purchase secure detention services from a private operator. OAG 36–84 115

HISTORICAL SOCIETY, STATE

Historic Sites Foundation, Inc.; Open Meetings Law

The Historic Sites Foundation, Inc., created under the provisions of chapter 181, Stats., by the Board of Curators of the State Historical Society of Wisconsin acting in their individual capacities, is a private corporation and as such is not subject to the requirements of the open meetings law, Section 19.81, Stats. OAG 14–84 53

HOME RULE

Libraries

The Madison Public Library can charge user fees for any services that fall outside of a library's inherent information-providing functions; services that constitute core "library services" must be provided free of charge to the inhabitants of the municipality; a one-dollar fee can

HOME RULE *(Continued)*

Libraries *(Continued)*

be collected for lending duplicate copies of best seller books. OAG 26–84 86

IMPLIED CONSENT LAW

Confidentiality requirements

The taking of a blood sample pursuant to the Wisconsin Implied Consent Law is not a procedure in connection with the performance of a drug or alcohol abuse prevention function nor is the acquired blood sample itself a patient record. The confidentiality requirements set out in 42 U.S.C. § 290dd-3 and 21 U.S.C. § 1175 have no application to such a procedure. OAG 11–84 45

LABOR

Grievance records

Public records relating to employe grievances are not generally exempt from disclosure under the public records law, and nondisclosure must be justified on a case-by-case basis. OAG 5–84..... 20

LAW ENFORCEMENT

Hospitals

The public records law permits the Department of Regulation and Licensing to refuse to disclose records relating to complaints against health care professionals while the matters are merely "under investigation"; good faith disclosure of the same will not expose the custodian to liability for damages; and prospective continuing requests for records are not contemplated by the public records law. OAG 10–84 37

Implied Consent Law

The public records law permits the Department of Regulation and Licensing to refuse to disclose records relating to complaints against health care professionals while the matters are merely "under investigation"; good faith disclosure of the same will not expose the custodian to liability for damages; and prospective continuing requests for records are not contemplated by the public records law. OAG 10–84 37

Patrol Academy

It is constitutional for the Legislature to authorize funds to be borrowed and expended for construction of state patrol training facilities on leased land. (Unpub.) OAG 8–84

LEGISLATION

Retroactivity of tax penalty ordinance

Section 74.80(2), Stats., does not permit a county or municipality to enact an ordinance which would make the one-half of one percent per month penalty apply on a retroactive basis to the date the tax first became delinquent. OAG 20–84 72

LIBRARIES

Federated Library Systems

Contract provision requiring payment as between Federated Library Systems of a fee for use of each system's facilities by nonresidents does not result in failure "to honor valid borrowers' cards of all public libraries in the system by all public libraries in the system" within the meaning of section 43.24(2)(d)2., Stats. OAG 16–84..... 60

Fees for users

The Madison Public Library can charge user fees for any services that fall outside of a library's inherent information-providing functions; services that constitute core "library services" must be provided free of charge to the inhabitants of the municipality; a one-dollar fee can be collected for lending duplicate copies of best seller books. OAG 26–84 86

LICENSES AND PERMITS

Occupational license

Imprisonment or suspension of license under section 345.47(1)(a) and (b), Stats., does not eliminate the liability of a defendant for payment of the $150 surcharge provided for in section 346.655. The county does not become liable for the surcharge if not paid. An application for an occupational license is not a special proceeding requiring the payment of clerk's fees under section 814.61(1). OAG 6–84 24

Public records

The public records law permits the Department of Regulation and Licensing to refuse to disclose records relating to complaints against health care professionals while the matters are merely "under investigation"; good faith disclosure of the same will not expose the custodian to liability for damages; and prospective continuing requests for records are not contemplated by the public records law. OAG 10–84 37

MEDICAL AID

Nursing home

A county health facility may not charge for non-medical assistance services given to medical assistance patients in excess of medical assistance rates without violating section 49.49, Stats. OAG 19–84..... 68

MILWAUKEE, CITY OF

Police, Chief of

Common Council of City of Milwaukee has power by reason of Wisconsin Constitution article XI, section 3, and section 62.03(2), Stats., to enact charter ordinance adopting section 62.09(13)(a), which provides that the chief of police shall have command of the police force of the city under the direction of the mayor and that it is the duty of the chief to obey all lawful written orders of the mayor or common council. OAG 17–84 64

MUNICIPALITIES

Electric company

Section 66.60(16) authorizes cities owning their own electric companies to pass ordinances allowing unpaid charges for furnished electricity to be placed on the tax bill of the receiving property; section 66.069(1)(b) cannot be construed to authorize such ordinances. OAG 40–84 128

Madison Public Library

The Madison Public Library can charge user fees for any services that fall outside of a library's inherent information-providing functions; services that constitute core "library services" must be provided free of charge to the inhabitants of the municipality; a one-dollar fee can be collected for lending duplicate copies of best seller books. OAG 26–84 86

Tax penalty ordinance

Section 74.80(2), Stats., does not permit a county or municipality to enact an ordinance which would make the one-half of one percent per month penalty apply on a retroactive basis to the date the tax first became delinquent. OAG 20–84 72

Taxation

Section 66.60(16) authorizes cities owning their own electric companies to pass ordinances allowing unpaid charges for furnished electricity to be placed on the tax bill of the receiving property; section 66.069(1)(b) cannot be construed to authorize such ordinances. OAG 40–84 128

NURSING HOMES

Richland County, bequest to Pine Valley Manor

The county board, not the board of trustees, determines the disposition of a bequest made to a county institution operated pursuant to section 46.18, Stats. The county board, acting pursuant to sections 59.07(101) and 59.75, may authorize the county treasurer to place such a bequest in long-term investments, with the income from such investments to be expended at the institution. OAG 39–84 125

Rock County Health Care Center

A county health facility may not charge for non-medical assistance services given to medical assistance patients in excess of medical assistance rates without violating section 49.49, Stats. OAG 19–84..... 68

OPEN MEETING

Private corporation

The Historic Sites Foundation, Inc., created under the provisions of chapter 181, Stats., by the Board of Curators of the State Historical Society of Wisconsin acting in their individual capacities, is a private corporation and as such is not subject to the requirements of the open meetings law, section 19.81, Stats. OAG 14–84 53

ORDINANCES

Milwaukee charter ordinance concerning Chief of Police

Common Council of City of Milwaukee has power by reason of Wisconsin Constitution article XI, section 3, and section 62.03(2), Stats., to enact charter ordinance adopting section 62.09(13)(a), which provides that the chief of police shall have command of the police force of the city under the direction of the mayor and that it is the duty of the chief to obey all lawful written orders of the mayor or common council. OAG 17–84 64

Municipally-owned electric companies

Section 66.60(16) authorizes cities owning their own electric companies to pass ordinances allowing unpaid charges for furnished electricity to be placed on the tax bill of the receiving property; section 66.069(1)(b) cannot be construed to authorize such ordinances. OAG 40–84 128

Veto powers

County executive's power of partial approval under Wisconsin Constitution article IV, section 23a, extends to any part of a county board resolution or ordinance containing an appropriation. Status of veto power of executives in populous counties discussed in view of court determination in 1959 that section 51.011(6) was unconstitutional and subsequent amendment of the Wisconsin Constitution. OAG 27–84 92

POLLUTION

Air

A work area established only by movable partitions which do not extend completely from floor to ceiling is not included in the term "office" as defined in section 101.123(1)(c), Stats. (Unpub.) OAG 21–84

Smoking

A work area established only by movable partitions which do not extend completely from floor to ceiling is not included in the term "office" as defined in section 101.123(1)(c), Stats. (Unpub.) OAG 21–84

PRISONS AND PRISONERS

Release

The Department of Health and Social Services has authority to supervise defendants conditionally released under section 971.17(2), Stats., if the court orders such supervision as a condition of release. The period of supervision, when added to the time defendant has spent in the treatment institution, cannot exceed the maximum term of imprisonment as defined in section 971.17(4). Such maximum term must be calculated as if consecutive sentences had been imposed. The Department lacks authority to supervise defendants released under section 971.17(4). OAG 24–84 76

PUBLIC ASSISTANCE

Medical assistance

A county health facility may not charge for non-medical assistance services given to medical assistance patients in excess of medical assistance rates without violating section 49.49, Stats. OAG 19–84..... 68

PUBLIC OFFICIALS

Board memberships of various kinds

Persons appointed by county executive and confirmed by county board to County Veterans Service Commission, single county 51.42 board or county institutions board serve for statutory term as stated in years and until their successors are appointed, confirmed and qualified. Persons appointed to vacancies in such positions also serve until their successors are appointed, confirmed and qualified. Difference between personal term of officer and statutory term which pertains to office discussed. OAG 30–84 99

Expenses for attendees of Wisconsin Conservation Congress

Counties lack statutory authority to pay the expenses of private citizens or county board members who attend meetings of the Wisconsin Conservation Congress; 61 Op. Att'y Gen. 327 (1972) discussed and adhered to. (Unpub.) OAG 29–84

Leave of absence

Classified state employes whose positions are federally funded in whole or in part, and who are not covered by a collective bargaining agreement, are entitled to leaves of absence in order to run for partisan political office and cannot be compelled to resign. Leaves of absence for such employes are governed generally by the terms of applicable collective bargaining agreements. OAG 41–84..... 131

Political activity

Classified state employes whose positions are federally funded in whole or in part, and who are not covered by a collective bargaining agreement, are entitled to leaves of absence in order to run for partisan political office and cannot be compelled to resign. Leaves of absence for such employes are governed generally by the terms of applicable collective bargaining agreements. OAG 41–84..... 131

Statutes and rules which restrict the partisan activities of some employes and officeholders do not offend the first amendment even if they result in the employes or officeholders being prohibited from participating in the party caucuses which choose delegates to the National Convention. OAG 13–84 51

PUBLIC RECORDS

Alphabetical index of the Register of Probate

The alphabetical index which the register in probate must maintain pursuant to section 851.72(5) is not a Court record and thus is open to

PUBLIC RECORDS *(Continued)*

Alphabetical index of the Register of Probate *(Continued)*

public access under sections 59.14(1) and 19.31. The index may not, however, contain results of proceedings under chapters 55 and 880. The $4.00 search fee of section 814.66(1)(j) applies only when a person fails to furnish the docket or file number or when a search is conducted to ascertain the existence or non-existence of a record. The charge for a one page certified copy from the register in probate or clerk of court is comprised of an initial $3.00 certifying fee and a $1.00 per page fee and is thus $4.00. OAG 4–84 16

Child-placing agencies, case records

If the Department of Health and Social Services does not wish to designate a child-placing agency licensed under section 48.60, Stats., to conduct searches under sections 48.432(4)(b) and 48.433(6)(b), the child-placing agency has no enforceable right to be so designated. Whether or not there is such a designation, the Department of Health and Social Services has an absolute right of access to the case records of the licensed child-placing agency for purposes of the search program under sections 48.432 and 48.433. (Unpub.) OAG 22–84

Exemptions to access to information

Information on sex, ethnic background and handicapped status obtained through state employment applications for affirmative action purposes is exempt from disclosure under the public records law, but birth date information is not. OAG 7–84 26

Federal law discussed

Information on sex, ethnic background and handicapped status obtained through state employment applications for affirmative action purposes is exempt from disclosure under the public records law, but birth date information is not. OAG 7–84 26

Health care professionals "under investigation"

The public records law permits the Department of Regulation and Licensing to refuse to disclose records relating to complaints against health care professionals while the matters are merely "under investigation"; good faith disclosure of the same will not expose the custodian to liability for damages; and prospective continuing requests for records are not contemplated by the public records law. OAG 10–84 37

Labor grievance

Public records relating to employe grievances are not generally exempt from disclosure under the public records law, and nondisclosure must be justified on a case-by-case basis. OAG 5–84..... 20

Regulation and Licensing, Department of

The public records law permits the Department of Regulation and Licensing to refuse to disclose records relating to complaints against health care professionals while the matters are merely "under investigation"; good faith disclosure of the same will not expose the custodian to liability for damages; and prospective continuing requests for records are not contemplated by the public records law. OAG 10–84 37

PUBLIC RECORDS *(Continued)*

Sales tax on fees for records

Fees charged for furnishing copies of public records are subject to sales tax. Fees charged for records searches and for certifying copies of records are not subject to sales tax. OAG 9–84 36

PUBLIC UTILITIES

Property tax liens

Section 66.60(16) authorizes cities owning their own electric companies to pass ordinances allowing unpaid charges for furnished electricity to be placed on the tax bill of the receiving property; section 66.069(1)(b) cannot be construed to authorize such ordinances. OAG 40–84 128

RAFFLES

see **GAMBLING**

REGISTER IN PROBATE

Certified copy of record

The alphabetical index which the register in probate must maintain pursuant to section 851.72(5) is not a court record and thus is open to public access under sections 59.14(1) and 19.31. The index may not, however, contain results of proceedings under chapters 55 and 880.

The $4.00 search fee of section 814.66(1)(j) applies only when a person fails to furnish the docket or file number or when a search is conducted to ascertain the existence or non-existence of a record.

The charge for a one page certified copy from the register in probate or clerk of court is comprised of an initial $3.00 certifying fee and a $1.00 per page fee and is thus $4.00. OAG 4–84 16

REGULATION AND LICENSING, DEPARTMENT OF

Records relating to health care professionals

The public records law permits the Department of Regulation and Licensing to refuse to disclose records relating to complaints against health care professionals while the matters are merely "under investigation"; good faith disclosure of the same will not expose the custodian to liability for damages; and prospective continuing requests for records are not contemplated by the public records law. OAG 10–84 37

RESIDENCE, DOMICILE AND LEGAL SETTLEMENT

Teachers

County board has power to adopt ordinance requiring all county employes, including those employed by the Handicapped Childrens Education Board (HCEB) pursuant to section 115.86(5), Stats., to maintain residence within the county. However, HCEB rather than county board has power to appoint such personnel and to remove them. Exercise of such power may be limited by civil service ordinance or labor contract. OAG 1–84 1

SALARIES AND WAGES

Sheriffs

In a county having no undersheriff, a person elected and serving as sheriff vacated office by accepting office of town supervisor during his term but is entitled to compensation paid and can continue to exercise duties of sheriff until successor is elected or appointed and qualifies. OAG 25–84 83

SCHOOLS AND SCHOOL DISTRICTS

Contracts

Multiple year contract renewal provisions under section 118.24(1) and (lm), Stats., do not apply to personnel and curriculum administrators and their assistants. (Unpub.) OAG 37–84

State aid

School districts may obtain adjustments in state aid payments whether their equalized valuation is changed either as a result of a reassessment of or a finding of exemption of manufacturing property. A final order or decision of the Tax Appeals Commission or a final order or judgment of a court can be a final redetermination under the Act. A decision of the Board of Assessors is not sufficient to support a request for adjustment in state aid. OAG 38–84 119

SHERIFFS

Blood or breathalyzer tests for employes

A sheriff's department may require an officer to take a breathalyzer or blood test if the officer appears to be under the influence of intoxicants or drugs when the officer reports for duty or is on duty. OAG 31-84 104

Compatibility

In a county having no undersheriff, a person elected and serving as sheriff vacated office by accepting office of town supervisor during his term but is entitled to compensation paid and can continue to exercise duties of sheriff until successor is elected or appointed and qualifies. OAG 25–84 83

Fees

Sheriffs may collect the statutory fee for each service or attempted service of process; fees for mileage, however, may only be collected if service is successful. OAG 32–84 106

SMOKING

See **POLLUTION**

STATE AID

School districts

School districts may obtain adjustments in state aid payments whether their equalized valuation is changed either as a result of a reassessment of or a finding of exemption of manufacturing property. A final order or decision of the Tax Appeals Commission or a final order or judgment of a court can be a final redetermination under the Act. A

STATE AID *(Continued)*

School districts *(Continued)*

decision of the Board of Assessors is not sufficient to support a request for adjustment in state aid. OAG 38–84 119

TAVERN LEAGUE OF WISCONSIN
see **GAMBLING**

TAXATION

Public records, sales tax on fees for

Fees charged for furnishing copies of public records are subject to sales tax. Fees charged for records searches and for certifying copies of records are not subject to sales tax. OAG 9–84 36

Retroactivity of penalty ordinance

Section 74.80(2), Stats., does not permit a county or municipality to enact an ordinance which would make the one-half of one percent per month penalty apply on a retroactive basis to the date the tax first became delinquent. OAG 20–84 72

TEACHERS

Residence within county

County board has power to adopt ordinance requiring all county employes, including those employed by the Handicapped Childrens Education Board (HCEB) pursuant to section 115.86(5), Stats., to maintain residence within the county. However, HCEB rather than county board has power to appoint such personnel and to remove them. Exercise of such power may be limited by civil service ordinance or labor contract. OAG 1–84 1

TRAFFIC

Enforcement of judgments

Imprisonment or suspension of license under section 345.47(1)(a) and (b), Stats., does not eliminate the liability of a defendant for payment of the $150 surcharge provided for in section 346.655. The application for an occupational license is not a special proceeding requiring the payment of clerk's fees under section 814.61(1). OAG 6–84 24

VETERANS

County Veteran's Service Commission, appointment to

Persons appointed by county executive and confirmed by county board to County Veterans Service Commission, single county 51.42 board or county institutions board serve for statutory term as stated in years and until their successors are appointed, confirmed and qualified. Persons appointed to vacancies in such positions also serve until their successors are appointed, confirmed and qualified. Difference between personal term of officer and statutory term which pertains to office discussed. OAG 30–84 99

VOCATIONAL, TECHNICAL AND ADULT EDUCATION BOARD

Appointment to

The State Board of Vocational, Technical and Adult Education may by rule require that the record concerning appointment of district board members show compliance with statutory procedural requirements, and the state board may disapprove appointments because of procedural irregularities except those involving the Open Meetings Law. Also, appointment by the appointment committee and approval by the state board is required to move a previously approved candidate from one membership category to another. OAG 33–84..... 108

Composition of

The State Board of Vocational, Technical and Adult Education may by rule require that the record concerning appointment of district board members show compliance with statutory procedural requirements, and the state board may disapprove appointments because of procedural irregularities except those involving the Open Meetings Law. Also, appointment by the appointment committee and approval by the state board is required to move a previously approved candidate from one membership category to another. OAG 33–84..... 108

Delegated Selection Rules

Statutes and rules which restrict the partisan activities of some employes and officeholders do not offend the first amendment even if they result in the employes or officeholders being prohibited from participating in the party caucuses which choose delegates to the National Convention. OAG 13–84 51

Political activity by state employes

Statutes and rules which restrict the partisan activities of some employes and officeholders do not offend the first amendment even if they result in the employes or officeholders being prohibited from participating in the party caucuses which choose delegates to the National Convention. OAG 13–84 51

WISCONSIN IMPLIED CONSENT LAW

see **LAW ENFORCEMENT**, Implied Consent Law

WORDS AND PHRASES

Advertise

Counties lack statutory authority to pay the expenses of private citizens or county board members who attend meetings of the Wisconsin Conservation Congress; 61 Op. Att'y Gen. 327 (1972) discussed and adhered to. (Unpub.) OAG 29–84

"Labor litigation"

Section 51.42(5)(h)7 permits multicounty 51.42/51.437 board to retain private legal counsel only where the corporation counsel of each county, or district attorney of each county not having a corporation counsel, notifies the board that he or she is unable to provide specific services in a timely manner. Litigation, as used in section 59.44(3), applies only to civil court proceedings and does not include grievance

WORDS AND PHRASES *(Continued)*

"Labor litigation" *(Continued)*

proceedings or proceedings before an administrative agency. OAG 3–84 8

"Office"

A work area established only by movable partitions which do not extend completely from floor to ceiling is not included in the term "office" as defined in section 101.123(1)(c), Stats. (Unpub.) OAG 21–84

"Quasi-governmental"

The Historic Sites Foundation, Inc., created under the provisions of chapter 181, Stats., by the Board of Curators of the State Historical Society of Wisconsin acting in their individual capacities, is a private corporation and as such is not subject to the requirements of the open meetings law, section 19.81, Stats. OAG 14–84 53

Record, patient

The taking of a blood sample pursuant to the Wisconsin Implied Consent Law is not a procedure in connection with the performance of a drug or alcohol abuse prevention function nor is the acquired blood sample itself a patient record. The confidentiality requirements set out in 42 U.S.C. § 290dd-3 and 21 U.S.C. § 1175 have no application to such a procedure. OAG 11–84 45

Reputation

Information on sex, ethnic background and handicapped status obtained through state employment applications for affirmative action purposes is exempt from disclosure under the public records law, but birth date information is not. OAG 7–84 26

"Service organization"

The Tavern League of Wisconsin is not a "service organization" within the meaning of section 163.90, Stats., so as to be eligible for a raffle license in the State of Wisconsin. OAG 34–84 114