Tribute and farewell to Theodore L. Priebe
on the occasion of his retirement by

Those of us who know Ted Priebe thought he would never retire. He loved his work as an Assistant Attorney General and was never happier than when he was trundling off somewhere in the state in his old Nash to represent his clients—the State of Wisconsin and the people.

But he has reluctantly decided that the appropriate time has arrived, and so he is hanging up his barrister's quill pen and the state incurs the loss of a gentlemanly, yet vigorous advocate who has served us with devotion for nearly 25 years.

From the biography previously delivered, you know that Ted grew up in central Wisconsin and that he had to drop out of high school to do the farm work when his dad died. Thereafter he knocked about in a variety of jobs, but he ultimately decided he wanted to be a lawyer, and overcome impossible odds to reach that goal. And a fine lawyer he became!

Private practice in Milwaukee and Ripon gave him broad experience in general practice. A Masters Degree in Resource Management meant that by the time he became an Assistant Attorney General in 1967, he was already a seasoned trial attorney in a variety of areas. His service ultimately spanned the terms of five Attorneys General.

Over the years, Ted became one of the stalwarts of the Department of Justice, representing all sorts of agencies in all types of litigation. After a major reorganization in the early 70's, he was put in command of the Department's newly created Environmental Unit. With the infusion of more attorneys and money, he presided over a bustling group who set about vigorously enforcing state laws involving waters, pollution and waste disposal. A federal grant permitted the creation of the STOP program (Students To Oppose Pollution),
consisting of environmental interns to provide scientific and investigative back-up in the lawsuits. At the center of this maelstrom of activity was Ted Priebe, prodding his minions into action when necessary; cautioning requisite restraint when overzealousness came into play; and overall, insisting on thorough and scholarly preparation of the cases his unit took to court. Of all the qualities Ted possesses, the greatest was the unselfish sharing of himself and his knowledge with young attorneys. His fatherly advice and his gentle nature not only caused many within the Department to seek his advice, it also caused them to emulate Ted in his dedication to and love of the law.

In recent years, Ted has renewed the application of his talents to civil litigation. He continued to travel, his old Nash wore out—but he now perambulated around the countryside in a state-owned car trying cases from one end of Wisconsin to the other. His watchword—"Have Briefcase—Will Travel."

Ted’s great ability to objectively analyze his clients’ cases and give wise counsel and advice resulted in his colleagues seeking him out for such help constantly. His devotion to the just and equitable resolution of matters and his constant devotion to the best interests of his clients make him a real servant of the people.

Ted, we salute you on behalf of Wisconsin and memorialize your outstanding career on behalf of all of us! Without Ted Priebe, Wisconsin will be the loser. But because of Ted Priebe, Wisconsin will have the benefit of his incomparable legacy.

IN MEMORIAM

Ted Priebe died on June 23, 1992, barely a year after Judge Warren delivered his tribute and farewell to a large gathering of Ted’s family, friends, and colleagues. It was a rich and enjoyable year for Ted. We mourn his loss, and are grateful for the benefits of having known, worked with, and loved him.
<table>
<thead>
<tr>
<th>Name</th>
<th>Location</th>
<th>Date Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>JAMES S. BROWN</td>
<td>Milwaukee</td>
<td>from June 7, 1848, to Jan. 7, 1850</td>
</tr>
<tr>
<td>S. PARK COON</td>
<td>Milwaukee</td>
<td>from Jan. 7, 1850, to Jan. 5, 1852</td>
</tr>
<tr>
<td>EXPERIENCE ESTABROOK</td>
<td>Geneva</td>
<td>from Jan. 5, 1852, to Jan. 2, 1854</td>
</tr>
<tr>
<td>GEORGE B. SMITH</td>
<td>Madison</td>
<td>from Jan. 2, 1854, to Jan. 7, 1856</td>
</tr>
<tr>
<td>WILLIAM R. SMITH</td>
<td>Mineral Point</td>
<td>from Jan. 7, 1856, to Jan. 4, 1858</td>
</tr>
<tr>
<td>GABRIEL BOUCK</td>
<td>Oshkosh</td>
<td>from Jan. 4, 1858, to Jan. 2, 1860</td>
</tr>
<tr>
<td>JAMES E. HOWE</td>
<td>Green Bay</td>
<td>from Jan. 2, 1860, to Oct. 7, 1862</td>
</tr>
<tr>
<td>WINFIELD SMITH</td>
<td>Milwaukee</td>
<td>from Oct. 7, 1862, to Jan. 2, 1866</td>
</tr>
<tr>
<td>CHARLES R. GILL</td>
<td>Watertown</td>
<td>from Jan. 1, 1866, to Jan. 3, 1870</td>
</tr>
<tr>
<td>STEPHEN S. BARLOW</td>
<td>Dellona</td>
<td>from Jan. 3, 1870, to Jan. 5, 1874</td>
</tr>
<tr>
<td>A. SCOTT SLOAN</td>
<td>Beaver Dam</td>
<td>from Jan. 5, 1874, to Jan. 7, 1878</td>
</tr>
<tr>
<td>ALEXANDER WILSON</td>
<td>Mineral Point</td>
<td>from Jan. 7, 1878, to Jan. 2, 1882</td>
</tr>
<tr>
<td>LEANDER F. FRISBY</td>
<td>West Bend</td>
<td>from Jan. 2, 1882, to Jan. 3, 1887</td>
</tr>
<tr>
<td>CHARLES E. ESTABROOK</td>
<td>Manitowoc</td>
<td>from Jan. 3, 1887, to Jan. 5, 1891</td>
</tr>
<tr>
<td>JAMES L. O'CONNOR</td>
<td>Madison</td>
<td>from Jan. 5, 1891, to Jan. 7, 1895</td>
</tr>
<tr>
<td>WILLIAM H. MYLREA</td>
<td>Wausau</td>
<td>from Jan. 7, 1895, to Jan. 2, 1899</td>
</tr>
<tr>
<td>EMMET R. HICKS</td>
<td>Oshkosh</td>
<td>from Jan. 2, 1899, to Jan. 5, 1903</td>
</tr>
<tr>
<td>LAFAYETTE M. STURDEVANT</td>
<td>Neillsville</td>
<td>from Jan. 5, 1903, to Jan. 7, 1907</td>
</tr>
<tr>
<td>FRANK L. GILBERT</td>
<td>Madison</td>
<td>from Jan. 7, 1907, to Jan. 2, 1911</td>
</tr>
<tr>
<td>LEVI H. BANCROFT</td>
<td>Richland Center</td>
<td>from Jan. 2, 1911, to Jan. 6, 1913</td>
</tr>
<tr>
<td>WALTER C. OWEN</td>
<td>Maiden Rock</td>
<td>from Jan. 6, 1913, to Jan. 7, 1918</td>
</tr>
<tr>
<td>SPENCER HAVEN</td>
<td>Hudson</td>
<td>from Jan. 7, 1918, to Jan. 6, 1919</td>
</tr>
<tr>
<td>JOHN J. BLAINE</td>
<td>Boscobel</td>
<td>from Jan. 6, 1919, to Jan. 3, 1921</td>
</tr>
<tr>
<td>WILLIAM J. MORGAN</td>
<td>Milwaukee</td>
<td>from Jan. 3, 1921, to Jan. 1, 1923</td>
</tr>
<tr>
<td>HERMAN L. EKERN</td>
<td>Madison</td>
<td>from Jan. 1, 1923, to Jan. 3, 1927</td>
</tr>
<tr>
<td>JOHN W. REYNOLDS</td>
<td>Green Bay</td>
<td>from Jan. 3, 1927, to Jan. 2, 1933</td>
</tr>
<tr>
<td>JAMES E. FINNEGAN</td>
<td>Milwaukee</td>
<td>from Jan. 2, 1933, to Jan. 4, 1937</td>
</tr>
<tr>
<td>ORLAND S. LOOMIS</td>
<td>Mauston</td>
<td>from Jan. 4, 1937, to Jan. 2, 1939</td>
</tr>
<tr>
<td>JOHN E. MARTIN</td>
<td>Milwaukee</td>
<td>from Jan. 2, 1939, to June 5, 1948</td>
</tr>
<tr>
<td>GROVER L. BROADFOOT</td>
<td>Mondovi</td>
<td>from June 5, 1948, to Nov. 15, 1948</td>
</tr>
<tr>
<td>THOMAS E. FAIRCHILD</td>
<td>Milwaukee</td>
<td>from Nov. 15, 1948, to Jan. 1, 1951</td>
</tr>
<tr>
<td>VERNON W. THOMSON</td>
<td>Richland Center</td>
<td>from Jan. 1, 1951, to Jan. 7, 1957</td>
</tr>
<tr>
<td>STEWART G. HONECK</td>
<td>Madison</td>
<td>from Jan. 7, 1957, to Jan. 5, 1959</td>
</tr>
<tr>
<td>JOHN W. REYNOLDS</td>
<td>Green Bay</td>
<td>from Jan. 5, 1959, to Jan. 7, 1963</td>
</tr>
<tr>
<td>GEORGE THOMPSON</td>
<td>LaCrosse</td>
<td>from Jan. 7, 1963, to Jan. 5, 1965</td>
</tr>
<tr>
<td>BRONSON C. LA FOLLETTE</td>
<td>Madison</td>
<td>from Jan. 5, 1965, to Jan. 6, 1969</td>
</tr>
<tr>
<td>ROBERT W. WARREN</td>
<td>Green Bay</td>
<td>from Jan. 6, 1969, to Oct. 8, 1974</td>
</tr>
</tbody>
</table>
VICTOR A. MILLER, Saint Nazianz from Oct. 8, 1974, to Nov. 25, 1974
BRONSON C. La FOLLETTE, Madison from Nov. 25, 1974, to Jan. 5, 1987
JAMES E. DOYLE, Madison from Jan. 7, 1991 to
DEPARTMENT OF JUSTICE

JAMES E. DOYLE .......................... Attorney General
PATRICIA J. GORENCE ........................ Deputy Attorney General
ANDREW COHN .......................... Executive Assistant

LEGAL STAFF

ROBERT A. SELK .......................... Admin., Legal Services Division
PETER C. ANDERSON ........................ Assistant Attorney General
WALTRAUD A. ARTS ........................ Assistant Attorney General
RUTH A. BACHMAN ........................ Assistant Attorney General
THOMAS J. BALISTRERI ....................... Assistant Attorney General
PAUL L. BARNETT ........................ Assistant Attorney General
MARY D. BATT ........................ Assistant Attorney General
DAVID J. BECKER ........................ Assistant Attorney General
MARY V. BOWMAN ........................ Assistant Attorney General
BURNETTA L. BRIDGE ......................... Assistant Attorney General
JANETTE BRIMMER ........................ Assistant Attorney General
MARY E. BURKE ........................ Assistant Attorney General
PETER J. CANNON ........................ Assistant Attorney General
JUAN B. COLAS ........................ Assistant Attorney General
BRUCE A. CRAIG ........................ Assistant Attorney General
F. THOMAS CREERON III .................... Assistant Attorney General
THOMAS J. DAWSON ........................ Assistant Attorney General
THOMAS L. DOSCH ........................ Assistant Attorney General
LAURA A. DULSKI ........................ Assistant Attorney General
STEVEN D. EBERT ........................ Assistant Attorney General
SHARI T. EGLESON ........................ Assistant Attorney General
KATHLEEN M. FALK ........................ Assistant Attorney General
DANIEL S. FARWELL ......................... Assistant Attorney General
DAVID T. FLANAGAN ......................... Assistant Attorney General
MAUREEN McGYNN FLANAGAN ................ Assistant Attorney General
MATTHEW J. FRANK ........................ Assistant Attorney General
JAMES M. FREIMUTH ......................... 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
JOHN S. GREENE ........................ Assistant Attorney General
J. DOUGLAS HAAG ........................ Assistant Attorney General
JERRY L. HANCOCK ........................ Assistant Attorney General
CRAIG HANSON ........................ Assistant Attorney General
CYNTHIA HIRSCH ........................ Assistant Attorney General
DAVID E. HOEL ........................ Assistant Attorney General
CHARLES D. HOORNSTRA .................... Assistant Attorney General
JAMES SCHNEIDER  Assistant Attorney General
DONALD W. SMITH  Assistant Attorney General
MARK E. SMITH  Assistant Attorney General
STEPHEN M. SOBOTA  Assistant Attorney General
LORRAINE C. STOLTZFUS  Assistant Attorney General
MARYANN SUMI  Assistant Attorney General
LAURA M. SUTHERLAND  Assistant Attorney General
LISA P. TAYLOR  Assistant Attorney General
STEVEN E. TINKER  Assistant Attorney General
BARBARA W. TUERKHEIMER  Assistant Attorney General
RICHARD A. VICTOR  Assistant Attorney General
WARREN D. WEINSTEIN  Assistant Attorney General
SALLY L. WELLMAN  Assistant Attorney General
STEVEN B. WICKLAND  Assistant Attorney General
ARNOLD J. WIGHTMAN  Assistant Attorney General
GERALD S. WILCOX  Assistant Attorney General
WILLIAM H. WILKER  Assistant Attorney General
WILLIAM C. WOLFORD  Assistant Attorney General
CHRISTOPHER G. WREN  Assistant Attorney General
E. GORDON YOUNG  Assistant Attorney General

1 Resigned, 1991
2 Resigned, 1992
3 Appointed, 1991
4 Appointed, 1992
5 Retired, 1991
6 Retired, 1992
Liability; Physicians And Surgeons; Volunteer physicians who give immunizations for local public agencies under rules of the Department of Health and Social Services are not state agents for purposes of liability indemnification. OAG 1-91

March 25, 1991

Gerald Whitburn, Secretary
Department of Health and Social Services

Your predecessor asked my opinion whether certain volunteer physicians are covered as state agents by section 895.46(1)(a), Stats., so as to be entitled to indemnification in case of liability. That statute covers state employes for liability arising from acts “within the scope of employment” and covers agents for acts “within the scope of their agency.”

In my opinion the volunteer physicians are not covered as agents by this statute.

The backdrop is that the Department of Health and Social Services (Department) has the responsibility to “carry out a statewide immunization program.” Sec. 140.05(16), Stats. The
Department is to undertake a program of public awareness; to design, print, and distribute appropriate reporting and waiver forms; to investigate outbreaks and otherwise maintain surveillance of vaccine preventable diseases; and to provide guidance to parents, physicians, schools and local public health agencies. Wis. Admin. Code § HSS 144.09 (1990). Each local public health agency is responsible to provide the immunization where the Department provides the serum free of charge; the responsibility for making the needed immunization may be transferred from the local public health agency to a school or day care center. Wis. Admin. Code § HSS 144.08 (1990). Every local health agency has a physician-sponsor. If a local health agency has no physician directly on its staff, the agency enters into a written agreement with a private physician whereby the private physician sponsors the local immunization program operated by the agency.

The agents covered by this statute must be distinguished from independent contractors. In some circumstances an independent contractor can be an agent. See Restatement (Second) of Agency § 2 at 12, 14 (1958). But the agents under this statute are the common law agents where the master is liable for the torts of the servant under the principle of respondeat superior. To be such an agent, the master must have the right to exercise close control of the details of the work. See Arsand v. City of Franklin, 83 Wis. 2d 40, 45-46, 264 N.W.2d 579 (1978); Kablitz v. Hoefl, 25 Wis. 2d 518, 521, 131 N.W.2d 346 (1964).

There are several reasons for concluding that this statute excludes independent contractors and includes only those who are agents in the traditional master-servant sense. First, agents are described in the same sentence of section 895.46(1)(a) as employees; both employees and agents are protected only when acting within the “scope of” their employment or agency. The concepts of protecting employees and those acting in the “scope” are historically identified with agency in the sense of respondeat superior and master-servant. See Cameron v.
Milwaukee, 102 Wis. 2d 448, 456-57, 307 N.W.2d 164 (1981). Second, the concepts of respondeat superior and master-servant have been applied to employes covered by section 895.46(1)(a). Id. Third, the court of appeals has applied these same concepts to determine that county personnel helping to carry out a state program are not servants for lack of the requisite right of control for respondeat superior purposes. Wilmot v. Racine County, 128 Wis. 2d 138, 150-51, 382 N.W.2d 442 (Ct. App. 1985), reversed on other grounds, Wilmot v. Racine County, 136 Wis. 2d 57, 400 N.W.2d 917 (1987). It follows that they are not agents within the meaning of section 895.46(1)(a).

In addition, my predecessors in office have consistently administered this statute to protect only those agents over whom the state exercises the right of control in the master-servant sense. Thus, indemnity has been denied to court-appointed guardians-ad-litem and private attorneys appointed by the public defender board to represent the indigent in criminal prosecutions, though a staff attorney performing the same service is protected as a state employe. County judges and district attorneys, prior to becoming state employees, were not regarded as agents of the state for indemnity purposes. The reason for this strict interpretation is that the Legislature intended to substitute this indemnity program for private insurance that covered the state and only those of its employes, officers, and others who effectively were integrated into state government itself, such as by being part of a state pay plan as provided in chapter 20. See generally, 75 Op. Att’y Gen. 49, 50-51 (1986); 75 Op. Att’y Gen. 43 (1986). Other, informal advice from Department of Justice attorneys is consistent with these conclusions and is footnoted.1 The alternative to this long-

---

1Two assistant attorneys general have advised that these physicians are not covered as agents, one advice being dated April 24, 1990, and another on March 19, 1979. The latter concluded that the supervising physicians are not indemnified under section 895.46 because the programs are sponsored by local
standing construction would be to finance any independent contractor who helps the state discharge its functions or who acts according to state rules. Highway construction contractors are a case in point. Unquestionably their work is necessary; the state hires them; it inspects their work to assure compliance with state specifications during the course of construction; and the millions of tax dollars paid to the contractors are necessary for the state to discharge its governmental function of facilitating transportation needs. Equally certain, however, is the fact that the contractors are independent contractors who must provide their own liability insurance and hire their own liability insurance and hire their own

1(...continued)

governmental units or agencies and the role of the Department is only to provide the vaccine and perhaps establish rules and guidelines for the conduct of such programs. On August 26, 1987, your office was advised that physicians and psychologists retained by the Department's Bureau of Social Security Disability Insurance to make disability determinations were not agents, the principal factors being that, although they worked from thirty-five to forty hours a week, they never saw claimants directly; their interactions were mainly with disability examiners; and the decision to grant, deny, or call for more medical information rested with the examiner.

To be contrasted is informal advice of December 17, 1987, that an individual executing a Department order regarding communicable disease under section 143.02(5) is an "agent" within the meaning of section 895.46, since section 143.02(5) specifically referred to the individual as an "agent" and the individual would act to execute an order of the Department. In contrast, under the immunization statute, section 140.05(16), the Department merely provides the vaccines and adopts rules regulating the immunization program. The local public health agencies, not the Department, actually conduct the immunizations.

Another advice memorandum to be contrasted is dated November 21, 1986. It concluded that contract physicians participating in departmental nursing home inspection teams are covered under section 895.46 because their role is governmental and no different than that of department staff serving alongside of them. On the other hand, it also concluded that if a claim rested on such a physician's "exercise of medical expertise . . . the right to indemnification would be doubtful." The role of the physician supervising a local public health agency immunization clinic is much closer to the latter scenario.
attorneys when sued; they are not state agents entitled to these services from state government as a matter of statutory right.

I am aware, of course, that there are strong public policy considerations favoring indemnification of the volunteer physicians who participate in this program, especially in view of the fact that our courts have uniformly followed a broad interpretation of the protection afforded by section 895.46. See Schroeder v. Schoessow, 108 Wis. 2d 49, 69, 321 N.W.2d 131 (1982). However, it is clear that such considerations must be addressed to the Legislature since liberal construction cannot be used as a tool to broaden the coverage of section 895.46. American Motors Corp. v. ILHR Department, 101 Wis. 2d 337, 350-51, 305 N.W.2d 62 (1981); Sinclair v. H&SS Department, 77 Wis. 2d 322, 332, 253 N.W.2d 245 (1977); Frye v. Angst, 28 Wis. 2d 575, 582, 137 N.W.2d 430 (1965); Application of Duveneck, 13 Wis. 2d 88, 92, 108 N.W.2d 113 (1961).

Finally, the legislative history reveals that the Legislature has specifically identified groups it has wanted to include in the indemnity program. Thus, separate legislation was enacted to include the Circus World Museum which is wholly owned and run by the State Historical Society, clearly itself a state agency. See sec. 895.46(1)(e), Stats.; 75 Op. Att’y. Gen. 182 (1986). Foster parents, for years argued by many to be agents of the Department, were given insurance protections entirely separate from the indemnity program. See sec. 48.627, Stats. And, quite significantly, in 1989 Wisconsin Act 206 the Legislature accorded agency status to some volunteer physicians in connection with a pilot program, but only in Brown and Racine counties. The express inclusion of this limited class of volunteer physicians, without even considering the meaning of the word "agent," itself strongly implies exclusion of these volunteer physicians.

Applying these general principles here, I believe it follows these physicians are not state agents. The Department only structures the overall program. It does not control the conduct
of individual physicians. The physicians are not directly integrated into state government, say by inclusion in a pay plan, by being a subordinate to someone in the executive branch of state government, or by any other similar exercise of procedural control. Rather, they carry out a state program like counties, cities, and schools generally do. They are associated with the local agencies. A case might be made that they are agents of the local units of government, but I feel it would require specific legislative action to make them state agents, just as 1989 Wisconsin Act 206 did for the volunteer physicians in the pilot project in Brown and Racine counties.

Accordingly, I conclude that legislative action would be necessary to make these physicians Department agents for purposes of the indemnity statute.

JED:CDH
You have asked for an opinion on whether the shining prohibition contained in section 29.245, Stats., applies to game farms. Then Attorney General Bronson LaFollette addressed this question in an opinion issued in 1983, and indicated then that animals located on game farms were considered “unprotected animals” and therefore fell within the exception to the shining proscription. 72 Op. Att’y Gen. 43, 45 (1983). According to that opinion, the shining of unprotected animals (as well as raccoons and foxes) was permitted, provided the light was used only at the point of kill. More accurately stated, then, your present question requests reconsideration of this former opinion.

Before addressing the merits of your question, however, I am compelled to first explain why reconsideration is appropriate. It should be initially noted that for years your department has had no cause to have this matter reconsidered. As your staff advised me, it is only recently that the incidence of game farm shining has increased to levels, which in your department’s opinion, present potential safety problems. Regarding the former opinion, I believe that it does not address two issues critical to resolution of your question, namely, what is meant by the term “unprotected animals” as used in the shining law and how to reconcile the conflicting law created by the interaction of the

---

1The term shining refers to the practice of illuminating, locating or attempting to illuminate or locate deer or other wild animals with flashlights, automobile lights or other lights. Secs. 29.245(1)(d); 29.245(1)(b), Stats.
shining law with the game, fur and deer\(^2\) farm statutes. While the prior opinion states that game farm animals are unprotected, it contains no reasoning to support that conclusion. Even if that analysis had been performed, there is, however, the additional issue of whether the shining prohibition can be applied to game, fur and deer farms,\(^3\) despite other statutes (sections 29.574(6)(a), 29.575(4) and 29.578(4)) which permit harvest of these licensed farm animals in almost any manner. In view of the fact that these issues were unaddressed in the prior opinion, I believe that reconsideration is necessary. Moreover, since the issuance of the 1983 opinion, new case law has developed regarding some objectives of Wisconsin’s shining law. I have therefore reviewed this matter in light of the recent case law on shining and the unprotected animal regulation, and concluded that the shining prohibition is applicable to all animals permitted on game, fur or deer farms with the exception of three species, namely, skunk, weasel, and opossum.

The relevant sections of the shining law, section 29.245, are as follows:

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

.,.,.,.,.

(4) **SHINING WILD ANIMALS WHILE HUNTING OR POSSESSING WEAPONS PROHIBITED.** (a) *Prohibition.* No person may use or possess with intent to use a light for

\(^2\)While you did not specifically request an opinion on the shining prohibition’s applicability to fur or deer farms, I believe that they raise the same issues and therefore have treated them together in this opinion.

\(^3\)These farms will also be collectively referred to as “private animal farms.”
shining wild animals while the person is hunting or in possession of a firearm, bow and arrow or crossbow.

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

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

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

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

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

The law prohibits the practice of shining deer, bear or other wild animals while hunting or in possession of firearms or other weapons. The law also prohibits the shining of wild animals during certain periods of the year without use or possession of weapons. While shining is recognized as a very effective harvest method, the practice is prohibited to safeguard the public health and safety. *See Lac Courte Oreilles Band of Indians v. Wisconsin*, 740 F. Supp. 1400, 1408, 1423 (W.D. Wis. 1990) (hereafter cited as “LCO”).

There are, however, exceptions to the general shining proscription. The one relevant to this opinion concerns shining what are referred to as “unprotected” animals. Subsecs. 29.245(4)(b)2., (5)(b)2., Stats. Hunters traveling on foot may shine these animals at the “point of kill.” As your staff has explained, this term generally refers to illuminating the animal
after the hunter has located the target animal and not at some prior point. The light cannot be used to locate or search out the animal in the dark. For example, in shining raccoons, point of kill refers to the practice of using the light to illuminate the raccoon in the tree after its identification, rather than to cause the animal to "freeze" on the ground as with deer. See LCO, 740 F. Supp. at 1408. The specific application of the term point of kill is, however, contingent upon the hunting practices commonly associated with those animals subject to shining, but in any event refers to the point in time after the identification of the targeted animal.

The first issue presented by your request is whether any of the animals permitted on game, fur or deer farms are subject to the shining exemption for unprotected animals under section 29.245. This raises a subsidiary question of what is meant by the term unprotected animal under the shining law. Although chapter 29 does not contain a definition for this term, your department's game and hunting regulations do define a similar term, unprotected wild animal, at Wisconsin Administrative Code section NR 10.04. It should be noted initially that the difference between these terms is not significant for two reasons. First, wild animals are defined under section 29.01(14) as including any mammal, bird or fish. With this broad definition, there does not appear to be a real distinction between the terms animal and wild animal for purposes of this opinion. Second, subsections (4) and (5) of section 29.245 actually reference the term wild animals.

---

4Wisconsin Administrative Code section NR 10.04 states: "The following wild animals are designated unprotected. No closed season, bag limit, size limit or possession limit applies to these animals.

(1) Opossum, skunk and weasel.
(2) Starlings, English sparrows, coturnix quail and chukar partridge.
(3) Any other wild animal not specified in this [NR 10] chapter."
I also conclude that the NR 10.04 definition should be applied to interpret the term unprotected animal in the shining law. The legislative history of section 29.245 reveals that it was enacted in chapter 190 of the Laws of 1979 and replaced the Department of Natural Resources ("DNR") regulations prohibiting the shining of wild animals while hunting or in possession of weapons. 71 Op. Att'y Gen. 49, 50 (1982). While the Legislature adopted the DNR's shining prohibition, it did not enact in 1979 or subsequently any corollary definition for the term unprotected animal. As of 1979, DNR had, however, published a rule (NR 10.04) defining unprotected wild animals, and this rule has not been changed to date. I am mindful that the Legislature is presumed to have full knowledge of existing laws and administrative agency regulations at the time it enacts new laws. Kindy v. Hayes, 44 Wis. 2d 301, 314, 171 N.W.2d 324 (1969). Since NR 10.04 was effective at the time of the shining law enactment and no other definition was enacted for unprotected animals in 1979 or thereafter, it is reasonable therefore to apply your department's regulatory definition of unprotected wild animals to interpret a similar term contained in the shining law.

Next, I address the application of NR 10.04 to the shining law. There is the threshold matter of which animals are permitted on game, fur and deer farms. They are: otter, beaver, mink, muskrat, marten, fisher, skunk, raccoon, fox, weasel, opossum, badger, wolf, coyote, wildcat, lynx, deer, moose, elk, bear, rabbits and squirrels. Wis. Admin. Code § NR 16.02 (incorporates by reference subsections 29.01(4), (6)). Section NR 10.04 enumerates three subsections of unprotected wild animals. The first and second subsections identify particular species that are not protected. Subsection three is the catch all.

5This opinion will not address shining of raccoon or fox because section 29.245 clearly permits shining of these animals at the point of kill.

6See footnote 5.
phrase, stating that all animals unspecified in DNR’s hunting and trapping regulations are considered unprotected. For these unprotected animals, there are no restrictions on harvest methods, open or closed seasons, bag limits or the like. It is also significant that NR 10.04 does not reference game, fur or deer farm animals as unprotected. Rather, it appears that in determining whether an animal falls within the unprotected class, the animal’s genus and not its geographical location is important. With the exception of skunk, weasel and opossum, the animal species permitted on game, fur and deer farms (as listed above) are specified in NR 10. These animal species, regardless of their location, are regulated by season and thus are excepted from the unprotection definition in NR 10.04(3). An analysis of section 29.245 alone proves therefore that the shining prohibition is applicable to game, fur and deer farms because the animals permitted on these farms (with the exceptions previously noted) do not fall under the shining exemption for unprotected animals.

The second issue presented by your request is how to resolve the conflict created by the interaction of the shining law with the game, fur and deer farm statutes. These laws (sections

\[\text{See also Wis. Admin Code § NR 10.04(1). Additionally, it should be noted that by excepting these animals, I am not stating that they may be shined absent restrictions. Rather, these unprotected animals may be shined only at the point of kill. See subsecs. 29.245(4)(b)2., (5)(b)2., Stats.}

\[\text{The following regulations establish the open and closed hunting seasons (unless noted otherwise) for the game or fur animal denoted in parentheses: Wis. Admin. Code §§ NR 10.01(4)(d) (otter trapping season); 10.01(4)(c) (beaver trapping season); 10.01(4)(a) (mink and muskrat trapping season); 10.02(2) (incorporates by reference Wisconsin’s endangered or threatened species list, which includes marten, wolf and lynx); 10.02(1) (badger, moose and elk); 10.01(3)(h) (coyote); 10.01(3)(d) (wildcat); 10.01(3)(e) (deer); 10.01(3)(g) (bear); 10.01(3)(c) (rabbits); 10.01(3)(a) (squirrels).}]}
29.245, 29.574(6)(a), and 29.575(4) and 29.578(4) are not necessarily ambiguous standing on their own. Rather, it is their interaction which creates conflicting results and poses more difficult problems to resolve. I will first discuss the ambiguity created by the interaction of the statutes, followed by a discussion seeking to harmonize them.

Courts will not generally interpret statutes absent ambiguity. *Dept. of Transp. v. Transp. Comm.*, 111 Wis. 2d 80, 87-88, 330 N.W.2d 159 (1983). An ambiguity exists when reasonably informed persons could disagree about the meaning of the statute or statutes. *Employers Ins. v. Blue Cross & Blue Shield*, 124 Wis. 2d 335, 344-45, 368 N.W.2d 838 (Ct. App. 1985). Ambiguity is created by the interaction of statutes when persons disagree as to what the statutes require. *Sweet v. Medical Examining Board*, 147 Wis. 2d 539, 544, 433 N.W.2d 614 (Ct. App. 1988). This is the case regarding the interaction of the shining law with the game, fur and deer farm laws.

The shining law does not provide any exemption for shining on game, fur or deer farms. Sec. 29.245, Stats. As discussed above, the exceptions to the shining prohibition are narrowly drawn. I have already reviewed for those animals permitted on

---

9Section 29.574(6)(a) states in relevant part:

Such game [farm] birds and animals, except waterfowl, may be taken at any time in any manner by persons qualified under this chapter to hunt thereon.

10Section 29.575(4) states in relevant part:

The [fur farm] licensee shall have the right to manage and control said lands and the licensed fur animals thereon, to take the same at any time or in any manner which the licensee sees fit and deems to the best advantage of the licensee's business, and to sell and transport at any time said fur animals or the pelts taken from them.

11Section 29.578(4) states in pertinent part:

After the complete installation of such fence and after the department has satisfied itself that it is satisfactory and complies with the law, it may issue a license to the [deer farm] applicant describing such lands, and certifying that the licensee is lawfully entitled to use the same for the breeding, propagating, killing and selling of deer thereon according to this section.
private animal farms precisely which ones may be shined under section 29.245. This would thus appear to end the inquiry regarding the extent of the shining exceptions. Under different statutes, however, game and fur farm licensees are permitted to harvest these animals at any time in any manner. Secs. 29.574(6)(a) and 29.575(4), Stats. These laws, at least on their face, permit licensees to harvest animals located on their farms by completely unrestricted methods, without regard for the shining proscription contained earlier in chapter 29. The deer farm statute, section 29.578, presents a similar problem. Subsection (4) of section 29.578 permits deer farm licensees to harvest their deer as provided for by that statute. The only harvest limitations placed on these licensees regard persons authorized to harvest deer on these farms and tagging and notice requirements subsequent to the harvest. Subsecs. 29.578(7), (8), (9), Stats. With the exception of these restrictions, section 29.578 permits deer farm licensees to harvest their deer by any method, again regardless of the shining prohibition. The interaction of section 29.245 with sections 29.574(6)(a), 29.575(4) and 29.578(4) creates therefore an ambiguity because reasonable persons could disagree regarding whether shining is permitted on game, fur or deer farms.

Where an ambiguity exists, as here, it is necessary to look beyond the face of the statute and apply the rules of statutory construction. Sweet, 147 Wis. 2d at 544. The construction rules require an examination of statutory context, subject matter, scope, history and objectives to be accomplished in order to discern the Legislature’s intent. Id. Conflicts between different statutes are generally not favored and should be reasonably construed and harmonized so as to give each full force and effect. Law Enforce. Stds. Bd. v. Lyndon Station, 101 Wis. 2d 472, 489-90, 305 N.W.2d 89 (1981); Glinski v. Sheldon, 88 Wis. 2d 509, 519, 276 N.W.2d 815 (1979).
The legislative history of these laws helps to illuminate the Legislature's intent in their enactment. The game farm law, section 29.574, was enacted in chapter 369 of the Laws of 1929, and at that time did not address methods or times of harvest on these farms. In the Laws of 1961, chapter 77, section 4, the statute was revised, however, to authorize licensees to harvest their animals, with the exception of waterfowl, in any manner.\(^\text{12}\) Subsection (4) of section 29.575, the fur farm statute, was created in chapter 322, section 10, Laws of 1975, and codified the previous laws referencing harvesting of muskrats, mink, otter, raccoon or skunk in any manner.\(^\text{13}\) The deer farm statute, section 29.578, was enacted in chapter 508, Laws of 1929, and has remained unchanged except for some editorial revisions not pertinent to this issue.

Despite the enactment of these laws, the shining law was subsequently created in 1979\(^\text{14}\) without providing exemptions for shining on private animal farms. Since the Legislature is presumed to have been familiar with the game, fur and deer

\(^{12}\)It should also be noted, however, that in chapter 277, Laws of 1959, the game farm law originally protected a larger class of animals. Section 29.574(6)(a) then authorized licensees to harvest by any method with the exception of deer, ruffed grouse, sharp-tailed grouse, prairie chicken and waterfowl. Since these animals (with the exception of waterfowl) were subsequently deleted in the Laws of 1961, it is arguable that this revision means that the Legislature intended to provide game farm licensees with expansive harvest rights on their property. This revision, however, cannot be read independently, but rather should be construed and harmonized with the related statutes on permissible hunting methods so as to give effect to each provision of the statutes involved. See Hansen Storage Co. v. Wis. Transp. Comm., 96 Wis. 2d 249, 256, 291 N.W.2d 534 (1980).

\(^{13}\)The fur farm statute in its initial enactment only pertained to muskrats. Chapter 344, Laws of 1919, did not restrict the methods of muskrat harvest, with the exception of prohibiting shooting or spearing. Chapter 536, Laws of 1955, authorized fur farm licensees to take otter, raccoon or skunk in any manner. Chapter 459, section 10 of the Laws of 1963, authorized the harvest of mink in any manner.

\(^{14}\)See discussion, supra.
farms statutes when it enacted the shining law, it is reasonable to infer that the Legislature did not intend to except these private farm animals from the shining prohibition. Aside from not excepting these animals in 1979, the Legislature has also not seen fit to broaden the shining exemptions since the law's initial enactment.

Subsections (6)(a) and (c) of section 29.574 and subsections (8) and (14) of section 29.578 are revealing in that they cast light on the legislative purpose of these laws. Generally each part of the statute should be interpreted with every other part so as to produce harmonious result. *Milwaukee County v. ILHR Dept.*, 80 Wis. 2d 445, 454 n.14, 259 N.W.2d 118 (1977). In determining the meaning of a single phrase in a statute, it is necessary to examine it in light of the entire section. *Gottfried, Inc. v. Dept. of Revenue*, 145 Wis. 2d 715, 720, 429 N.W.2d 508 (Ct. App. 1988).

Subsection (6) of the game farm law requires licensees to band or tag all animals that are sold or removed from the farm for food consumption. Licensees must also retain sale records for animals acquired for food consumption. As your staff has advised, and is reasonable to infer, one purpose of this subsection is to help guard against the sale and distribution of adulterated food. In the event contaminated meat enters the marketplace, the tagging and recordkeeping requirements would assist in tracking the source of the contamination and hopefully prevent further sale of the contaminated food. Subsections 29.578(8) and (14) also contain similar tagging requirements for the sale of deer. I submit that these subsections are aimed at safeguarding the public health. This purpose suggests that the Legislature intended to authorize private animal farm licensees to operate their farms subject to those regulations necessary to

---

\(^{15}\text{See Kindy, 44 Wis. 2d at 314.}\)
I conclude that the shining prohibition is also necessary to protect human safety and should therefore be applied to game, fur and deer farms.

A court recently addressed the objectives of Wisconsin’s shining law and concluded that section 29.245 is indeed reasonable and necessary to protect human safety. LCO, 740 F. Supp. at 1423. The court concluded that regarding those species which may be shined at the point of kill, they are typically shot with lower caliber bullets and some may be hunted in trees, as opposed to on the ground. LCO, 740 F. Supp. at 1408. If an animal is shined in the tree and the target is missed, the bullet will fall harmlessly to the ground, rather than traveling straight and potentially injuring someone. LCO, 740 F. Supp. at 1423. The court found, however, that shining other species in conjunction with the use of high caliber weapons poses significant safety risks. Id. At night, hunters cannot see what lies beyond their target to identify whether there are persons nearby in homes or campsites. Id. Aside from not knowing what may exist beyond the hunted target, there is the added danger of the force and range of the ammunition that extends far away from the hunter, which presents unacceptable safety risks to the public in and around the hunted area. Id.

These same safety risks also exist on game, fur and deer farms. As stated in your request, nothing precludes a bullet or arrow from going beyond the boundaries of the licensed farm area and injuring people. You also indicated that many game farms are surrounded by nearby residences and public roads, all jeopardizing the public safety, if shining was permitted on these and other private animal farms.

I am not concluding, however, that this is the only purpose for which licensees can be regulated. There may be other permissible purposes for regulating private animal farms, such as protection and conservation of wildlife and assistance with law enforcement. I do not address these questions in this opinion.
While game, fur and deer farm operators are generally not subject to harvest regulations regarding the animals purchased for their farms, this authority if taken to an extreme could very well result in significant and unnecessary safety problems. Licensees could argue that in addition to shining, they should be authorized to use spring guns, since the law grants them authority to harvest their animals by any manner. Certainly, the Legislature could not have desired these kinds of results, namely, endangerment of public health and safety, in the enactment of sections 29.574(6)(a), 29.575(4) and 29.578(4). It is a basic rule of statutory construction that statutes should be interpreted to avoid absurd or unreasonable results. *State v. Pham*, 137 Wis. 2d 31, 34, 403 N.W.2d 35 (1987); *Acquisition of Certain Lands by Benson*, 101 Wis. 2d 691, 697, 305 N.W.2d 184 (Ct. App. 1981). To authorize shining, with its attendant unacceptable safety risks, on private animal farms would be to adopt a statutory construction in derogation of common sense, which is impermissible to do. *See State v. Clausen*, 105 Wis. 2d 231, 246, 313 N.W.2d 819 (1982). I conclude therefore that there is only one reasonable construction of the shining and private animal farm laws: the shining prohibition should be applied to game, fur and deer farms because it is necessary to protect human safety. With this interpretation, these statutes can be harmonized to provide a rational and sensible construction of the Legislature's intent in the enactment of these laws.

JED:LL
Counties; District Attorney; It is the responsibility of the county to develop position descriptions, determine salaries and compile a list of eligible applicants for investigative and support staff positions within the district attorney’s office. It is the district attorney’s responsibility to approve each new member of the investigative and support staff and to supervise such staff after it is hired. OAG 3-91

March 26, 1991

ANGELINE D. MILLER, Corporation Counsel
Juneau County

You ask whether it is the responsibility of the district attorney or the county to develop position descriptions, determine salaries, compile a list of eligible applicants and select investigative and support staff for positions within the district attorney’s office.

In my opinion, all such responsibilities other than approval and subsequent supervision of such support staff are county responsibilities.

Section 978.05(8)(b), Stats., as created by 1989 Wisconsin Act 31 and amended by 1989 Wisconsin Acts 117 and 336 provides that the district attorney shall:

Supervise, Hire, employ and supervise his or her staff and make appropriate assignments of the staff throughout the prosecutorial unit. The district attorney may request the assistance of district attorneys, deputy district attorneys or assistant district attorneys from other prosecutorial units or assistant attorneys general who then may appear and assist in the investigation and prosecution of criminal matters in like manner as assistants in the prosecutorial unit and with the same authority as the district attorney in the unit in which the action is brought. Nothing in this paragraph limits the authority of counties to regulate the hiring, employment and supervision of county employes.
Section 978.13, as created by 1989 Wisconsin Act 31 and amended by 1989 Wisconsin Acts 117, 122 and 336, provides as follows:

Operational expenses of district attorney offices. (1) The state shall assume financial responsibility for all of the following:

(a) Payment of salaries and fringe benefits for district attorneys, deputy district attorneys and assistant district attorneys and compensation and disbursements of acting district attorneys.

(2) Except as provided in sub. (1), each county in a district attorney's prosecutorial unit has financial responsibility for the operation of the district attorney's office, including, but not limited to all of the following:

(a) Adequate office space in or near the county courthouse for district attorney operations in the county.

(b) The necessary maintenance services for the upkeep and repair of the office space.

(c) Necessary utilities for the office space.

(d) A sufficient law library and subscriptions to legal books and publications necessary for the performance of the duties of the district attorney. Books and publications under this paragraph shall remain assets and property of the county.

(e) Adequate investigators and clerical and all other support staff subject to the approval and supervision of the district attorney.

(f) Office equipment and supplies.

The insertions and deletions made by 1989 Wisconsin Act 117 are shown. The drafting file indicates that the last sentence of section 978.05(8)(b) was inserted as an amendment to 1989 Senate Bill 542 by the Joint Finance Committee, indicating a
conscious intent on the part of the Legislature not to further diminish county hiring responsibilities for county employees in the district attorney’s office.

“In construing a statute, the general object is to give effect to the intent reflected in the language and to give every word, clause and sentence in a statute a construction that would not render it surplus.” State Central Credit Union v. Bigus, 101 Wis. 2d 237, 242, 304 N.W.2d 148 (Ct. App. 1981). See 75 Op. Att’y Gen. 269, 271 (1986). The underscored language inserted in sections 978.05(8)(b) and 978.13(2)(e) clarified that counties are financially responsible for providing adequate support staff of all kinds to the district attorney and that, unless stated elsewhere, counties “regulate the hiring, employment and supervision” of such support staff. Since the words, “[h]ire, employ and supervise” were substituted for the word “supervise” in the first sentence of section 978.05(8)(b), that subsection, standing alone, tends to indicate that district attorneys exercise pervasive powers concerning the hiring process for state employees and that counties exercise pervasive powers concerning the hiring process for county employees.

The last sentence of section 978.05(8)(b), however, is a limitation on language “in this paragraph,” but does not limit language contained in other sections of the statutes. The preexisting language of section 978.13(2)(e) as created by 1989 Wisconsin Act 31, section 2900, was not repealed when section 978.05(8)(b) was amended. That preexisting language granted the district attorney “approval and supervision” with respect to investigative and clerical staff provided by the county.

Under section 978.13(2)(e), the district attorney must approve each new member of the investigative and support staff for his or her office. If the district attorney refuses to approve of any of the individuals on the list of eligible applicants, the hiring process proceeds according to county employment regulations. The district attorney also supervises all investigative and support staff after it is hired. In all other respects, however, the
last sentence of section 978.05(8)(b) is controlling. That sentence grants the county exclusive control over the regulation of the hiring and employment process concerning county employes in the district attorney’s office.

I therefore conclude that it is the responsibility of the county to develop position descriptions, determine salaries and compile a list of eligible applicants for investigative and support staff positions within the district attorney’s office and that it is the responsibility of the district attorney to approve each new member of the investigative and support staff and to supervise such staff after it is hired.

JED:FTC
Counties; Liability; "Volunteer Registration Form" utilized by county human services department to register volunteer drivers who transport department clients is ineffective to release county from civil liability in event client is injured or killed in accident. Moreover, an attempt by a county to obtain such a release from liability may violate public policy. OAG 4-91

March 26, 1991

DAVID J. HERRICK, District Attorney
Florence County

You have requested my opinion as to whether a document entitled "Volunteer Registration Form," which accompanied your request, absolves Florence County from liability in the event a client of the county's Human Services Department is injured or killed while being transported by a driver who volunteers for the purpose.

It is my opinion that the form as drafted is ineffective to release the county from liability. Moreover, even a properly drafted "exculpatory contract" may not survive scrutiny as against public policy.

According to your correspondence, Florence County’s Human Services Department utilizes volunteer drivers to furnish transportation services to its clients. Volunteers use their personal vehicles and are reimbursed for mileage. They receive no other compensation. In addition, I learned that only medical assistance (MA) eligible persons are clients, that MA transportation funds are used to pay mileage, and that these funds consist of both federal and state monies.

As a threshold matter, and to remove any doubt you have, there is no question that, given these circumstances, the county may be held liable. The supreme court settled the issue in Manor v. Hanson, 123 Wis. 2d. 524, 368 N.W.2d 41 (1985). Under facts strikingly similar to those you present, the Manor court concluded that the county in effect "rented" the volunteers' vehicles in the course of the county's business and,
therefore, the county was exposed to liability under section 345.05(3), Stats. Id. at 536-37. In effect, section 345.05(3) imputed to the county the negligence of its volunteer driver. Thus, Florence County is likewise exposed to liability through its volunteer driver program.

It is important to note that the decision in Manor was not based upon an agency theory of liability. Indeed, the supreme court expressly eschewed reliance on any master-servant relationship between the county and the volunteer driver, concluding that that question was "extraneous" to determining the county's liability. Id. at 537. Thus, section 893.80, which is generally implicated whenever a plaintiff seeks to hold a county responsible for the acts of its officials, employes or agents, does not apply in the case of a negligent volunteer driver. See Lemon v. Federal Ins. Co., 111 Wis. 2d 563, 564-65, 331 N.W.2d 379 (1983) (implies sections 345.05 and 893.80 [formerly 895.43] are mutually exclusive).

Recognition of the proper basis upon which liability is grounded is important in assessing the extent of the county's possible exposure. If liability stemmed from section 893.80, then the maximum exposure is $50,000.00. Sec. 893.80(3), Stats. However, since the supreme court in Manor clearly held that section 345.05 governs, the county's exposure is $250,000.00. Sec. 345.05(3), Stats.

The county seeks to avoid liability through the use of the form which volunteer drivers are required to complete. A document which purports to limit or avoid liability is known as an exculpatory contract. While these contracts are generally valid, they will be closely scrutinized and construed against the party who seeks to rely on them. Arnold v. Shawano County Agr. Society, 111 Wis. 2d 203, 209, 330 N.W.2d 773 (1983), overruled on other grounds, Green Spring Farms v. Kersten, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987). Principles of contract law apply, however, to effectuate the intention of the parties. 76 C.J.S. Release § 38 (1952).
You ask whether the county may avoid liability to a client if the volunteer driver executes the form. Clearly not. The client is not a party to the document, and thus is not bound by any release. *See Arnold*, 111 Wis. 2d at 214-15. Likewise, separate causes of action which could be maintained by members of the client’s family will not be extinguished unless they, too, are parties to the form. *Id.*

Moreover, even if a client and family members executed a document containing substantially similar language, the document will not release the county from liability. The only language which arguably purports to do so is as follows:

I also understand that all individual drivers are responsible for insurance coverage and also for all traffic violations and accidents. The Florence County Human Services Department does not assume this responsibility.

This language is deficient in a number of respects. It fails to state any particular conditions regarding the nature and scope of the transportation service. *Cf. Arnold*, 111 Wis. 2d at 211 (exculpatory contract signed by race car driver found ambiguous where it failed to specify conditions concerning nature of race and facility where it took place). Furthermore, it does not set forth in what manner a volunteer driver is, and Florence county is not, “responsible” in connection with accidents. While the term “responsible” could be equated with liability of every kind which flows from an accident, it could also refer only to the obligation to report the accident to the proper authorities, and related tasks. Similarly, the term “accident” is undefined. Thus the question arises whether “accident” refers only to an incident that takes place while the vehicle is operated, or, for example, does it also include entering into or alighting from the vehicle while not being operated.

These concerns are not trivial. The ambiguities identified above will be construed against the county as drafter of the document. *Rensink v. Wallenfang*, 8 Wis. 2d 206, 212, 99 N.W.2d 196 (1959); 76 C.J.S. *Release* § 38 (1952).
Furthermore, an exculpatory contract with broad and general terms will bar only claims within the contemplation of the parties at the time of its execution. *Arnold*, 111 Wis. 2d at 211; *see also* *Brown v. Hammermill Paper Co.*, 88 Wis. 2d 224, 234, 276 N.W.2d 709 (1979) (whether releases which resulted in dismissal on the merits of “complaint and each and every cause of action” on behalf of plaintiffs applied to unnamed defendant held to be jury question); *Pokorny v. Stastny*, 51 Wis. 2d 14, 186 N.W.2d 284 (1971) (jury question as to whether action in contract fell within scope of agreement which released defendants from all claims “in tort or in equity”); *Doyle v. Teasdale*, 263 Wis. 328, 57 N.W.2d 381 (1953) (language releasing tortfeasor from all claims for injuries “known and unknown” held ineffective to avoid setting aside release where injury not within contemplation of parties at time of execution).

The intent of the parties is “critical” given the judicially expressed desire that “a plaintiff should never be compelled to surrender his cause of action against any wrongdoer unless he has intentionally done so, or unless he has received such full compensation that he is no longer entitled to maintain it.” *Brown*, 88 Wis. 2d at 237-38, *quoting from* Prosser, *Torts* § 49, at 304 (4th ed. 1971). Consequently, an exculpatory contract that fails to express the intent of the parties with particularity will not be enforced. *Arnold*, 111 Wis. 2d at 211.

Given these infirmities, the county would be hard-pressed to assert that, by signing the document, clients and their family members knowingly and intentionally waived their rights to recover against the county for injuries suffered in connection with the volunteer driver program. Both the meaning and the scope of the quoted language is ambiguous. Moreover, the absence of particularity in the document concerning the intent on the county’s part that the client waive liability to which the county is exposed under the *Manor* decision largely undercuts its effectiveness as a release of the liability (compare the language of the exculpatory contracts upheld as valid in
Apart from the foregoing, questions arise concerning whether the county could avoid liability in this manner, regardless of whether the driver or the client signs the document. The Wisconsin Supreme Court recognizes there are instances where public policy considerations override the validity of exculpatory contracts. See, e.g., Arnold, 111 Wis. 2d at 210; Merten v. Nathan, 108 Wis. 2d 205, 212-13, 321 N.W.2d 173 (1982); College Mobile Home Park & Sales v. Hoffmann, 72 Wis. 2d 514, 241 N.W.2d 174 (1976). These situations may be summarized as follows:

1. A contract arises out of a business generally thought suitable for public regulation;
2. the party seeking exculpation is engaged in performing a service of great importance to the public;
3. the party seeking exculpation holds itself out as willing to give reasonable public service to all who apply; and
4. the party invoking exculpation possesses a decisive advantage of bargaining strength.

Discount Fabric House v. Wis. Tel. Co., 117 Wis. 2d 587, 593, 345 N.W.2d 417 (1984). Although Discount Fabric House involved the validity of an exculpatory contract by a business in the private sector, these public policy grounds for voiding such contracts apply equally well here.

The county should also be wary of being lulled into a false sense of security by merely confirming that a volunteer driver candidate has automobile insurance. Many such policies expressly exclude from coverage drivers who receive any form of compensation. Thus, if the county intends to rely upon insurance coverage in favor of the volunteer driver, it should take further steps to ensure coverage is in fact available.
First, the county must acknowledge that its MA program is highly regulated by both federal and state agencies. Next, it is equally apparent that the MA program in general, and the transportation service in particular, constitute important service to the public. Third, the county, through its Human Services Department, holds itself out as willing to furnish transportation to all eligible members of the public who apply. Indeed, by accepting federal and state funding, the county is obligated to furnish transportation to eligible members of the public. Finally, the county maintains superior bargaining strength over its clients. By virtue of their eligibility for the program, many clients have no alternative. Thus, they are confronted with the choice of either foregoing a medical or other necessary appointment or accepting transportation offered by the county only after waiving all rights of recovery against the county in the event they are injured. The decisive advantage to the county is clear.

Additionally, the Legislature may have implicitly rejected the availability of exculpatory contracts in this context. Section 345.05(2) authorizes persons to file a claim against counties whenever they suffer damage caused by a negligently operated vehicle owned or operated by the county. The scope of this section would be sharply limited if counties could require medical assistance recipients to waive liability in exchange for transportation services. Moreover, the Legislature's response to the supreme court's decision in Manor did not include enacting language either restricting the scope of section 345.05 or authorizing exculpatory contracts. Rather, the only relevant post-Manor amendment was to place a ceiling, where none existed before, of $250,000.00 on the county's exposure in claims of this sort. 1987 Wisconsin Act 377, sec. 15. Thus, to sanction the county's use of an exculpatory contract would arguably defeat the legislative objective of ensuring a cause of action against the county. See Lemon, 111 Wis. 2d at 570
(legislative policy promotes safety on highway and protects victims from risks of government's use of highways).

In sum, the language of your enclosed document is inadequate to constitute an enforceable exculpatory contract. Moreover, even a properly drafted contract may run afoul of public policy considerations. While a definitive decision necessarily awaits litigation, it would be my suggestion that contact be made with the county's liability insurance carrier to discuss coverage options.²

JED:PLB

²You should be aware that although the county may be unable to compel a waiver of its liability under section 345.05, Stats., that section does not require the county to provide primary insurance coverage. Rather, according to the court in Duncan v. Ehrhard, 158 Wis. 2d 252, 461 N.W.2d 822 (Ct. App. 1990), where more than one policy is involved, the proper procedure is to construe the policy provisions to apportion responsibility. Id. at 258. Thus, section 345.05 does not override contractual language in insurance policies.
Counties; County Human Services Board; Words And Phrases; Under section 46.23(4)(a)1., Stats., officers, employes and directors of public or private entities that furnish "human services" to a county may not be appointed to the county's human services board. The prohibition contained in section 46.23(4)(a)1. does not extend to the appointment of members of the immediate family that do not provide human services to the board, but other legal and practical considerations may mitigate strongly against such appointments. OAG 5-91

March 26, 1991

MATTHEW F. ANICH, Corporation Counsel
Ashland County

DAVID B. DEDA, Corporation Counsel
Price County

You ask, in effect, whether all officers, employes and directors of entities that furnish human services to a county pursuant to section 46.23(5)(c) and (d), Stats., are precluded from serving on the county human services board.

In my opinion, the answer is yes.

The answer to your question depends upon how the term "public or private provider of services" contained in section 46.23(4)(a)1. is defined. Section 46.23(4) provides in part as follows:

COUNTY HUMAN SERVICES BOARD. (a) Composition. 1. In any single-county or multicounty department of human services, the county human services board shall be composed of not less than 7 nor more than 15 persons of recognized ability and demonstrated interest in human services. Not less than one-third nor more than two-thirds of the county human services board members may be members of the county board of supervisors. The remainder of the county human services board members shall be consumers of services or citizens-at-large. No
public or private provider of services may be appointed to the county human services board.

In the health care context, the term "provider" is most commonly employed in the Medicare and Medicaid programs. In the Medicaid context, 42 C.F.R. § 400.203 (1990) indicates that the term "means any individual or entity furnishing Medicaid services under a provider agreement with the Medicaid agency." Specific examples of "providers" are given in the Medicare regulation, 42 C.F.R. § 400.202 (1990).

As is true with the Medicaid regulation, any individual or public or private entity furnishing "human services" as defined in section 46.23(2)(a) that are "provided or purchased or contracted for" within the meaning of section 46.23(5)(c) or "provided directly" within the meaning of section 46.23(5)(d) is a "provider of services."

It is clear that individuals who formally agree to provide human services are precluded from serving on the board under section 46.23(4)(a)1. The more difficult issue is whether officers, employes and directors of public or private legal entities such as corporations that furnish human services are also subject to the prohibition contained in section 46.23(4)(a)1. It is my opinion that they are, for at least three reasons.

First, a statute must be construed so as to effectuate the intent of the Legislature. County of Columbia v. Bylewski, 94 Wis. 2d 153, 164, 288 N.W.2d 129 (1980). The general legislative intent surrounding the enactment of section 46.23 is to "develop and make available . . . a comprehensive range of human services in an integrated and efficient manner[.]" Sec. 46.23(1), Stats. A construction of section 46.23(4)(a)1. that avoids any possibility that preference will be accorded to one provider over another broadens the range of potentially available human services. The extension of the prohibition contained in section 46.23(4)(a)1. to individuals who own, direct or are employed by a provider fosters the intent surrounding the enactment of section 46.23.
Second, a literal construction of statutory language must be rejected where it would be "contrary to the purpose of a statute." Riley v. Doe, 152 Wis. 2d 766, 770, 449 N.W.2d 83 (Ct. App. 1989). Although no legislative history concerning this particular prohibition was located in the drafting file of chapter 39, Laws of 1975, its obvious purpose was to eliminate potential conflicts of interest and assure complete fairness to all potential providers of services. Again, that statutory purpose is fostered if the prohibition contained in section 46.23(4)(a)1. is construed to apply to officers, employes and directors of public or private entities.

Third, "the meaning of a doubtful phrase or word may be ascertained by reference to the meaning of the phrases and words associated with it." Midtown Church of Christ v. City of Racine, 83 Wis. 2d 72, 75 n.4, 264 N.W.2d 281 (1978). The use of the word "public" indicates that the term "provider of services" is not limited solely to the legal entity that furnishes services, since there are few if any instances where a public provider of services would be an individual not under the employ of a public entity. In that regard, statutes must be construed to avoid results which are "unrealistic and unreasonable." Maxey v. Racine Redevelopment Authority, 120 Wis. 2d 13, 20, 353 N.W.2d 812 (Ct. App. 1984). It would be both unrealistic and unreasonable to construe the statutory prohibition in a manner that would limit it to individuals that have formally agreed to furnish services to the board. To limit the applicability of the statute to individuals would provide an unfair advantage to governmental or private corporate providers, since corporations themselves do not serve on boards. From a competitive standpoint, the statute should therefore also be construed in such a fashion that it applies to individuals affiliated with corporate providers or other legal entities, both public and private.

Given these principles of statutory construction, I conclude that the prohibition contained in section 46.23(4)(a)1. was
intended to apply to the entirety of the legal entity that furnishes human services to the board. It therefore must be construed to encompass officers, employes and directors of public or private entities that furnish services to a board, since all such individuals are part of the legal entity that is the provider.

You also ask, in effect, whether section 46.23(4)(a)1. extends to people who do not furnish human services to the board, but are members of the immediate family of individuals subject to the prohibition on appointment contained in that statute.

In my opinion, the answer is no.

"The primary source used in construing a statute is the statutory language itself." State v. Sher, 149 Wis. 2d 1, 8-9, 437 N.W.2d 878 (1989). The term "public or private provider of services" is not susceptible of any interpretation that would result in its application to individuals not formally affiliated with an entity that furnishes human services to the board. The lack of such a prohibition may be an oversight on the part of the Legislature, since the Legislature has expressed its concern about the relationship between public officials and their immediate families in other statutory contexts. See, e.g., secs. 19.44 and 19.46, Stats.

Other legal and practical considerations may, however, mitigate strongly against the appointment of members of the immediate family of individuals subject to the prohibition contained in section 46.23(4)(a)1. For example, a county may have an ethics ordinance. 66 Op. Att’y Gen. 148 (1977). Such an ordinance may impact upon the appointment of members of the immediate family. In addition, members of the immediate family may have conflicts of interest that would prohibit them from voting on certain matters that come before the board. See 76 Op. Att’y Gen. 15 (1987). As stated in 60 Op. Att’y Gen. 98, 99 (1971): "It is good governmental practice . . . for the appointing authority . . . to select supervisors and committee members who have the least potential for conflict of interest."
I therefore conclude that the prohibition on appointments to the human services board in section 46.23(4)(a)1. extends to individuals who are officers, employes and directors of entities that furnish human services to the board but does not extend to people who are members of the immediate family of individuals subject to that prohibition and who do not furnish such services to the board.

JED:FTC
Register Of Deeds; Vital Statistics; Consistent with his or her respective powers and duties under sections 69.03 and 69.05, Stats., and with the specific uniformity requirement of section 69.03(7), a local registrar does not possess the power to adopt and implement procedures more stringent than those directed by the state registrar of vital statistics for issuing certified copies of a vital record under section 69.21(1). OAG 6-91

April 4, 1991

ROBERT G. OTT, Corporation Counsel
Milwaukee County

You ask two questions relating to the respective powers and duties of the state registrar of vital statistics and local registrars. Under section 69.01(15), Stats., "local registrar" means either the register of deeds responsible for filing vital records in the county or the city registrar responsible for filing certificates of births or certificates of births and deaths in his or her city.

Before stating and addressing your specific questions, it is important to recite some background information. Recent well-publicized events again have focused attention on the problem of persons who obtain false identification documents by using certified copies of birth certificates of deceased persons. You believe that those events have called into question the relative ease with which such certified copies can be obtained by those not legally entitled to them. The state registrar has recognized that the problem of fraudulent identification and the use of birth certificates to establish fraudulent identification is one of long standing and, further, one that is difficult to solve.

As it pertains to your questions, section 69.21(1)(a) provides that the state registrar and any local registrar shall issue a certified copy of a vital record to any person if the person submits a written request accompanied by the required fee. However, no registrar may issue any certified copy of a vital record if the event which is the subject of the vital record occurred after September 30, 1907, "unless the requester is a
person with a direct and tangible interest in the record" or unless the registrar has received a court order directing issuance of the vital record. Sec. 69.21(1)(a)2.a., Stats. Under paragraph b. of subdivision 2., all registrars also are prohibited from issuing any certified copy of "[a]ny information of the part of a birth certificate, marriage document or divorce report the disclosure of which is limited under s. 69.20(2)(a) unless the requester is the subject of the information."

Section 69.20(1) defines those persons who are deemed to have the necessary "direct and tangible interest" required under section 69.21(1). Generally speaking, this statute limits the availability of certified copies of birth certificates to the subject of the certificate, his or her immediate family or legal representative and any other person who demonstrates a direct and tangible interest when information is necessary for the determination or protection of a personal or property right. Anyone may obtain an uncertified copy but an uncertified copy must be stamped with a notation that it is uncertified thereby limiting its validity for identification purposes. Sec. 69.21(2), Stats.

Within the vital statistics system the state registrar has extremely broad powers and duties to administer and enforce all vital statistics statutes, direct the system of vital statistics and direct any activity related to the operation of the system. Sec. 69.03(1), (2) and (6), Stats. The local registrar is subject to the direction of the state registrar. Sec. 69.05(1), Stats. Under section 69.03(7) the state registrar is required to conduct training programs to promote uniformity of policy and procedure in the system of vital statistics.

The state registrar has provided some brief guidelines in his handbook distributed to all local registrars. In order to enforce the direct and tangible interest requirement for receiving certified copies, the state registrar recommends that walk-in requesters should show proof of identity unless known to the registrar in which case the registrar should enter "known
personally” on the application. The state registrar further directs that correspondence requests should be signed and have a return address to which the certificate is mailed.

In addition to the guidelines addressed to local registrars, the state registrar requires only a signed letter that states for whom the record is obtained and what that person’s interest is. You specifically ask (1) whether the guidelines issued by the state registrar constitute legally sufficient direction on the issue of maintaining a reasonable level of compliance with the direct and tangible interest requirement of section 69.21(1)(a) and (2) whether the register of deeds may adopt and implement more stringent procedures notwithstanding the state registrar’s disapproval of these methods.

It is your belief and that of the Milwaukee County Register of Deeds that these guidelines are not adequate to enforce a reasonable level of compliance with the direct and tangible interest requirement in cases of mail requests and telephone requests for copies that are billed to credit cards. The latter requests are referred to as “Comcheck” purchases.

In an attempt to solve at least part of the problem, the Milwaukee County Register of Deeds would like to implement certain procedures which have been developed with a goal of requiring that a mail or telephone requester of certified copies submit reasonable evidence that he or she is the person the requester claims to be. In response to this proposal, the state registrar has rejected the idea of more stringent procedures for a variety of reasons.

Neither reported decisions nor any applicable administrative rules specifically address these issues. However, your questions are answered by the vital statistics statutes and, to the extent that any interpretation is necessary, by the state registrar’s interpretation of these mandates. In this latter respect, when the Legislature empowers an agency to apply and enforce a statute, the agency’s interpretation of the statute is entitled to great weight and a rational basis will sustain its interpretation. School
Dist. of Drummond v. WERC, 121 Wis. 2d 126, 133, 358 N.W.2d 285 (1984).

It is my opinion that the register of deeds, as the local registrar in this instance, has no authority to adopt and implement procedures more stringent than those mandated by statute or by the state registrar. A state official has only such authority as he or she is granted by statute or is reasonably implied. Kimberly-Clark Corp. v. Public Service Comm., 110 Wis. 2d 455, 461-62, 329 N.W.2d 143 (1983); Kasik v. Janssen, 158 Wis. 606, 609-10, 149 N.W. 398 (1914). It is not the guidelines alone that constitute legally sufficient direction on the issue of maintaining a reasonable level of compliance but rather the vital statistics statutes and the interpretation thereof by the state registrar. Since the local registrar has a duty to “certify vital records . . . as directed by the state registrar” under section 69.05(4), the statutory scheme does not provide for the local registrar to adopt more stringent policies nor may that authority reasonably be implied.

You indicate your awareness that the Legislature clearly has expressed an intent that policy and procedure in the system of vital statistics be uniform throughout the state citing section 69.03(7). Some of the solutions you propose could not possibly be implemented in some areas of the state while others have been rejected by the state registrar for legal or practical reasons. As other local registrars might share these concerns, I believe that it would be beneficial to now state your local registrar’s proposed solutions and the state registrar’s response in rejecting these methods.

With the goal of requiring that a mail or telephone requester of certified copies submit reasonable evidence that he or she is the person the requester claims to be, the Milwaukee County Register of Deeds has proposed that:

1. A mail-order request will not be processed if the return address is a post office box.
2. Mail requests must include a copy of a driver’s license, identification card, social security card or other similar proof of requester identity.

3. Comcheck purchases will be denied unless requester ownership of the credit card number is verified. “Comcheck” is a credit card process which allows for emergency, same-day telephone sales. We enter the credit card number given over the phone into a computer. If the computer reports that the number is valid, we fulfill the request. We have concluded that credit card access alone is insufficient evidence for the purchase of a record.

The first proposal cannot be implemented fairly and effectively because some people have only a post office box mailing address in areas where the postal service does not deliver to street addresses. I fully realize that a post office box can be used for fraudulent concealment of one’s true identity, but in most instances such boxes serve a valuable and lawful purpose. Milwaukee County’s proposal would serve to deny some people the right to a certified copy, even when they were otherwise eligible, merely because they moved from Milwaukee County to an area in which there is no home delivery service of mail. Outside Milwaukee County in areas where only post office boxes are used, your plan would be totally unworkable or violative of the uniformity requirement of section 69.03(7). Even if this proposal served to resolve most or all of Milwaukee County’s problems, it arguably would create greater problems if applied on a statewide basis.

Requiring enclosed copies of identifying documents has been considered and rejected by the state registrar, even though there would be no statutory impediment to adoption of this additional requirement. Because such documents are easily altered, the state registrar has determined that this action would not prevent fraud, would increase the burden on the public and would result in an additional workload that would exceed available resources.
In the case of telephone credit card requests, the credit card is checked immediately through Comcheck for validity. Therefore, the state registrar believes that this constitutes a better identification process than now exists through the mail. He further believes that it would be counterproductive to refuse this service because some people are in desperate and immediate need of a certified birth certificate. I find no legal or practical basis to disagree in any respect with the state registrar's observations and policies. The vital statistics system is not without protection against the illegal practices you seek to eliminate. The state registrar has a program to match birth and death records and thereafter to note on the birth record that the person is deceased. Further, with the repeal and recreation of section 69.24(1)(b) under 1985 Wisconsin Act 315, effective November 1, 1986, it now is a felony to fraudulently obtain a certified copy of a birth certificate carrying a fine of not more than $10,000 or imprisonment of not more than two years or both.

JED:DPJ
Criminal Law; Extradition; Law Enforcement; Prisons And Prisoners; Sheriffs; Uniform Criminal Extradition Act; A Wisconsin law enforcement officer may transport a prisoner out of state for emergency medical treatment. Upon leaving Wisconsin, a law enforcement officer from the receiving state must take custody of the prisoner. The prisoner may be brought back to Wisconsin using the Uniform Criminal Extradition Act, section 976.03, Stats. OAG 7-91

April 10, 1991

JAMES DUVALL, Corporation Counsel
Buffalo County

You state that the closest hospital to the Buffalo County Jail is in Wabasha, Minnesota. The closest hospital to southern Buffalo County is in Winona, Minnesota. You ask whether a Wisconsin law enforcement officer may take a prisoner to Minnesota for emergency medical treatment, whether the officer may detain the prisoner when he is in Minnesota and whether the officer may bring the prisoner back into Wisconsin.

In my opinion, a law enforcement officer may take a prisoner out of Wisconsin for emergency medical treatment. However, upon leaving Wisconsin, a law enforcement officer of the receiving state must take custody of the prisoner. In addition, the prisoner may only be returned to Wisconsin using the Uniform Criminal Extradition Act. As is apparent from the discussion that follows, these required procedures present serious practical problems.

A sheriff and his or her deputies have county wide jurisdiction. Secs. 59.23 and 59.24, Stats.; 50 Op. Att’y Gen. 47, 48 (1961). Unless specifically authorized by statute, however, they have no authority outside of their jurisdiction. 1910 Op. Att’y Gen. 373 (1909); McLean v. State of Mississippi, 96 F.2d 741, 744-45 (5th Cir. 1938), cert. denied, 305 U.S. 623 (1938). For example, Wisconsin statutes authorize sheriffs to transport criminals through other counties. Sec. 59.25, Stats. Under
section 976.04, Stats., the Uniform Act on Close Pursuit, any member of a duly organized state, county or municipal peace unit of another state who enters Wisconsin in close pursuit may arrest the person in this state. Therefore, if neighboring states were signatories to the Uniform Act on Close Pursuit, Wisconsin officers entering those states in close pursuit would have arrest powers. Absent such a law, however, Wisconsin’s authority, and the authority of any Wisconsin officer, stops at the state line.

The sheriff must provide appropriate care or treatment for prisoners, and “may transfer the prisoner to a hospital . . . making provision for the security of the prisoner.” Sec. 302.38(1), Stats.; 77 Op. Att’y Gen. 249 (1988). In a medical emergency, the sheriff should transport the prisoner to a facility that is able to provide the necessary care or treatment in a timely manner. A failure to do so would subject the sheriff to potential liability.

If the sheriff decides to take the prisoner to a medical facility that is not in Wisconsin, the sheriff should proceed under the Uniform Criminal Extradition Act, section 976.03. That act is applicable to “any person charged . . . with treason, felony or other crime, who has fled from justice” and is found in another state. Sec. 976.03(2), Stats. The states bordering Wisconsin have adopted the Uniform Act. A person has fled from justice, if “having been in a state when a crime is alleged to have occurred within its borders, and being charged with the offense, is found outside the state.” State ex rel. Krueger v. Michalski, 1 Wis. 2d 644, 647, 85 N.W.2d 339 (1957). Our supreme court has adopted the general rule that the mode or manner of a person’s departure from the state does not affect his status as a fugitive from justice, even if the departure is involuntary or under legal compulsion. State ex rel. Jackson v. Froelich, 77 Wis. 2d 299, 311, 253 N.W.2d 69 (1977); State ex rel. O’Connor v. Williams, 95 Wis. 2d 378, 382, 290 N.W.2d 533
(Ct. App. 1980). The test described by Justice Harlan over eighty years ago is still applicable:

So that the simple inquiry must be whether the person whose surrender is demanded is in fact a fugitive from justice, not whether he **consciously** fled from justice in order to avoid prosecution for the crime with which he is charged by the demanding state. A person charged by indictment or by affidavit before a magistrate with the commission within a state of a crime covered by its laws, and who, after the date of the commission of such crime, leaves the state, -- no matter for what purpose or with what motive, nor under what belief, -- becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice . . . .

*Appleyard v. Massachusetts*, 203 U.S. 222, 227 (1906). The fact that a person has left the state with the knowledge and consent of state officials does not preclude him from being subject to extradition. *Chamberlain v. Celeste*, 729 F.2d 1071 (6th Cir. 1984).

Under the Uniform Criminal Extradition Act the arrest of a person may be made by an officer or a private citizen without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year. Sec. 976.03(14), Stats. Under section 976.03(13), a fugitive may be arrested before requisition, upon a warrant issued by a judge in the other state, even if the crime in Wisconsin is not a felony. Therefore, if the person being brought to Minnesota has been charged with or convicted of a felony, Wisconsin may maintain security over the prisoner through the agency of a Minnesota peace officer even before the extradition process is begun. If the prisoner has been charged with or convicted of a misdemeanor, he or she cannot be arrested without a warrant. Under section 976.03(13), however, a judge in Minnesota may issue a warrant
directing a Minnesota peace officer to take custody of the prisoner. After an arrest under that subsection, the accused must be taken before a judge with all practicable speed. The judge may then commit the person to local custody in order to provide time for extradition. Sec. 976.03(15), Stats.

When a prisoner is brought to Minnesota for emergency medical treatment, you should proceed under the Uniform Criminal Extradition Act, informing the local officials of the prisoner's presence in their jurisdiction and, if appropriate, ask that they arrest him or her without a warrant. In any event, you are required to use the Uniform Criminal Extradition Act to obtain the prisoner's return to Wisconsin. That Act provides the authority for the Wisconsin officers to have custody of the prisoner on the return to Wisconsin, either by the governor's warrant or by execution of a valid waiver by the prisoner. Sec. 976.03(8) and (27), Stats. This analysis is the same whether the person is convicted, convicted and sentenced or is being held for trial, because the Uniform Criminal Extradition Act applies to persons charged with treason, felonies or other crimes. Because misdemeanors are crimes, section 939.12, persons charged with misdemeanors are subject to extradition.

The Uniform Criminal Extradition Act does not apply to forfeitures because in Wisconsin, conduct punishable by forfeiture is not a crime. Sec. 939.12, Stats. Therefore, someone charged in Wisconsin with a forfeiture who happens to be found in Minnesota is not subject to extradition.

If the problems of obtaining medical treatment and maintaining custody are a recurring problem in your county or other border counties, it may be appropriate for Wisconsin and the other states to enter into compacts. These compacts could waive the extradition process for persons transported across state lines for emergency medical treatment and could also provide that the appropriate officers of each state could exercise their law enforcement powers over that prisoner for that specific purpose. The extradition process is a right conferred on the state
and the state may waive that right as to an identifiable group of citizens as long as the waiver is not arbitrary. *State ex rel. Niederer v. Cady*, 72 Wis. 2d 311, 317-18, 240 N.W.2d 626 (1976). Both the Interstate Corrections Compact, section 302.25(5)(a), and the Uniform Act for Out-of-State Parolees Supervision, section 304.13(3), dispense with the formal extradition process. If the problems you describe in Buffalo County occur frequently or reflect similar problems in other border counties, representatives of those counties may wish to ask the Governor to consider entering into compacts with our neighboring states.

The Uniform Criminal Extradition Act allows the Wisconsin sheriff to maintain security on a prisoner in custody for a crime. The prisoner may be transported to Minnesota with the assistance of Minnesota law enforcement authorities and kept in custody. The sheriff has the authority to transport the prisoner back to Wisconsin upon his waiver of extradition or the completion of extradition proceedings. Of course, in the usual case it is probably preferable to take Wisconsin prisoners to Wisconsin hospitals. In emergency situations, however, the Uniform Criminal Extradition Act provides the means for maintaining Wisconsin's jurisdiction over the prisoner.

JED:AL
County Highway Commissioner; Words And Phrases; A county board may provide that the term of office of the county highway commissioner is indefinite. OAG 8-91

April 15, 1991

RENEE J. SAMUELSON, Corporation Counsel
Waushara County

1989 Wisconsin Act 171 created section 59.07(34g), Stats., giving the county board the authority to establish the term of service of a highway commissioner who is elected under section 83.01(1)(a). It also amended section 83.01(2). Before amendment that law provided that upon election the county highway commissioner served until the first Monday in January of the second year succeeding the year of the election and “if reelected it shall be for a term of two years.” 1989 Wisconsin Act 171 amended section 83.01(2) to provide “[u]nless the county board establishes a different term of service by ordinance . . . the . . . highway commissioner shall serve until the first Monday in January of the 2nd year succeeding the year of the election, and if reelected it shall be for a 2-year term.” You ask whether the county board may provide that the commissioner’s term is indefinite. I conclude that it may.

Unless a term of office is set by constitution, the Legislature may enlarge or restrict the term of office. The State and De Guenther v. Douglas, 26 Wis. 428, 430-31, 7 A.R. 87 (1870). Because the office and tenure of the highway commissioner are “created by the legislature; they can be changed or abolished entirely by the legislature.” State ex rel. Reuss v. Giessel, 260 Wis. 524, 529, 51 N.W.2d 547 (1952); Moses v. Board of Veterans Affairs, 80 Wis. 2d 411, 259 N.W.2d 102 (1977). There is no doubt that the Legislature has the authority to change the term of office of highway commissioner or to allow the county board to change the term of office of highway commissioner. The only question, therefore, is whether the Legislature intended to give the county
boards the option of making the highway commissioner's term indefinite.

The Legislature certainly recognizes the concept of an indefinite term. For example, subsections 17.07(4) and (5) concerning the removal of appointive state officers, discuss the removal of officers who have been appointed "for a fixed or indefinite term." Nothing in 1989 Wisconsin Act 171 indicates that the Legislature meant to preclude an indefinite term or meant to restrict its authorization to the county board in any way whatsoever. Under section 83.01(2), as amended by 1989 Wisconsin Act 171, the county board could provide a definite but very long term of office, for example thirty years, thereby effectively providing an indefinite term. I must conclude that the Legislature meant to allow the county board to set whatever term of office it chose; "[n]o sufficient reason presents itself why this intention should not have effect . . . ." Douglas, 26 Wis. at 431.

Because the county board sets the term of office of highway commissioner under 1989 Wisconsin Act 171, it can change that term of office. Giessel, 260 Wis. at 529. Of course, the county board would also be able to remove the county highway commissioner under section 17.10(2).

The Legislature did not amend section 17.22 which determines how vacancies in appointive county offices are filled. Section 17.22(1) provides: "[B]ut the term of any person appointed by the county board to fill a vacancy in the office of county highway commissioner shall terminate the first Monday of January of the second year next succeeding the appointment." The term of office set by county ordinance, therefore, would begin on the Tuesday following the first Monday of January of the second year next succeeding the appointment.

You also ask whether the nonstatutory provisions of 1989 Wisconsin Act 171 together with the county board's action has created a vacancy in the office of Waushara County Highway
Commissioner. That law states: "This act first applies to a term of service beginning after the expiration of a term of service to which a person was elected prior to the effective date of this Section." Under section 83.01(1)(a), if the county board fails to elect a highway commissioner, the county may not participate in state allotments for highways. If the law contains no contrary provisions, an officer is entitled to hold office until his or her successor is elected and qualified. *State ex rel. Pluntz v. Johnson*, 176 Wis. 107, 184 N.W. 683 (1921), vacated, 176 Wis. 112, 186 N.W. 729 (1922); *Sheboygan County v. Gaffron*, 143 Wis. 124, 126 N.W. 542 (1910). Expiration of a term of office does not create a vacancy under section 17.03. *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 125 N.W.2d 636 (1964). The law abhors vacancies in public office and courts generally indulge in a strong presumption against a legislative intent to create such a condition. 62 Op. Att’y Gen. 35, 37 (1973).

There was no vacancy in the office of Waushara County Highway Commissioner because of the county board’s actions. Section 17.03(10) is not applicable because the county highway commissioner is an appointive, not an elective, office, even though the method of appointment is election by the county board. 61 Op. Att’y Gen. 116, 117-18 (1972).

JED:AL
County Board; County Executive; Public Property; County ordinances delegating the authority to decide the terms under which county property will be sold and delegating the authority to negotiate certain public works contracts to county committees do not impermissibly infringe upon the administrative duties and powers of the county executive. OAG 9-91

April 15, 1991

RICHARD HAMILTON, Corporation Counsel
Outagamie County

You ask two questions concerning the respective roles of the county board and the county executive. The Outagamie County Board has passed an ordinance delegating the authority to decide the method and means for selling county property, and the authority to conduct negotiations for sales of property, to the Property Committee. The county board has also granted the authority to negotiate contracts for public works of less than $20,000 and the selection of architectural and engineering firms to the Property Committee. You ask whether these ordinances infringe upon the administrative duties and powers of the county executive.

As explained in 68 Op. Att’y Gen. 92, 95 (1979), the role of the county board is primarily policy making and legislative. The county executive has the duty to “[c]oordinate and direct by executive order or otherwise all administrative and management functions of the county government not otherwise vested by law in other elected officers.” Sec. 59.031(2)(a), Stats.

The net effect . . . is to place the coordination and direction of all administrative and management functions exercised by county committees in the hands of the county executive, since such committees are not “. . . other elected officers,” and, with but few exceptions, such committees exercise delegated administrative and management
authority rather than authority which is specifically vested in them "by law."

Section 59.07(1)(c), Stats., gives the county board the specific authority to "[d]irect the clerk to lease, sell or convey or contract to sell or convey any county property, not donated and required to be held for a special purpose, on such terms as the board approves." The decision to sell county land, and the terms of that sale, are policy decisions which must be made by the legislative authority, the county board.

The county board may, as a matter of policy, determine that it does not want to sell property unless it is sold in a certain manner, for example by auction, under certain conditions restricting use, or above a certain price. The county executive's administrative duties would require him or her to effectuate those county board policies.

It is possible that some of the responsibilities delegated to the committee may conflict with some administrative duties of the county executive. For example, under section 8.01(3)(a) and (b) of the ordinance, the committee is authorized to negotiate contracts, the estimated cost of which does not exceed $20,000. The actual negotiation of the terms of a contract may involve some administrative duties. Ultimately, however, the contract must be accepted by the county board because only the board, or a committee, 74 Op. Att'y Gen. 228, 230 (1985), has the authority to actually enter into the contract. Accepting a particular contract for the construction or repair of a building, therefore, involves a legislative or policy decision, even though the process resulting in that final contract may involve some administrative duties. In short, the decision to enter into a public works contract, and therefore setting the terms of that contract, is primarily a legislative or policy decision. Because the board can set the terms of the contract, it does not infringe on the executive's authority when it does so. The administration
of a contract is primarily an administrative or management function.

You also question the county board's granting the authority to negotiate contracts for public works of less than $20,000 to the Solid Waste Committee and the Property Committee. The county board has the authority to construct, purchase, equip, remodel, operate and maintain all county buildings, structures and facilities. Sec. 59.07(1)(d), Stats. Section 59.08 restricts the board's discretion on entering into public works contracts by requiring that any contract over $20,000 must be let to the lowest responsible bidder and by providing that if the estimated cost of the contract is between $5,000 and $20,000, the board must give a Class 1 notice before it contracts for the work or must contract with a person qualified under section 66.29(2). The statute specifically provides, "[a]ny public work, the estimated cost of which does not exceed $20,000 shall be let as the board may direct." Sec. 59.08(1), Stats.

In its public works and public property ordinance, the board is directing, as section 59.08(1) requires, the method of letting contracts the estimated cost of which does not exceed $20,000. Decisions on whether to require sealed bids, or any bids at all, or alternatively to advertise for proposals are policy questions to be decided by the county board in those areas where the state statutes grant discretion. Likewise the board can decide, as a matter of policy, to adopt a procedure for selecting providers of architectural and engineering consulting services and set qualifications for those firms.

As noted in earlier opinions, it is difficult to define precisely the demarcation between policy and administrative matters, between legislative and executive functions. Almost inevitably, the functions will overlap or coalesce. In light of the recent vintage of these ordinances as well as the fact that the county executive saw no need to veto them, I cannot say that they are invalid.
In closing, I would note that this office only reluctantly determines the meaning or validity of municipal ordinances. 77 Op. Att’y Gen. Preface No. 3 H (1988). It is possible that these ordinances in actual operation will impinge on the county executive’s administrative functions. See 76 Op. Att’y Gen. 60, 64 (1987).

JED:AL
Gambling; Lotteries; Lottery Board; Words And Phrases;
Under article IV, section 24 of the Wisconsin Constitution the
Legislature may not authorize any scheme involving prize,
chance, and consideration without amending the constitution
unless the scheme falls within the bingo, raffle, on-track pari-
mutuel or state lottery exceptions to the constitution.
OAG 10-91

May 2, 1991

WALTER KUNICKI, Chairperson
Assembly Organization Committee
The Assembly Committee on Organization has requested that
I render a formal opinion on the following question. "[D]oes
Wisconsin Constitution, article IV, section 24, prohibit all forms
of gambling in Wisconsin, except for those matters specified in
the Constitution, or does the constitutional term ‘lottery’ have a
narrow scope that would allow legislation to be enacted
legalizing the forms of gambling to which reference is made in
OAG 3-90?"

You have, on behalf of the committee, quoted at length from
79 Op. Att’y Gen. 14 (1990) in which my predecessor opined:

I therefore believe it to be clear, and conclude, that both
the framers of the constitution and the Legislature in its
various enactments, treat lotteries as a form of gambling
separate and distinct from the other methods of gambling
such as betting, playing gambling machines and the
like . . . .

. . . . I wish to emphasize that the forms of gambling
encompassed by the definition of bet and gambling
machines are prohibited by statute only, and do not come
within the purview of prohibited lotteries as described in
the constitution of this state. Therefore, the Legislature
may allow casino-type gambling in the State of Wisconsin.
Because my predecessor’s opinion is contrary to the prior decisions of the Wisconsin Supreme Court, the legislative history of the 1955 criminal code revision and the manner in which the Legislature has treated the term “lottery” in proposing amendments to our constitution and enacting legislation, I have determined to depart from that opinion.

In construing the constitution, courts rely on the same rules that govern statutory construction. Where there is no ambiguity, there is no room for judicial construction. Ripley v. Brown, 141 Wis. 2d 447, 415 N.W.2d 550 (Ct. App. 1987). The courts in interpreting constitutional provisions will examine:

“(1) The plain meaning of the words in the context used;
“(2) The historical analysis of the constitutional debates . . . .
“(3) The earliest interpretation of this section by the legislature as manifested in the first law passed following the adoption of the constitution. . . .”


Article IV, section 24(1) of the Wisconsin Constitution states “[e]xcept as provided in this section, the legislature shall never authorize any lottery or grant any divorce.” Words are to be given their plain meaning, that is their ordinary and approved meaning. Sec. 990.01(1), Stats. State v. Williquette, 129 Wis. 2d 239, 385 N.W.2d 145 (1986). The words should be construed

---

1The State of Wisconsin is currently a defendant in a lawsuit involving the issue of the gambling activities which must be the subject of negotiations between the state and Indian Tribes under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq., Lac du Flambeau Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al., Case No. 90-C-0408-C. (United States District Court for the Western District of Wisconsin.) The issue in that litigation is different than the issue addressed in this opinion.
to give effect to the intent of the framers. *State v. Beno*, 116 Wis. 2d at 138.

The term "lottery" has been continuously and uniformly construed by the courts to include the three elements of prize, chance and consideration. *Kayden Industries, Inc., v. Murphy*, 34 Wis. 2d 718, 150 N.W.2d 447 (1967); *State v. Laven*, 270 Wis. 524, 71 N.W.2d 287 (1955); *State ex rel. Regez v. Blumer*, 236 Wis. 129, 294 N.W. 491 (1940); and *State ex rel. Cowie v. La Crosse Theaters Co.*, 232 Wis. 153, 286 N.W. 707 (1939). The Legislature is presumed to enact statutory provisions with full knowledge of the existing laws, including decisions of the Wisconsin Supreme Court interpreting relevant statutes. *Glinski v. Sheldon*, 88 Wis. 2d 509, 520, 276 N.W.2d 815 (1979). The courts would undoubtedly hold that the Legislature had been aware of the judicial definition of lottery for almost fifty years. *See State v. Banks*, 105 Wis. 2d 32, 313 N.W.2d 67 (1981).


As stated by the Wisconsin Supreme Court: “The legislature, the courts, and the attorney general of Wisconsin have traditionally taken a restrictive view of games, schemes, and plans involving a prize, chance, and consideration, condemning
them as lotteries prohibited by the constitution.” *Kayden Industries*, 34 Wis. 2d at 724.

The history of our constitutional provision further evidences that the term as construed by the courts was the definition accepted by the Legislature and the people. Until 1965, article IV, section 24 of the Wisconsin Constitution stated simply “[t]he legislature shall never authorize any lottery, or grant any divorce.” In April of 1965 the people approved a constitutional amendment limiting the definition of consideration as an element of a lottery. Wis. Const. art. IV, § 24(2). The Legislature quickly added these limitations to the statutory definition. Sec. 945.01, Stats.

The next expansion of lotteries was the constitutional amendments authorizing the Legislature to legalize bingo in 1973 and raffles in 1977 when these activities are conducted by religious, charitable, service, fraternal or veterans’ organizations or those to which contributions are deductible for federal or state income tax purposes. Wis. Const. art. IV, § 24(3) and (4). The Legislature thereafter adopted section 945.01(5)(am) which specifically excluded bingo and raffles conducted under chapter 163 from the statutory definition of lottery.

In 1987, article IV, section 24(6) of the Wisconsin Constitution was adopted to provide:

The legislature may authorize the creation of a lottery to be operated by the state as provided by law. The expenditure of public funds or of revenues derived from lottery operations to engage in promotional advertising of the Wisconsin state lottery is prohibited. Any advertising of the state lottery shall indicate the odds of a specific lottery ticket to be selected as the winning ticket for each prize amount offered. The net proceeds of the state lottery shall be deposited in the treasury of the state, to be used for property tax relief as provided by law.

A separate amendment in 1987 authorized on-track, pari-mutuel wagering.
Prior amendments to the constitution, including the 1987 amendments, removed the absolute prohibition against the Legislature’s authorizing a lottery. These amendments narrowed definitions and excepted games and eventually authorized the creation of a state operated lottery. Since these amendments did not modify the preexisting definition of lottery, I can only conclude that the scope of the amendments must be construed identically to the definition of lottery which has been constantly used by the courts, the Legislature and this department. Generally, when a word in one subsection is clear, it will be given the same interpretation as in other subsections of the same section. United States v. Nunez, 573 F.2d 769, 771 (2d Cir. 1978); 2A Singer, Sutherland Statutory Construction § 46.06 n.6 (Sands 4th ed. 1984).

There is additional evidence that the Legislature itself has operated under a broad definition of the term “lottery.” “[T]he overall purpose of the 1965 amendment was to remove the constitutional obstacle to the conduct of the kinds of activities forbidden by Cowie [theater bank nights], Regez [drug store promotional giveaway] and Laven [watching television or listening to radio] . . . under the original sec. 24 of art. IV, Const.” Kayden Industries, 34 Wis. 2d at 730. The amendment to legalize bingo in 1973 and the amendment to authorize on-track, pari-mutuel wagering were necessary only if the term “lottery” was understood to prohibit all schemes involving prize, chance and consideration.

The legislative council report to the criminal code revision in the 1950’s indicated that the definition of lottery included in the code was a “restatement of the rule laid down by the supreme court. State ex rel. Regez v. Blumer, 236 Wis. 129, 294 N. W. 491 (1940); State ex rel. Cowie v. La Crosse Theaters Co., 232 Wis. 153, 286 N. W. 707 (1939); 40 Ops. Atty. Gen. 438 (Wis., 1951).” Kayden Industries, 34 Wis. 2d at 726 (quoting from Wisconsin Legislative Council Reports, comment to 1953 Criminal Code draft of section 345.01(2)). I must, therefore,
conclude that the term "lottery" throughout article IV, section 24, refers to any game, scheme or plan comprising prize, chance and consideration.

Under the constitution, the Legislature may authorize any type of state-operated lottery subject only to the advertising, use-of-revenue and off-track wagering restrictions. The Legislature may not, however, authorize such lotteries if they are not operated by the state, or fall within the bingo, raffle or on-track, pari-mutuel exceptions. Any other lottery requires an amendment to the constitution.

In reaching this conclusion, I recognize that article IV, section 24(6) of the Wisconsin Constitution includes provisions relating to promotional advertising and the required use of lottery proceeds. Although these provisions unquestionably limit the Legislature's discretion regarding the administration and regulation of a state lottery, they do not in any way limit the scope of gaming which may be authorized by the Legislature. There is nothing in the language of the amendment to prohibit legislative authorization of casino-type games by the Lottery Board.

The Legislature has plenary power to legislate all laws not expressly prohibited by the constitution. Jacobs, 139 Wis. 2d at 507. Although the constitutional requirement to disclose the odds of selecting a winning ticket may, as a practical matter, make implementation of some lottery games more difficult than others, it does not stand as an absolute barrier to games such as those involving casino-type gambling.

Nor do I view the use of the word "ticket" in the third sentence of article IV, section 24(6) of the Wisconsin Constitution as limiting the lottery to games employing a ticket as a method of determining the winner. The plain, ordinary definition of ticket is "a written, typed, printed, stamped, or engraved notice, record, memorandum, or token." Webster's Third New International Dictionary 2389 (1986). Under this definition, a ticket is evidence of participation in a lottery game.
The word ticket does not require that the ticket be in some way used in the play of the game or selection of the winner. Compare, e.g., the definition of raffle, chapter 163. Under the plain meaning of the word “ticket” as set forth above, a note, document or token in writing which serves as a permit to participate in any specific game would serve as a ticket within the meaning of the constitutional provision.

The Lottery Board currently operates three such games involving tickets. The instant game television show does not use the ticket to determine the amount of the prizes awarded on the television show. A ticket is used to determine the participants in the show. Megabucks and SuperCash tickets are memoranda of the numbers selected by the player. The winners are ultimately determined by mechanical selection of numbered balls.

The first legislation after the 1987 amendment authorized the Lottery Board to use lottery tickets or lottery shares. See secs. 565.02(3)(b)5., 565.17, 565.27(1)(b) and 565.27(3), Stats. Section 565.02(3)(g) further gives the Lottery Board authority to define “lottery shares.” This is compelling evidence that the Legislature did not view the constitutional reference to “tickets” as a restriction on the conduct of games.

The Legislature also contemplated that the Lottery Board could have conducted games in which the winners were determined by the outcome of a race or other sporting event. Enabling legislation for the state lottery provides that the Lottery Board shall promulgate rules “[d]etermining the types of lottery games to be offered under s. 565.27.” Sec. 565.02(3)(d), Stats. Section 565.27(1) provides:

Subject to this section, the rules promulgated under s. 565.02(3)(d) and (4)(a) and board approval, the executive director shall determine the particular features of and procedures for each lottery game offered. The executive director shall recommend to the board for promulgation by rule under s. 565.02(3)(d) the types of
state or multistate lottery games to be offered, except that no game may be offered for which winners are selected based on the results of a race or sporting event.

There would have been no need for this provision if "lottery" in chapter 565 did not include betting on races or other sports betting.

It is my opinion that any lottery game which is not based on the outcome of a race or sporting event and which includes all of the elements of section 565.27(1)(a) through (f) may be authorized by the Lottery Board. While these requirements may make certain games more difficult or require modifications to meet the provisions of section 565.27(1), the only limitation contained in that section is on games involving races or sporting events. Language in similar statutes in another state has also been interpreted as a broad grant of authority. See Tichenor v. Missouri State Lottery Com'n, 742 S.W.2d 170 (Mo. en banc 1988).

Of course, the Legislature has the power to limit the type of games which the Lottery Board may permissibly authorize. Section 565.27(1) already prohibits the Lottery Board from offering games "based on the results of a race or a sporting event." This exception could be expanded to prohibit card games, casino-type games or any other game the Legislature deems undesirable. The types of games the Lottery Board may offer is solely a legislative decision.

JED: WDW
Employer And Employe; Fire Department; Classification of chapter 213 and chapter 181, Stats., fire departments; Public sector versus private sector departments; The classification of a fire department depends upon the statute under which it was organized. OAG 11-91

May 10, 1991

CAROL SKORNICKA, Secretary
Department of Industry, Labor and Human Relations

Your predecessor stated that the application of various existing and pending state rules and statutes to individual fire departments depends on whether the department is a public sector employer or a private sector employer. For example, section 101.055, Stats., governs public employe's safety and health.

Section 101.055(3)(a) provides, in part, that the Department of Industry, Labor and Human Relations "shall adopt, by administrative rule, standards to protect the safety and health of public employes." A public employe is defined in section 101.055(2)(b) as "any employe of the state, of any state agency or of any political subdivision of the state." A public employer "means the state, any state agency or any political subdivision of the state." Sec. 101.055(2)(d), Stats. The safety standards mandated by section 101.055 are inapplicable to private sector firefighters.

Your predecessor further stated that private sector volunteer fire departments have traditionally been established under chapter 213 and under chapter 181, as nonstock, nonprofit corporations. Section 213.05 provides that:

Any number of persons, not less than 15, not residing in any city or village may organize a fire engine, hook and ladder, sack or other fire company for the protection of life and property in the manner prescribed in ch. 181 and thereupon shall have all the powers of a corporation, including the powers respecting real estate under these
statutes necessary or proper to accomplish the purposes prescribed by its articles of organization, and shall be governed by all the provisions of these statutes applicable thereto.

Finally, your predecessor related that over time some chapter 213 or chapter 181 volunteer fire departments have come to rely on the resources or policies of their local municipal governments. For instance, he explained that chapter 213 or chapter 181 fire departments may acquire operating revenue through assessment on the tax mill rate, by contracting at a fixed rate with the municipality, by billing property owners per call, or by combining any of these methods.

To summarize, the general focus of the inquiry is: a) whether a private sector fire department may be transformed into a public sector department upon reaching a particular level of governmental involvement or sponsorship; and b) whether state regulation of a private sector fire department might, at some point, become appropriate depending on the level of governmental involvement the department has reached.

Your predecessor asked for an opinion on the following specific question:

Is the classification of a volunteer fire department as a private sector or public sector department based on the classification of the entity owning, housing, and maintaining the equipment or on the classification of the entity to which the member firefighters belong?

Ownership or maintenance of fire fighting equipment is not a determining factor in the classification of private sector versus public sector fire departments. The statute governing town fire protection is illustrative. 1983 Wisconsin Act 532 recodified chapter 60, relating to towns. The legislation was developed by the Legislative Council’s Special Committee on Revision of Town Laws. Until the 1983 recodification, provision of fire service by a town board was optional. The recodification required towns to provide fire services. 1983 Wisconsin Act
Section 60.55 governs town fire protection. The Special Committee's note to section 60.55 states that the section gives
the town board broad authority to provide for and fund fire protection. Flexibility in providing fire protection is necessary because of the widely varying circumstances of towns--circumstances that affect the level of fire protection needed or desired, such as population, geography, area, proximity to urban centers and commercial and industrial development.

Section 60.55(1)(a) permits a town board to provide for fire protection in any manner including:

1. Establishing a town fire department.
2. Joining with another town, village or city to establish a joint fire department. . . .
3. Contracting with any person.
4. Utilizing a fire company organized under ch. 213.

Section 60.55(1)(b) authorizes the town board to provide for the equipping, staffing, housing and maintenance of fire protection services. Pursuant to section 60.55(2), the board is also authorized to utilize a variety of mechanisms to obtain funding for fire services, including a levy of taxes on the entire town to pay for fire protection.

This flexible statutory scheme allows the town board to raise money for fire services, to purchase, house, and maintain fire equipment, and to staff the fire protection services, not only with employees of a municipal fire department, but with a private "fire company organized under ch. 213." Sec. 60.55(1)(a)1. and 4., Stats.

The Wisconsin Supreme Court considered a challenge to public funding of a private volunteer fire department in Tonn v. Strehlau, 265 Wis. 250, 61 N.W.2d 486 (1953). In Tonn, residents of two adjoining towns formed a private volunteer fire
department under section 213.05. The town boards of the adjoining towns levied taxes and directly appropriated money to the chapter 213 department to cover its cost of acquiring fire fighting equipment. The court rejected the argument that the town board was restricted to contracting with a private fire department and could not directly appropriate funds to provide the private company with equipment. According to the court, the town’s direct appropriation to the corporation was permissible because of the private corporation’s public purpose. The court observed that in Wisconsin the practice of appropriating public funds to privately owned or controlled corporations was long-continuing and judicially sanctioned. There is no suggestion in Town that the corporation’s acceptance of public funds to undertake a public purpose altered its private sector status.

In my opinion, a privately organized chapter 213 or chapter 181 fire department does not lose its private character by accepting funds or equipment from a local governmental unit. A similar conclusion was reached in 66 Op. Att’y Gen. 113 (1977). The Palmyra Volunteer Fire Department was organized as a nonstock, nonprofit corporation under chapter 181, pursuant to authority granted in section 213.05. The chief of the department asked the attorney general whether the department was subject to the provisions of the open meeting law. The answer turned on whether the department was a governmental or quasi-governmental corporation. The attorney general concluded that the fact that a private corporation receives payment for fire service from a town does not change the corporation into a governmental or quasi-governmental entity.

I conclude that a private fire department does not become a public department if it utilizes municipal equipment or accepts municipal funding. Expressed in the terms of the inquiry, classification of a volunteer fire department as public versus private is not determined by ownership of the fire fighting equipment utilized.
Your predecessor next asked if members of a chapter 213 or chapter 181 volunteer fire department would be reclassified as public sector employes if a municipality becomes responsible for their insurance or worker's compensation coverage?

A pertinent worker's compensation statute exists. Section 102.07(7) provides, in part, that:

Every member of any volunteer fire company or fire department organized under ch. 213 or any legally organized rescue squad shall be deemed an employe of such company, department or squad. . . . If such company, department or squad has not insured its liability for compensation to its employes, the municipality or county within which such company, department or squad was organized shall be liable for such compensation.

Members of chapter 213 fire departments are deemed employes of the fire department by operation of section 102.07(7). Their status under the statute does not change if the municipality assumes responsibility for worker's compensation coverage when the chapter 213 corporation fails to do so. Instead, liability is statutorily transferred to the municipality with no attendant change in the firefighter's classification as an employe of a private sector company.

Under the reasoning followed in the answer to the first question, just as a municipality may directly fund and equip a private sector fire department without affecting the department's private sector status, there appears to be no reason why a municipality could not similarly elect to provide insurance other than worker's compensation coverage for the individuals providing it with fire protection services. Therefore, members of a private volunteer fire department would not be reclassified as public employes if a municipality were to undertake responsibility for their worker's compensation coverage or other insurance.

Your predecessor next asked whether a chapter 181 volunteer fire department would be considered a public fire department if
the articles of incorporation require that the board of directors of the corporation include one or more representatives of the municipality or municipalities for which the fire department is providing protection?

There are no reported Wisconsin decisions or opinions of the attorney general that address a private fire department’s practice of providing that one or more municipal representatives be seated on its board of directors. Section 213.05 simply states that any number of persons may organize a fire company “in the manner prescribed in ch. 181.” Section 181.18 provides that the affairs of a chapter 181 corporation shall be managed by a board of directors. Section 181.18 further provides that “[d]irectors need not be residents of this state or members of the corporation unless the articles of incorporation or bylaws so require. The bylaws may prescribe other qualifications for directors.”

Section 181.20(2) states, in part, that “[t]he directors constituting the first board of directors shall be named in the articles of incorporation . . . [t]hereafter, directors shall be elected or appointed in the manner and for terms provided in the articles of incorporation or the bylaws.” “The articles of incorporation may include any provision, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation . . . .” Sec. 181.31(2), Stats.

The practice of designating municipal representatives as chapter 181 corporate board members does not seem to be inconsistent with the necessarily close relationship between private fire departments and the municipalities that they serve. Furthermore, because it appears that such appointments can be statutorily accomplished without creating any conflict of interest, see section 181.225, the independent nature of the chapter 181 fire department is not likely to be compromised by the practice.

In short, no statutory provision or judicial precedent directs that a chapter 181 volunteer fire department be considered a
public department if the department chooses to include municipal representatives on its board. Statutes and case law aside, policy reasons are likely to favor, rather than prohibit, appointment of municipal representatives.

Finally, your predecessor asked what criteria should be used to determine whether a chapter 213 or a chapter 181 fire department retains its status as a private (private employer) fire department.

The final question presupposes that a volunteer fire department's private status can be lost depending on how closely its affairs become entwined with those of a local governmental unit. The classification of a fire department depends on the enabling statute under which it was organized. A fire department created by a town board pursuant to section 60.55(1)(a)1. is certainly a public fire department, as are village and city departments established under sections 61.65(2)(a)1. and 62.13(8). A fire department organized under chapters 213 and 181 is a private entity, despite its evident public purpose. In my opinion, although a private, volunteer fire department can be disbanded or dissolved, then reconstituted as a public entity, public status does not automatically accrue by virtue of increased municipal involvement.

The mechanisms for disbandment or for voluntary dissolution of private departments are found in sections 213.04 and 181.50. I believe that the only certain criteria for determining whether a volunteer fire department has lost its private status are findings that: (1) chapter 213 disbandment and/or chapter 181 dissolution have taken place; and (2) either by town board action or by ordinance, the department in question had been recreated as a municipal entity.

JED:LD
Civil Service; Public Officials; Words And Phrases; Classified employes, including classified employes of legislative service agencies can run for nonpartisan office. An agency cannot prohibit its classified employes from running for nonpartisan office except in certain circumstances. OAG 12-91

May 30, 1991

JON E. LITSCHER, Secretary
Department of Employment Relations

Section 230.40, Stats., regulates the political activity of classified state employes. The administrator of the Division of Merit Recruitment and Selection in the Department of Employment Relations is responsible for administering the law. Sec. 230.40(6), Stats. You state that in the past the administrator has interpreted section 230.40 as permitting classified civil service employes to run for such public offices as school board, city council or county board. You have been informed that a classified civil service employe of a legislative service agency has been told that he could not run for a position on a local school board. You ask several questions concerning this conflict between the legislative service agency’s policy and the administrator’s understanding of section 230.40. I conclude that the administrator’s understanding of the law is correct; a classified employe of a legislative service agency has the right to run for school board. The administrator may enforce the law through appropriate orders to the appropriate appointing authority.

There is no doubt that the relinquishment of the right to run for partisan political office can constitutionally be made a condition of state employment. United States C. Serv. Com’n v. National Ass’n of Let. Car., 413 U.S. 548 (1973); Wisconsin State Emp. Ass’n v. Wisconsin Nat. Resources Bd., 298 F. Supp. 339, 350 (W.D. Wis. 1969). Absent any statutory prohibition, however, a state employe is free to engage in political activity, including partisan political activity.
Wisconsin's laws do not prohibit or discourage all partisan political activity; rather, the laws encourage state employes to engage in political activities, including partisan political activities. 63 Op. Att'y Gen. 217, 218-19 (1974). The law's clear and unambiguous language requires that classified state employes who run for partisan political office must take a leave of absence for the duration of the election campaign. Sec. 230.40(2), Stats. The Legislature has chosen not to require candidates for nonpartisan office to take leaves of absence. See 67 Op. Att'y Gen. 315, 319 (1978). Neither section 230.40 nor any other state law prohibits a state employe from being a candidate for nonpartisan political office or requires a state employe to take a leave of absence to run for nonpartisan political office.

The statutes do not define "partisan." Wisconsin courts have not had occasion to interpret the term except in the context of the open meetings law. That discussion is of little assistance outside of that context. State ex rel Lynch v. Conta, 71 Wis. 2d 662, 691-94, 239 N.W.2d 313 (1976). It is not necessary, however, to define the term completely in order to resolve the present issue. School district officers are elected at the spring election. Section 5.58 which governs the spring primary ballots provides "[o]nly nonpartisan candidates nominated for office by nomination papers shall have their names placed on the official spring primary ballot . . . ." Section 5.02(22) defines the spring primary as "the nonpartisan primary held the 3rd Tuesday in February to nominate candidates to be voted for at the spring election." The statutes do not allow a party designation for candidates for school board. Because the ballots do not identify the candidates for school board as being affiliated with any national or state political party, the election is nonpartisan and the office of member of the school board is nonpartisan. See United States C. Serv. Com'n, 413 U.S. at 577. Under the Hatch Act an election is nonpartisan "if none of the candidates is to be nominated or elected at such election as representing a party
any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected." 5 U.S.C.A. § 1503 (1977).

In 63 Op. Att’y Gen. at 219, the attorney general interpreted the predecessor of section 230.40(2) and held that a state agency could not proscribe partisan political activity of state employees covered by the Hatch Act if that activity was permissible under state law. In 73 Op. Att’y Gen. 131, 132 (1984), the attorney general affirmed that earlier conclusion and specifically held that even the prohibition of partisan political activity contained in the Hatch Act could not “empower a state agency to ignore the provisions of section 230.40(2).” That opinion noted that the civil service statutes do not apply to employees included in certified bargaining units. Therefore, if a collective bargaining agreement contains provisions concerning leaves of absence, those provisions, not section 230.40, are controlling. If the classified employee is included in a certified bargaining unit whose collective bargaining agreement is silent concerning leaves of absence for political activities, “the decision whether to grant a leave rests in the discretion of the state agency involved.” 73 Op. Att’y Gen. at 133. But the attorney general cautioned that

[...] the agency also should consider that the Legislature expressly has authorized unrepresented employees to take leaves of absence to run for partisan political office . . . thereby creating the potential for unfairness (and perhaps even the denial of constitutionally-guaranteed equal protection) if represented employees were to be denied leaves of absence to run for partisan political office.

73 Op. Att’y Gen. at 133-34. Absent an applicable collective bargaining agreement or separate statutory authorization, a state agency does not have the authority to impose more stringent conditions on political activity than those imposed under section 230.40.
The Legislature has created various legislative service agencies. Under section 230.08(2)(fe), (fm), and (fo) personnel of the Legislative Audit Bureau, the Legislative Fiscal Bureau and the Legislative Council are unclassified. The laws governing the Legislative Reference Bureau, section 13.92; the Revisor of Statutes Bureau, section 13.93; the Legislative Audit Bureau, section 13.94 and the Legislative Fiscal Bureau, section 13.95 all provide that the bureaus “shall be strictly nonpartisan.” Section 13.91 requires that “[t]he legislative council staff shall be strictly nonpartisan.” Nothing in any of these statutes evidences a legislative intent to treat the classified employees of the legislative service bureaus any differently from classified employees of other state agencies except that they must “be strictly nonpartisan,” that is, not identified with national or state political parties. An employee’s being a candidate for a nonpartisan office does not violate the statutory command that the agencies be strictly nonpartisan.

You ask whether a classified civil service employee can be prohibited from engaging in any political activity when not on duty “based solely on a supervisor’s or employer’s belief that the employee’s activities may interfere with or impair the person’s efficiency during work hours.” Section 230.40(1) is clear; it prohibits a person covered by the statute from engaging in any political activity “when not on duty to such an extent that the person’s efficiency during working hours will be impaired or that he or she will be tardy or absent from work.” Sec. 230.40(1), Stats. The statute does not provide that a supervisor or agency may decide to prohibit all off-duty political activity on the belief that such activity will impair the employee’s job performance. On the contrary, the statute permits political activity when not on duty unless the person’s efficiency during working hours is impaired or he or she is tardy or absent from work. The statute is a simple declaration that off-duty political activity, like any other off-duty activity, will not be accepted as an excuse for poor job performance. The statute permits
personnel actions against an employe if the employe's efficiency is impaired or he or she is tardy or absent from work. It does not permit the agency to make a determination in advance of any facts to support the determination.

You ask whether the administrator of the Division of Merit Recruitment and Selection has the authority to issue orders to enforce the provisions of section 230.40. Section 230.40(6) provides "[t]he administrator shall administer this section." Under section 230.05(4), "[t]he administrator may issue enforceable orders on all matters relating to the administration, enforcement and effect of the provisions of this subchapter for which responsibility is specifically charged to the administrator . . . ." The administrator has the responsibility to enforce the provisions of section 230.40 and issue enforceable orders if the appointing authority will not comply with the law. Under the statute, the administrator has not only the authority to issue such orders, but the duty to enforce the Legislature's regulation of political activity against agencies as well as against employes.

JED:AL
Property; Register Of Deeds; Taxation; The register of deeds and county or municipal tax listing officials may accept for filing, as an alternative to other statutory proceedings, for the eventual purpose of changing tax bill listings an affidavit of identity containing a legal description of the premises, the date and place of death of the decedent and full identification of both the decedent and the surviving joint tenant. County and municipal tax listing officials and the register of deeds have no authority to record or file any vital record including a death certificate except where the register of deeds acts as the local registrar under section 69.07, Stats. OAG 13-91

June 14, 1991

JOHN A. BODNAR, Corporation Counsel
Winnebago County

You have asked for my opinion on the following two questions:

1. Can the register of deeds record a death certificate and an accompanying affidavit, designating a surviving joint tenant, as an alternative to summary or formal probate proceedings for the purpose of the recordation of transfer of title from a deceased joint tenant to a surviving joint tenant?

2. Are county and municipal tax listing officials required to designate the surviving joint tenant as the owner of property on tax listings and billings upon the filing of a death certificate as to the deceased joint tenant and an accompanying affidavit, designating the surviving joint tenant, with the tax lister's office?

By virtue of section 700.17(2), Stats., the surviving joint tenant already owns the whole property, and the ownership interest of the deceased joint tenant is terminated by operation of law. The transfer of property actually occurred at the time of the creation of the joint tenancy. The death of one of the joint tenants does not transfer his or her interest; it merely terminates it. The interest is terminated by operation of law. The surviving
joint tenant already owns the whole. Thus, the probate filing and recording procedures do not act as a conveyance; they merely recognize what has already happened. *See Will of Barnes*, 4 Wis. 2d 22, 89 N.W.2d 807 (1958).

The Legislature has provided several methods by which the surviving joint tenant may obtain evidence of the termination of such joint tenancy. Upon petition of any person interested in the property to the court of the county of domicile of the decedent, the court is required to issue a certificate under the seal of the court setting forth the fact of the death of the joint tenant, the termination of the joint tenancy interest, the right of survivorship of any joint tenant and any other facts essential to determination of the rights of persons interested. Sec. 867.04, Stats. The certificate is *prima facie* evidence of the facts recited, and if the certificate relates to an interest in real property or to a debt which is secured by an interest in real property, a certified copy or duplicate original of the certificate must be recorded by the petitioner in the office of the register of deeds in each county in which the real property is located.

As an alternative to section 867.04, upon the death of any person having an interest as a joint tenant, the surviving joint tenant may obtain evidence of the termination of such joint tenancy by providing to the register of deeds of the county in which such property is located a certified copy of the death certificate and by providing, in triplicate, on applications supplied by the register of deeds for that purpose, the precise information required under section 867.045(1). Upon the recording of the original application, the application constitutes *prima facie* evidence of the facts recited and further constitutes the termination of the joint tenancy with the same force and effect as if issued by the court assigned to exercise probate jurisdiction. Sec. 867.045(4), Stats.

Summary confirmation of an interest in property is similarly available under section 867.046 by filing a petition with the court under subsection (1) or, as an alternative, filing and
recording an application supplied by the register of deeds under subsection (2). There is yet another alternative to sections 867.04 and 867.045 wherein the personal representative files with the probate registrar a verified statement describing the property in which the decedent had an interest as joint tenant, including the recording data, if any, of the document creating the joint tenancy. Sec. 865.20(1), Stats. Upon being filed with the probate registrar, this statement constitutes *prima facie* evidence of the facts recited and evidence of the termination of the decedent's interest in the property. A certified copy or duplicate original of the statement may be recorded in the office of the register of deeds in each county in the state in which real property is located. Sec. 865.20(2), Stats. I have been advised that this latter procedure is seldom used in most counties because the register of deeds usually advises that the applications be prepared and recorded on the printed forms available under section 867.045.

In response to your first question, it is my opinion that the register of deeds has the authority to record an affidavit to clear title, not unlike many such affidavits filed daily with registers of deeds. He or she is not recording a death certificate but merely referring to one already recorded under other statutory requirements.

It is important to emphasize that the register of deeds does not actually record the death certificate, but only the application form, even under sections 867.045(3) and 867.046(5). A certified copy of a death certificate is only presented to establish that it is filed elsewhere. The actual death certificate is not filed with the application. This is an important distinction because only the state registrar under section 69.03 and the local registrar under section 69.05 are required or permitted to register vital records which include death certificates under section 69.01(26). The register of deeds' duties under section 69.07, when acting as local registrar, have no bearing on the administrative and summary procedures which the register of
deeds must enforce under sections 867.045 and 867.046 or on the procedure now proposed for clearing title.

I understand that a problem arises in your county in those cases where no probate proceeding is necessary because all of the assets are jointly held when one spouse dies. The purpose of the affidavit in these cases would be to (1) set forth that the person died and is survived by a spouse, (2) correct any name variance between the death certificate and the way title is held on the deed and (3) instruct tax authorities to issue the tax bill in the name of the surviving joint tenant for, among other reasons, homestead tax relief claims.

There is no statute which specifically compels the recording of an affidavit in lieu of the summary or formal probate proceedings discussed above. Transfer by affidavit is permitted under section 867.03 when the decedent leaves solely owned property in this state which does not exceed $10,000 in value.

However, the register of deeds is required to record all deeds, mortgages, maps, instruments and “writings authorized by law to be recorded” in his or her office and left for that purpose. Sec. 59.51(1), Stats. In determining the duty imposed under the above-quoted language, the importance of the term “writings authorized by law to be recorded” becomes obvious. The statutory language “authorized by law” has been construed to mean allowed by statute of this state. Musback v. Schaefer, 115 Wis. 357, 91 N.W. 966 (1902); 66 Op. Att’y Gen. 148 (1977).

The proposed affidavit is no different than the numerous title defect curing affidavits already filed for recording. Such affidavits clearly are authorized by section 706.05(1) which provides that “every other instrument which affects title to land in this state, shall be entitled to record.” Affidavits are instruments as that term is used in section 706.05(1). Sec. 706.06(3), Stats.

The duties of registers of deeds are ministerial. Annot., 94 A.L.R. 1303 (1935); Youngblood v. United States, 141 F.2d 912 (6th Cir. 1944); State v. Shaver, 172 Ohio St. 111, 173
N.E.2d 758 (1961); 69 Op. Att’y Gen. 58 (1980). He or she has no basis to question the purpose of the affidavit presented for recording as long as it meets the requirements of section 706.05. This affidavit is similar to an affidavit of identity to clear title name variances or an affidavit of marital status, both of which are accepted for filing.

No legal proceeding is required to extinguish the title defect when one of the joint tenants dies. That defect can be cleared simply by reference to the death certificate which is required to be recorded by other statutes.

Under much the same reasoning, I also conclude in response to your second question that the county and municipal tax listing officials are not limited to making only those name changes which are based upon recorded documents. Even if they were so limited, the recorded death certificate itself would be sufficient to eliminate a deceased joint tenant as owner. While some municipalities routinely have a staff person sift through the daily register of deeds’ recordings to identify name changes, the assessor’s office will change the tax roll name listing based upon other information. For example, a deceased joint tenant’s name might be eliminated from the roll upon request where the decedent’s estate is in the probate process but where no document has yet been filed showing the termination.

Section 70.17 requires the assessor to enter the real property on the tax rolls in the name of the owner “if known to the assessor.” The clerk of the taxation district must certify that the information contained in the tax roll is accurate “to the clerk’s best knowledge.” Sec. 70.65(3), Stats. As a practical matter, most name changes in smaller municipalities such as towns probably are based on the assessor’s actual knowledge rather than on a copy of any recorded document. If the Legislature had intended that a recorded document be necessary, the tax roll certification probably would have been worded differently.

Historically, the assessor has not been required to utilize the register of deeds’ records to ascertain the owner of property.
This is clear from the court's observation in *Massing v. Ames, Treasurer of Dane County, and another*, 37 Wis. 645, 652-53 (1875):

But it would be laying down too strict a rule on the subject to say the assessor was chargeable with notice of the record title, and if he happened to make an honest mistake in regard to the real owner, the assessment was void. Where the assessor knows, or has reliable information as to the real owner, he is inexcusable in assessing the property to the wrong party.

*See also Doherty v. Rice*, 240 Wis. 389, 394, 3 N.W.2d 734 (1942).

I see no problem, therefore, with the lister or clerk relying on the death certificate already recorded and the proposed affidavit as a basis for dropping a deceased joint tenant from the tax rolls and assessment notice. Since the tax rolls are merely reflective of the transfer of title by operation of law, they should reflect the legal owner regardless of how the lister or assessor becomes aware of the change in ownership. Sections 70.17 and 70.65(3) when read together require the lister and/or assessor to list or indicate the owner of the property to the best of their knowledge. This clearly permits, but does not require, the tax listing officials to change the ownership designation on the tax listings and billings on the basis of notification other than through the formal procedures under sections 867.04, 867.045(1) and 867.046.

It is my opinion that an affidavit setting forth a legal description of the premises, the date of death and the place of death where that property is located outside that county and full identification of both the decedent and the surviving joint tenant is legally sufficient to accomplish this purpose. The clerk of the taxation district or assessor must be satisfied that the information is complete and accurate, and under no circumstances do county and municipal tax listing officials have
authority to record or file any vital record including the actual death certificate.

JED:DPJ
Counties; Land; Public Property; Although a county may not acquire land specifically for the purpose of leasing that land to a private entity licensed to operate a racetrack under section 562.05(1)(a), Stats., it may lease land initially acquired for a valid public purpose to such a private entity, unless the circumstances of the lease demonstrate that the land has become surplus land. OAG 14-91

July 9, 1991

Stephen Lepley, Corporation Counsel
Waukesha County

You ask whether there are circumstances in which county-owned land may be leased to a private entity that would construct, own and operate a racetrack licensed under section 562.05(1)(a), Stats.

In my opinion, land may not be acquired specifically for such a purpose, but land previously acquired for a valid public purpose may be leased to a private entity unless the circumstances of the lease demonstrate that the land has become surplus land.

Under section 59.01(1), counties may “acquire . . . real and personal estate for public uses or purposes . . . [and] sell, lease and convey the same.” Although you suggest that a racetrack is open to all members of the public, the public purpose doctrine prohibits municipalities from expending tax monies to engage in private business activity. See 76 Op. Att’y Gen. 169, 171 (1987). In order for a municipality to expend funds in connection with a business operation, “such business must involve a public function or be concerned with some element of public utility.” Heimerl v. Ozaukee County, 256 Wis. 151, 160, 40 N.W.2d 564 (1949). See 67 Op. Att’y Gen. 304 (1978).

Under section 59.07(1)(a), counties may acquire land for public purposes, such as “county buildings, airports, parks, recreation, highways, dam sites in parks, parkways and playgrounds, flowages” and the like. A pari-mutuel racetrack
under private ownership operated for profit under section 562.05(1)(a) is markedly different from these kinds of items and, under Wisconsin law, cannot be deemed to be operated for a public purpose. Therefore, a county could not acquire land under section 59.01(1) if the purpose of the acquisition were solely to lease that land to the owner or operator of a private racetrack licensed under section 562.05(1)(a).

County land initially acquired for valid public purposes, may, however, generally be leased to private entities. See 76 Op. Att'y Gen. at 169-70. Such property may be leased “during the interim period between one specific public use and another.” 76 Op. Att'y Gen. at 171. But such property must “not be considered as surplus by the governmental body involved.” 76 Op. Att'y Gen. at 170. That is, the property may not be leased for the conduct of private enterprise if there is no conceivable or identifiable need for its future use in connection with some public purpose at any foreseeable point in time. Compare 76 Op. Att’y Gen. 77 (1987).

Any court challenge to a lease of county property would be governed by the principle that “counties are not required by law nor expected to disregard ordinary sound business principles and practices which may reasonably dictate the retention of assets in reasonable amounts to meet the needs of an on-going operation.” 76 Op. Att’y Gen. at 170. In S.D. Realty Co. v. Sewerage Comm., 15 Wis. 2d 15, 112 N.W.2d 177 (1961), the court upheld a ninety-nine year lease of land on top of a tunnel over a river for ultimate use as a shopping center parking lot. The case suggests, but does not explicitly state, that the sewerage commission had valid reasons for constructing and continuing to maintain the tunnel, since the lease reflected that it “w[ould] have no use for the surface over the tunnel.” S.D. Realty, 15 Wis. 2d at 19.

Whether property has become surplus is a question of fact. See 76 Op. Att’y Gen. at 171. “[T]he type of activity carried on, the duration of such use, the amount of funds necessarily
expended and control and accountability” are four factors that would likely be evaluated by a reviewing court in determining whether property has become surplus. 76 Op. Att’y Gen. at 171. Circumstances such as the permanence and magnitude of the facility, the size and use of the parcel leased and the length of the lease term therefore would all be considered by a court in determining whether the land might conceivably be put to a public use at some future point in time. Since you have provided no information concerning any of these items, I decline to speculate as to whether any particular lease arrangement would be permissible. In any event, an attorney general’s opinion is not an appropriate vehicle for resolution of such questions of fact. See 77 Op. Att’y Gen. Preface, No. 3.C. (1988).

You also ask whether article IV, section 24(5) of the Wisconsin Constitution prohibits a lease arrangement that does not violate the public purpose doctrine and is permissible under chapter 59.

In my opinion, the answer is no.

Article IV, section 24 of the Wisconsin Constitution provides in part as follows:

(1) Except as provided in this section, the legislature shall never authorize any lottery or grant any divorce.

(5) This section shall not prohibit pari-mutuel on-track betting as provided by law. The state may not own or operate any facility or enterprise for pari-mutuel betting, or lease any state-owned land to any other owner or operator for such purposes.

(6) The legislature may authorize the creation of a lottery to be operated by the state as provided by law.

These provisions authorize the creation of a lottery to be operated by the state, but preclude the state from participation in all pari-mutuel on-track betting operations. The Legislature
implemented subsection five by enacting section 562.05, which provides in part as follows:

(1) No person may engage in any of the following activities without a valid annual license issued by the board:

(a) The ownership and operation of a racetrack at which pari-mutuel wagering is conducted.

(b) The sponsorship and management of any race on which pari-mutuel wagering is conducted and which is not located at a fair.

(c) The sponsorship and management of any horse race on which pari-mutuel wagering is conducted and which is located at a fair.

.......

(3m) The board may not accept an application for a license for a race under sub. (1)(c) unless the county board of the county in which that race will be conducted has approved the applicant’s sponsorship and management of that race.

.......

(a) ....

(b) A license under sub. (1)(c) may authorize horse races on days on which the fair is conducted and for 2 additional periods not to exceed 5 days each. Either or both of the additional periods may be consecutive with the days on which the fair is conducted. ....

.......

(10) The board shall revoke the license issued under sub. (1)(a) of any person who accepts any public money to construct or operate a racetrack in Wisconsin. This subsection does not apply to any racetrack operated in conjunction with a county fair.
(11) In this section, "public money" means any direct or indirect gift, grant, financial assistance or guarantee by or from the federal government, state, any political subdivision of the state, or any authority or corporation authorized by the state to borrow funds for a public purpose.

Article IV, section 24(5) of the Wisconsin Constitution applies only to the "state." "A county or governmental agency is created almost exclusively in the view of the policy of the state at large for purposes of political organization and civil administration in matters of state concern." Columbia County v. Wisconsin Retirement Fund, 17 Wis. 2d 310, 317, 116 N.W.2d 142 (1962) (citations omitted). Consequently, the term "state" sometimes includes political subdivisions. See Robinson v. Kunach, 76 Wis. 2d 436, 444, 251 N.W.2d 449 (1977). Usually, however, the Legislature explicitly includes political subdivisions when it deems them to be encompassed by the term "state." See Robinson, 76 Wis. 2d at 445.

I have located no legislative history concerning the meaning of the word "state" in article IV, section 24(5) of the Wisconsin Constitution. But the Legislature's passage of section 562.05(1)(b), (c), (3m), (9)(b) and (10) indicates that it did not view the constitutional prohibition as being applicable to counties. In my opinion, the passage of this statute contemporaneously with the constitutional enactment permitting pari-mutuel betting provides a sufficient basis for concluding that the prohibition contained in article IV, section 24(5) of the Wisconsin Constitution does not apply to counties or other political subdivisions.

Although article IV, section 24(5) of the Wisconsin Constitution does not prevent a county from leasing land to a private racetrack developer, any lease transaction entered into by a county must be expressly authorized by statute. See State ex rel. Teunas v. Kenosha County, 142 Wis. 2d 498, 418 N.W.2d 833 (1988). While such express authority can generally
be derived from section 59.01(1), no lease may violate any statute or administrative rule administered by the racing board, including but not limited to section 562.05(10) and (11). Questions as to whether any particular lease arrangement complies with those statutes or rules are beyond the scope of this opinion and should be directed to that agency.

JED:FTC
Landlord And Tenant; Words And Phrases; Security deposits: interpretation of the phrase "surrender of the premises" as used in Wisconsin Administrative Code section Ag 134.06(2) (1990), created Feb. 1980, effective May 1, 1980; The phrase "surrender of the premises" is analogous to the term "vacating the premises," coupled with the knowledge or reason to know of the vacating by the landlord. Therefore, under Wisconsin law, security deposits must be returned within twenty-one days from the time the tenants physically and permanently vacate the premises, where the landlord knows or has reason to know that the premises have been vacated. OAG 15-91

July 9, 1991

Fred a. Risser, Chairperson

Senate Organization Committee

The Senate Organization Committee has requested an opinion interpreting the phrase "surrender of the premises" as used in the state residential rental practices general order, Wisconsin Administrative Code section Ag 134.06(2) (1990), created Feb. 1980, effective May 1, 1990. This section requires that "[t]he landlord shall, within 21 days after surrender of the premises, return all security deposits less any amounts withheld by the landlord." Your letter raises the concern that by virtue of courts interpreting the phrase to mean "vacates the premises," unfair situations have arisen. For example, you note the possibility that a tenant may move out earlier than the date specified to the landlord, who, unaware of the early move, believes that he or she has twenty-one days from the notified date to make the refund. If the phrase "surrender of the premises" is interpreted as meaning solely when the tenant physically vacates the premises, the landlord could be held liable for damages under the code, though unaware that the tenant had vacated prior to the specified date.
I conclude that a "surrender of the premises" occurs when a tenant physically vacates the premises, and when the landlord knows or has reason to know that fact.

Administrative rules and regulations are to be construed in the same manner as statutes. Moonlight v. Boyce, 125 Wis. 2d 298, 303, 372 N.W.2d 479 (Ct. App. 1985). Legislative intent is ascertained from the statute's language in relation to its context, subject matter, history, scope and objective. State ex rel. First Nat. Bank & Trust v. Skow, 91 Wis. 2d 773, 779, 284 N.W.2d 74 (1979). In addition, when interpreting statutes, nontechnical words used in a statute are to be given their ordinary and accepted meaning when not specifically defined. This meaning may be ascertained from a recognized dictionary. Id. at 781.

In interpreting the phrase "surrender of the premises," the operative term is "surrender." The word "surrender" is commonly used in landlord/tenant law in cases involving the termination of a lease prior to the expiration date originally agreed upon between the parties. When a tenant vacates the leased premises before the end of a lease term, it is said that the landlord has the choice to accept the surrender and terminate the lease, or to refuse acceptance and take possession for the purpose of mitigating the damages for which the tenant is to be held liable. First Wis. Trust Co. v. L. Wiemann Co., 93 Wis. 2d 258, 271, 286 N.W.2d 360 (1980). Implied acceptance of the surrender may also be found when the landlord acts in such a way that he or she unequivocally demonstrates an intent to release the defaulting tenant. For example, if the landlord takes possession of the premises for his or her own use, he or she has unequivocally demonstrated such an interest. Id. at 272. "Surrender," as used in these termination cases, is intended to be distinguished from "abandonment." According to Black's Law Dictionary "surrender" differs from "abandonment," in that "abandonment" refers to a unilateral act made by the lessee, whereas in order to show "surrender," a mutual agreement
between the lessor and lessee to terminate the lease must be proven. Black's Law Dictionary 1295 (5th ed. 1979).

Other jurisdictions have addressed the meaning of “surrender” in security deposit cases. Colorado’s statute requires that the landlord return the security deposit within one month after the termination of the lease or surrender and acceptance of the premises. Colo. Rev. Stat. sec. 38-12-103(1) (1973). As used in this way, it is clear that the deposit must be returned either when the lease ends according to its terms or when surrender is accepted prior to its natural expiration.

I do not think the word “surrender,” as used in Wisconsin Administrative Code section Ag 134.06(2) is intended to be completely analogous to the way in which the word is used in early termination cases. The return of a security deposit under Wisconsin Administrative Code section Ag 134.06(2) is not limited to early termination circumstances. In most cases security deposits are returned after the lease has expired and the tenant has vacated. A security deposit is something that a tenant is entitled to unless the landlord can provide legitimate reasons for its retention. In the context of termination cases, the word “surrender” is used to refer to a mutual agreement between the landlord and tenant to terminate the lease prior to its original agreed upon date. Because returning a security deposit is generally an act which occurs upon the normal expiration of a lease, it does not follow that the return of a security deposit is contingent upon a landlord’s “acceptance” of the surrender as is the case in an early termination setting.

I have found no Wisconsin case law construing Wisconsin Administrative Code section Ag 134.06(2) to include acceptance. An unpublished court of appeals’ opinion, O’Leary v. Marquette Campus Village, 137 Wis. 2d 649, 405 N.W.2d 84 (Ct. App. 1987), considered Wisconsin Administrative Code section Ag 134.06(2). In this case, a written lease was to expire on June 10, 1985. On June 6, the tenants gave a written notice that they would vacate the premises on June 8. On that date,
they delivered a checkout memo and the keys to Village's office. Village argued that the tenants did not surrender the premises until after it accepted the tenant's relinquishment of possession. The students did not challenge this interpretation of Wisconsin Administrative Code section Ag 134.06(2), but argued instead that Village accepted surrender on June 8 when they delivered the checkout memo. The court agreed with the students, and never addressed the question of whether "acceptance" is a necessary aspect of "surrender" under Wisconsin Administrative Code section Ag 134.06(2). It was factually clear that the landlord had actual notice on June 8 that the tenants had vacated the premises. The court of appeals noted that Wisconsin courts have not used the word surrender consistently in considering landlord-tenant cases.

Another Wisconsin Court of Appeals case included consideration of a violation of Wisconsin Administrative Code section Ag 134.06(2), but did not interpret the phrase "surrender of the premises." Moonlight, 125 Wis. 2d at 301. Since the tenant vacated after notice by the landlord to do so, the surrender factually included both a vacating of the unit and knowledge by the landlord.

According to the common dictionary definition, surrender occurs when one "give[s] up the possession of something." Webster's Ninth New Collegiate Dictionary 1188 (1984). Under this definition, surrender would occur when the tenant gives up possession of the premises. The common definition includes the element of "giving up one's person or possessions into the authority of another." American Heritage Dictionary 1224 (2d College Ed. 1985). Implicit in the concept of giving up possession is the element of giving possession to another entity. Typically, the tenant removes all of his or her belongings, vacates the premises, and returns the keys to the landlord or his agent. The common definition of surrender includes the concept of yielding possession to the landlord.
Interpretation of an administrative rule by the promulgating agency is entitled to great weight. *Beal v. First Fed. Sav. & Loan Ass'n of Madison*, 90 Wis. 2d 171, 183, 279 N.W.2d 693 (1979). The Department of Agriculture, Trade and Consumer Protection has not had occasion to formally rule upon the meaning of the term “surrender” in a contested case, but has informally indicated that its interpretation of the term couples the tenant’s vacating of the premises with some knowledge of that fact by the landlord through notification or other factual information. Notice in some form by the tenant, or discovery of the fact that the premises have been vacated, would satisfy the element of knowledge by the landlord. In the most common situation, the expiration date in the lease would give reason to the landlord to know that the premises will be surrendered.

I conclude that given the common meaning of the word “surrender,” the views of the promulgating agency, and the inconsistent use of the term by courts, “surrender of the premises” in Wisconsin Administrative Code section Ag 134.06(2) means that the tenant has vacated the premises with some indication of notice to the landlord or that the landlord has reason to know the rental unit has been vacated. The rule was not intended to require the landlord’s “acceptance” of surrender to activate the twenty-one day return period, since then the landlord could solely control the triggering of the period by delaying “acceptance” of the surrender. To be fair to both parties, there should be some evidence that the landlord was or should have been aware that the premises have been vacated. I do not believe that this interpretation necessitates a revision or clarification of the rule.

JED:MES
Counties; Indians; Menominee Indians; A county has statutory authority to enter into a joint law enforcement agreement with an Indian tribe which locates a joint telecommunications terminal in a tribal building, so long as the terminal is properly secured, supervised and under the control of a county law enforcement agency. OAG 16-91

July 23, 1991

STEPHEN J. MENARD, Corporation Counsel
Menominee County

You advise that Menominee County and the Menominee Indian Tribe are parties to a series of joint telecommunications agreements dating back to September, 1981. You further state that, for a time after September, 1981, this joint operation was located in a county building. At some subsequent time, the operation was relocated to a tribal building. Recent disagreements have arisen concerning this arrangement, and you ask my opinion on the following questions:

1. Does sec. 59.245 Stats., “County Telecommunications” which mandates a telecommunication terminal in every county and which mandates that the terminal be installed in the county law enforcement agency, permit the installation and maintenance of a terminal in a tribal facility?

2. Does sec. 146.70 Stats., which permits joint power agreements between public agencies for providing emergency services permit a joint telecommunication agreement between the County and the Tribe, when sec. 345.05(1)(c) defines public agency as a municipality?

In my opinion, the answer to both questions is yes.

To answer your first question it is necessary to consider section 59.245, Stats., in relation to other statutory provisions which promote joint county/tribal cooperation in law
enforcement matters generally. Section 59.245 provides, in relevant part:

Every county in the state shall have a telecommunication terminal installed in a county law enforcement agency which is interconnected with the department of transportation and other county, municipal and governmental law enforcement agencies in the TIME (Transaction Information for Management of Enforcement) system.

This statute, to my knowledge, has never been considered in prior court decisions or opinions of the attorney general. Whether section 59.245 permits the location of a joint county-tribal telecommunications system in a tribal building turns on the application of settled rules of statutory construction.

Statutory construction begins with an examination of the language used by the Legislature. *State v. Denter*, 121 Wis. 2d 118, 357 N.W.2d 555 (1984). In *Denter*, the Wisconsin Supreme Court held, “In construing a statute the primary source of construction is the language of the statute itself. . . . If the meaning of the statute is clear and unambiguous on its face, resort to extrinsic aids for the purpose of statutory construction is improper.” *Denter*, 121 Wis. 2d at 123, citing *State v. Derenne*, 102 Wis. 2d 38, 45, 306 N.W.2d 12 (1981).

The issue is whether housing a telecommunications terminal in a tribal building pursuant to a joint county-tribal agreement comports with the statutory requirement that “[e]very county in the state shall have a telecommunication terminal installed in a county law enforcement agency . . . .” Sec. 59.245, Stats. I believe that it does. The language does not explicitly limit the location to the county sheriff’s office or any other specific building housing a law enforcement agency. Nor does it imply a strict construction by requiring the terminal to be installed in “the” county law enforcement agency. It merely states that the terminal must be located in “a county law enforcement agency.” Sec. 59.245, Stats. Assuming that facility is appropriately
staffed, secured and under the management control of county authorities, a joint telecommunications terminal located in a tribal building is "in a county law enforcement agency," precisely as if the terminal were located in the county sheriff's office. This language is "clear and unambiguous on its face," making further statutory construction unnecessary. Denter, 121 Wis. 2d at 123.

The Wisconsin Supreme Court has held that counties, as agents of the state, have a role in the enforcement of the criminal law. Green County v. Monroe, 3 Wis. 2d 196, 87 N.W.2d 827 (1958). In Green County, a case involving the construction of a county jail, the court held that "a county is a governmental arm and agency of the state performing primarily the functions of the state locally." Green County, 3 Wis. 2d at 199. Specifically, a county is empowered to take steps "necessary in the general administration of justice and particularly in the enforcement of the state's criminal laws." Id. at 200. See also Kyncl v. Kenosha County, 37 Wis. 2d 547, 555, 155 N.W.2d 583 (1968), quoting State ex rel. Bare v. Schinz, 194 Wis. 397, 400-01, 216 N.W. 509 (1927) (a county "acts for the state in the administration of justice").

The reasoning of Green County and the supporting cases makes the basic point that counties have long been delegated criminal law responsibilities such as those found in section 59.245. By requiring that every county "shall have a telecommunication terminal . . . interconnected with . . . law

---

1 See discussion below relating to the administrative interpretation given to section 59.245 by the Crime Information Bureau within the Wisconsin Department of Justice.

2 For another formulation of this concept, see Brown County v. H&SS Department, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981) ("This court has often expressed the fundamental rule that counties, as creatures of the legislature, exist largely for purposes of political organization and administrative convenience.") See also 77 Op. Att’y Gen. 230, 234 (1988), quoting McQuillen, Municipal Corporations § 1.24 (3d ed. 1987).
enforcement agencies in the TIME (Transaction Information for Management of Enforcement) system,” section 59.245 is simply one explicit means by which a county aids the state “in the general administration of justice and particularly in the enforcement of the state’s criminal laws.” Green County, 3 Wis. 2d at 200. The question then becomes whether such assistance can be rendered using a tribal building in the context of a joint county-tribal law enforcement agreement.

A county has only those powers explicitly given or necessarily implied in a grant of authority from the Legislature. Town of Vernon v. Waukesha County, 102 Wis. 2d 686, 307 N.W.2d 227 (1981). In Town of Vernon, a case involving the county’s power to remove certain roads from the county trunk highway system, the court held, “It is true, of course, that a county board has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power.” Town of Vernon, 102 Wis. 2d at 689.3 The court concluded that the power to remove highways from the trunk system was “by express language,” or at a minimum by “clear implication from the grant of power to the county . . . .” Id. at 691, 692.

The reasoning of Town of Vernon is applicable to the present situation. As discussed above, a jointly operated telecommunications terminal that is located by mutual agreement in a tribal facility may satisfy the requirements of section 59.245. See Town of Vernon, 102 Wis. 2d at 691. Even if this principle is not explicit, however, it is “necessarily implied from the powers expressly given or from the nature of the grant of power.” Id. at 689. The county has expressly been given the power to enter into joint county-tribal law

3 For a restatement of this rule, see St. ex rel. Teunas v. Kenosha County, 142 Wis. 2d 498, 504, 418 N.W.2d 833 (1988). See also Dane County v. H&SS Dept., 79 Wis. 2d 323, 329-30, 255 N.W.2d 539 (1977); State ex rel. Conway v. Elvod, 70 Wis. 2d 448, 450, 234 N.W.2d 354 (1975).
enforcement agreements by the Legislature. Under section 59.07(141), entitled *County-Tribal Law Enforcement Programs*, “a county board may enter into an agreement and seek funding under s. 165.90.” Sec. 59.07(141), Stats.

Under section 165.90(1),

> “Any county that has one or more federally recognized Indian reservations within or partially within its boundaries may enter into an agreement in accordance with s. 59.07(141) with an Indian tribe located in the county to establish a cooperative county-tribal law enforcement program.”

It is clear that such arrangements are, by their nature, “cooperative.” Sec. 165.90(1), Stats. This language indicates that the parties should be free to locate the joint terminal in the building which best suits their mutual purposes. Thus, the location of the joint terminal in a tribal building by mutual agreement is “necessarily implied” from two statutes explicitly authorizing joint agreements, and from the cooperative “nature of the grant of power.” *Town of Vernon*, 102 Wis. 2d at 689.

The Wisconsin Supreme Court has also relied on practical administrative interpretations for guidance in interpreting

---

4This statute was recently amended to make explicit that counties were empowered to “enter into an agreement” with a tribe for joint law enforcement. See 1987 Wisconsin Act 326, sec. 6, effective July 1, 1988.

5Section 165.90(1) was amended by 1989 Wisconsin Act 31. However, that amendment relates to the funding of county-tribal law enforcement plans, which is not at issue here.

6Because of the existence of both sections 59.07(141) and 165.90(1), specifically authorizing these agreements, I do not apply the strict construction used in certain previous opinions of the attorney general involving Indians where such explicit authorization was not apparent. See generally 76 Op. Att’y Gen. 189, 196 (1987) (concluding Indian tribe not a municipality for purposes of sewerage districts under section 66.20(4)); 72 Op. Att’y Gen. 132 (1983) (concluding that an Indian tribe is not a “governmental unit” within the meaning of section 144.07(4)(a), for purposes of a joint sewerage district); 66 Op. Att’y Gen. 335 (1977) (concluding that because statewide Indian legal services provider was not a “‘local’ public defender organization” within the meaning of section 977.07, the State Public Defender Board could not contract with it to provide such services).
statutes involving county powers. *Town of Vernon*, supra. In *Town of Vernon*, the Court emphasized that recognition of the "administrative practice and practical interpretation" of a statute was appropriate in construing a county's powers. *Town of Vernon*, 102 Wis. 2d at 693. See also *Chappy v. LIRC*, 136 Wis. 2d 172, 180, 401 N.W.2d 568 (1987) (the court "does defer to a certain extent to the interpretation and application of the statute by the enforcing agency") (citations and editing omitted).

The reasoning of *Town of Vernon* concerning administrative interpretation is persuasive on the present facts. Section 59.245 is administered by the Wisconsin Department of Justice, Division of Law Enforcement Services. Specifically, the statute is applied by the Crime Information Bureau (CIB) which, in cooperation with federal authorities such as the Federal Bureau of Investigation (FBI), compiles and controls access to records of prior criminal activity. On April 7, 1987, Mr. Robert L. McGrath, Director of CIB, sent a letter to an official with the Menominee Tribal/County Telecommunications System. That official had asked, as is being asked here, whether the joint terminal could be located in a tribal building under section 59.245. The director of CIB responded, in pertinent part:

It is our understanding that the intent of ss. 59.245 is to ensure that each county in Wisconsin provides law enforcement access to the TIME System through any law enforcement agency, sheriff or police department. By policy, the physical location of the terminal must be within a law enforcement agency or in a secure facility under the management control of a law enforcement agency. Various law enforcement agencies on the TIME System are served by centralized dispatch centers that are physically separated from the law enforcement agencies they serve and this has not presented any legal or policy problems.

A central dispatch center located outside of a law enforcement agency is permitted, provided that the TIME
System terminal is physically secure. It must also be secure from unauthorized access and if the dispatch center is staffed by non-sworn personnel, the operators must be trained by the Crime Information Bureau and be under the management control of law enforcement.

Based on our review of the TIME System operational procedures followed in Menominee County, I am unable to identify any conflict with law or policy.

CIB's conclusion, that the implementation of the joint county-tribal law enforcement agreement using a tribal building is proper, is consistent with the view of federal law enforcement authorities. The National Crime Information Center (NCIC), within the FBI, controls access to information systems such as the TIME system. The NCIC permits access only when a requesting agency meets detailed criteria qualifying it as a "criminal justice agency" pursuant to 28 U.S.C.A. § 534 (West Supp. 1991) and 28 C.F.R. § 20.3(c) (1990), or when the agency fits within certain other exceptions not relevant here. See NCIC Operating Manual (May 31, 1989 ed.), sec. 1.3.1, at 13-1. The Menominee Tribal/County Telecommunications System has met these requirements and has been issued a nine-character Originating Agency Identifier (OAI) giving it access to the TIME system. The existence of the OAI demonstrates that the Menominee Tribal/County Communications System, as currently operated, "has met the qualifying criteria" as a criminal justice agency for the NCIC's purposes. Id., sec. 1.4, at 13-4.

In view of the existing operating procedures of various law enforcement agencies within the TIME network, therefore, CIB has interpreted section 59.245 as permitting location of a central terminal "within a law enforcement agency or in a secure facility under the management control of a law enforcement agency." CIB specifically concluded that the joint operation in Menominee County appeared to meet this definition at the time.
of the review of the joint operational procedures. The NCIC makes no determination the operation complies with state law.

For the reasons discussed above, I believe section 59.245 permits locating the joint county-tribal terminal in a tribal building as long as a county law enforcement agency maintains effective management control over the terminal. This does not, of course, require Menominee County to accept this arrangement, or even to continue the joint county-tribal agreement as a whole. You indicate in your letter that the county and the tribe have had disagreements as to the use of the terminal. The county retains “broad powers” to resolve these problems by, for example, further negotiation with the tribe. Kenosha County C.H. Local v. Kenosha County, 30 Wis. 2d 279, 283, 140 N.W.2d 277 (1966). I conclude only that section 59.245 permits this arrangement, not that it requires it.

For these reasons, I believe that section 59.245 permits the location of joint county-tribal telecommunications terminal in a tribal building.

Your second question is:

2. Does sec. 146.70 Stats., which permits joint power agreements between public agencies for providing emergency services permit a joint telecommunication agreement between the County and the Tribe, when sec. 345.05(1)(c) defines public agency as a municipality?

Initially, I note that section 146.70 seems largely irrelevant to the issues raised in your first question, which involved the TIME system. Section 146.70 is entitled “Statewide emergency services number,” and applies to systems “transmitting requests for law enforcement, fire fighting and emergency medical and ambulance services to the public safety agencies providing such services.” Sec. 146.70(2)(b), Stats. In colloquial language, this statute deals with providing “911 service” to Wisconsin citizens. See also secs. 146.70(2)(c) and 146.70(1)(c), Stats. Such service has no involvement with the TIME system. The TIME system does not receive calls about emergencies as they occur. TIME
is a recordkeeping system which runs background checks for previous arrests, outstanding warrants and similar matters on individuals. There is no interrelationship between the TIME system and the "911" system. Your letter provides no explicit indication that an aspect of the agreement between the county and the tribe involves 911 services. If there is no such element of the agreement, I am of the opinion that section 146.70 does not apply to the joint county-tribal agreement. Because you do indicate in your letter that you filed the joint agreement with the Department of Justice pursuant to a filing requirement in section 146.70(9)(c), however, I will assume section 146.70 has some potential application to the present facts.

Section 146.70(9)(a) provides, "In implementing a basic or sophisticated system under this section, public agencies . . . shall annually enter into a joint powers agreement." The term "public agency" is then defined at section 146.70(1)(f) as "any municipality as defined in s. 345.05(1)(c) or any state agency which provides or is authorized by statute to provide . . . emergency services." Section 345.05(1)(c) then defines "municipality" as "any county, city, village, town, school district . . . sewer district, drainage district and, without restriction because of failure of enumeration, any other political subdivision of the state." The issue then becomes whether a joint agreement between the county and the tribe is permitted where Indian tribes are not specifically enumerated in this definition of a municipality. In my opinion, such an agreement is permissible.

The existence of a specific statute precludes the application of more general laws. Rice v. City of Oshkosh, 148 Wis. 2d 78, 435 N.W.2d 252 (1989). In Rice, a specific statute permitting a town to regulate public improvements governed over a general statute allowing a city to enact ordinances on a variety of matters. In ruling for the town, the Wisconsin Supreme Court
held that "specific statutes supersede general statutory provisions." *Rice*, 148 Wis. 2d at 88. See also *Tenpas v. DNR*, 148 Wis. 2d 579, 592, 436 N.W.2d 297 (1989) ("specific legislative treatment" prevails over "general . . . requirements").

The reasoning of *Rice* and *Tenpas* is applicable to your question. As noted in my discussion of your first question, the Legislature has passed two statutes specifically authorizing counties to enter into joint law enforcement agreements with Indian tribes. *See* secs. 59.07(141) and 165.90(1), Stats.; *see also* 78 Op. Att'y Gen. 85, 86 (1989) and 78 Op. Att'y Gen. 122, 131-32 (1989). In contrast, section 146.70(1)(f) borrows a general definition of municipality from section 345.05(1)(c), a statute dealing with an issue (municipal liability for motor vehicle accidents) which has no specific application to county-Indian relations. Therefore, the fact that the term "Indian tribe" was not included in the various governmental bodies listed in the definition of a "public agency" in section 345.05(1)(c) is not controlling here. A joint agreement to accept calls concerning, for example, crimes in progress, is plainly an aspect of county-tribal law enforcement. Under section 59.07(141), "a county board may enter into an agreement" with an Indian tribe. Section 165.90(1) also specifically authorizes "an agreement . . . with an Indian tribe . . . ." These two statutes explicitly and specifically dealing with county-tribal law enforcement control over a general definition of municipalities imported from another statute with no relation to that subject. This is because "specific statutes supersede general statutory provisions." *Rice*, 148 Wis. 2d at 88.

For this reason, even if section 146.70 is applicable to your situation, I believe the answer to your second question would also be yes.

JED:JDN
Employe Trust Funds Board; Employe Trust Funds, Department Of; Retirement Systems; The Employe Trust Funds Board must under section 40.05(2n), Stats., divide post-1990 contribution rate adjustments between employer and employe contributions. An increase in employe contributions based upon such division is not a constitution contract clause violation. The Board lacks the authority to redetermine the unfunded accrued actuarial liability for calendar year 1991 rate setting purposes as an alternative to a contribution increase. OAG 17-91

September 9, 1991

GARY I. GATES, Secretary
Department of Employe Trust Funds

On behalf of the Employe Trust Funds Board (ETFB), you request my opinion on several questions concerning the board’s authority to set employe and employer contribution rates for Wisconsin retirement system purposes. These percentages of payroll contributions plus investment earnings provide the assets to fund the retirement benefits provided by the system. The ETFB, an administrative agency created by the Legislature, has only those powers which are expressly conferred or necessarily implied by the statutes under which the agency operates. Kimberly-Clark Corp. v. Public Service Comm., 110 Wis. 2d 455, 461-62, 329 N.W.2d 143 (1983).

Employe retirement contributions are established by state statute as a percentage of each payment of earnings. Section 40.05, Stats., provides in part:

(1) EMPLOYE RETIREMENT CONTRIBUTIONS. For Wisconsin retirement system purposes employe contributions on earnings for service credited as creditable service shall be made as follows:

(a) Except as provided in par. (b) and sub. (2n):
1. For each participating employee not otherwise specified, 5% of each payment of earnings. [general employee]

2. For each participating employee whose formula rate is determined under s. 40.23(2m)(e)2, 5.5% of each payment of earnings. [elected and executive]

3. For each participating employee whose formula rate is determined under s. 40.23(2m)(e)3, 6% of each payment of earnings. [protective]

4. For each participating employee whose formula rate is determined under s. 40.23(2m)(e)4, 8% of each payment of earnings. [firefighters]

... ...

(b) In lieu of employee payment, the employer may pay all or part of the contributions required by par. (a), but all the payments shall be available for benefit purposes to the same extent as required contributions deducted from earnings of the participating employees.

... ...

(2m) Benefit Adjustment Contribution. Except as provided in sub. (2n), in addition to the amounts under subs. (1) and (2), a benefit adjustment contribution equal to 1% of earnings shall be paid by or for participating employees whose formula rate is determined under s. 40.23(2m)(e)1 and 3. This contribution shall be deducted from each payment of earnings to participating employees unless the employer provides through its compensation provisions or agreements that all or part of the contribution will be paid by the employer. For benefit purposes, this contribution shall be treated as if it were an employer required contribution regardless of whether the employer or the employee pays the contribution.

While employee contributions differ depending upon employee category (general, elected and executive, protective, firefighter),
only the general category, the largest group, will be considered in this opinion since that is the group which is the basis for the Wisconsin Education Association Council (WEAC) request which caused your opinion request. Caution is suggested, however, in light of your statement, on page one of your letter, that "whatever answers are given will be applied to all four categories." This opinion does not address any possible differences that theoretically could arise, between employment categories, in the application of section 40.05(2n) because the elected/executive and firefighter employe groups are not required to make the one percent benefit adjustment contribution.

The general employe retirement contribution thus established by section 40.05 consists of the basic five percent at subsection (1)(a)1., plus the one percent benefit adjustment contribution of subsection (2m) plus or minus any contribution rate adjustment required by subsection (2n).

Employer retirement contributions are established by state statute as the percentage of earnings necessary to fund the promised future retirement benefits after deducting the amounts generated from the employe required and benefit adjustment contributions.

Section 40.05(2) provides in part:

**EMPLOYER RETIREMENT CONTRIBUTIONS.** For Wisconsin retirement system purposes:

(a) Each participating employer shall make contributions for current service determined as a percentage of the earnings of each participating employe, determined as though all employes of all participating employers were employes of a single employer, but with a separate percentage rate determined for the employe occupational categories specified under s. 40.23(2m). A separate percentage shall also be determined for subcategories within each category determined by the department to be necessary for equity among employers.
(am) The percentage of earnings under par. (a) shall be determined on the basis of the information available at the time the determinations are made and on the assumptions the actuary recommends and the board approves by dividing the amount determined by subtracting from the then present value of all future benefits to be paid or purchased from the employer accumulation reserve on behalf of the then participants the amount then credited to the reserve for the benefit of the members and the present value of future unfunded prior service liability contributions of the employers under par. (b) by the present value of the prospective future compensation of all participants.

(c) The percentage rates determined under this subsection shall become effective as of the beginning of the calendar year to which they are applicable and shall remain in effect during the calendar year, except that the secretary, upon the written certification of the actuary, may change any percentage determined under par. (b) during any calendar year for the purpose of reflecting any reduced obligation which results from any payment of advance contributions.

Section 40.03(5)(b) requires that the actuary:

Shall make a general investigation at least once every 3 years of the experience of the Wisconsin retirement system relating to mortality, disability, retirement, separation, interest, employe earnings rates and of any other factors deemed pertinent and to certify, as a result of each investigation, the actuarial assumptions to be used for computing employer contribution rates, the assumed rate and the tables to be used for computing annuities and benefits . . . .
Based upon the recommendations of the actuary, the ETFB is authorized by section 40.03(1)(e) to “approve the contribution rates and actuarial assumptions determined by the actuary . . . .”

The actuarial recommendations adopted by the ETFB that are the subject of the questions you ask are described on pages 1-2 of your letter where you state:

One recommendation in the Actuarial Valuation was to adjust the future investment earnings assumption from 7.5 to 7.8 percent. Another recommendation was to increase the contribution rate for “normal cost” (current service) by .2 percent of payroll effective January 1, 1991. Relying upon Section 40.05(2n), which became effective on May 19, 1989, the Board determined that the adjustment was to be apportioned as directed, half to the employer rates under sub. (2)(a) and (am) and half to benefit adjustment contributions (paid by employes) under sub. (2m).

The actuary noted in his report that the principal cause of the proposed adjustment in contribution rates for 1991 was the provision to the actuary of corrected creditable service figures which increased participant service by an average of about one year. He further reported and the Department confirmed that the extra year of service had always been recorded on Department records but that the Department had not reported the additional service to the actuary beginning with the 1986 valuation year due to a computer programming error. The Department and consulting actuary were not aware of the reporting problem due to the concurrent merging of data bases for what had been three predecessor retirement systems.

Your questions thus relate to the increase to the 1991 contribution rate of .2 percent of payroll which increase the ETFB apportioned half to employer rates and half to benefit adjustment contributions. I have altered the order of your questions to provide better continuity in answering.
You ask:

[Do]oes Section 40.05(2n) apply or rather may the Board determine that only Section 40.05(2)(a) applies. . . .

Section 40.05(2)(a) establishes employer contributions as the percentage of earnings necessary to fund the retirement benefit after deducting the amount generated by employee-required and benefit-adjustment contributions. Section 40.05(2n) additionally provides that any required increase in employer contributions (not caused by benefit improvements under 1989 Wisconsin Act 13) or decrease be shared equally between employer and employee contributions. Section 40.05(2n) states:

**CONTRIBUTION RATE ADJUSTMENT.** (a) If the board, on the advice of the actuary, determines that an increase or decrease in contribution rates is necessary for any annual period after 1989, the board, on the advice of the actuary, shall adjust contribution rates in the following manner:

1. One-half of the increase or decrease in contribution rates shall be provided for by an increase or decrease in employer contributions under sub. (2)(a) and (am), except as provided in subd. 3.

2. One-half of the increase or decrease in contribution rates shall be provided for by an increase or decrease in benefit adjustment contributions under sub. (2m), except as provided in subd. 3 or par. (b).

3. Any increase in contribution rates required after 1989 that results from benefit improvements under 1989 Wisconsin Act 13, which would otherwise increase employer contribution rates over the 1989 rate shall be provided for by an increase in benefit adjustment contributions under sub. (2m). Notwithstanding sub. (2m), an employer may not pay for all or part of any increase in benefit adjustment contributions that is required under this subdivision.
(b) If under par. (a) 2 a decrease in benefit adjustment contributions under sub. (2m) would reduce the amount under sub. (2m) to less than zero, the employe contribution rates under sub. (1) shall be decreased.

It is my opinion that section 40.05(2n) controls and the ETFB is required to divide the contribution adjustment between employer and employe contributions. Correspondingly, the ETFB lacks the statutory authority to increase only the employer contribution under section 40.05(2)(a).

WEAC suggests that there is ambiguity in the phrase “for any annual period after 1989” and that it is unclear as to whether the period intended (to invoke the adjustment division between employer and employe contributions) is the period during which the error was made or the period during which the correction is made. While the correction was made in the 1991 contribution rates, the error occurred beginning with the December 31, 1985, valuation, prior to enactment of section 40.05(2n). I find nothing in the language of section 40.05 however that indicates that the Legislature intended mechanical mistake correction to be handled any different than actuarial mistakes. The whole purpose of section 40.05(2) is to adjust the contribution rate to ameliorate prior mistakes.

As stated by the actuary (Wisconsin Department of Employe Trust Funds 9th Annual Actuarial Valuation, December 31, 1989, at 37):

*The principal areas of risk assumption are:*

(i) long-term *rates of investment income* likely to be generated by the assets of the retirement fund -- this includes both realized and unrealized appreciation and depreciation

(ii) *rates of mortality* among participants, retirants and beneficiaries

(iii) *rates of withdrawal* of active participants

(iv) *rates of disability* among participants
(v) *patterns of salary increases* to be experienced by participants

(vi) the age and service *distribution of actual retirements.*

In making a valuation the actuary must project the monetary value of each risk assumption for each distinct experience group, for the next year and for each year over the next half-century or longer.

Once actual risk experience has occurred and been observed, it will not coincide exactly with assumed risk experience, regardless of the skill of the actuary, the completeness of the data, and the precision of the calculations. Each valuation provides a complete recalculation of assumed future risk experience and takes into account all past differences between assumed and actual risk experience. The result is a continual series of small adjustments to the computed contribution rate.

The listed areas of risk assumption are subject not only to errors resulting from projection but also to mechanical errors in reporting and computation. The actuary indicates that actual risk experience "will not coincide exactly with assumed risk experience, regardless of the skill of the actuary, the completeness of the data and the precision of the calculations." This summary of risk analysis assumes the possibility of error both in projection and in generation of the data.

Similarly, the Joint Survey Committee on Retirement Systems Report on 1989 Senate Bill 148, which created section 40.05(2n), states at 3:

This bill provides that any future changes in the contribution rates after 1990 shall be shared equally between employer and employe participants of the system.

The focus again is to the handling of changes required after 1990, not on the cause of the changes. This is in direct contrast to section 40.05(2n)(a)3. which requires that "[a]ny increase in
contribution rates required after 1989 that results from benefit improvements under 1989 Wisconsin Act 13 . . . shall be provided for by an increase in benefit adjustment contributions under sub. (2m).” Since the Legislature has in subsection (2n)(a)3. specifically related the increase to the cause but has not done so in subsection (2n)(a), it is not appropriate to expand the (2n)(a) language to treat a change resulting from a pre-1989 error differently than a change resulting from an erroneous assumption. It is therefore my opinion that section 40.05(2n) applies to future changes to the contribution rates regardless of the type of error that necessitated the changes.

You also ask:

Does the Board action to increase contribution rates to employes for 1991 impair an existing contractual right of employes as suggested in the WEAC memo dated December 5, 1990?

As discussed in my response to the previous question, section 40.05(2n) requires that one-half of the contribution rate increase be assigned to employe contribution rates. It is my opinion that neither section 40.05(2n) nor its implementation by the ETFB impairs an existing contractual right of employes affected.

Article I, section 10, clause 1 of the United States Constitution states that “[n]o state shall . . . pass any . . . law impairing the obligation of contracts . . . .” Similarly, article I, section 12 of the Wisconsin Constitution states that “[n]o bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed . . . .”

As the court stated in State ex rel. Cannon v. Moran, 111 Wis. 2d 544, 554, 331 N.W.2d 369 (1983), “[t]he first step in analyzing a contract clause problem is to determine whether an obligation of contract has been impaired.” A contract is impaired when the rights and obligations of the parties to that contract, which arise by virtue of that contract, are altered by legislation. Home Building & Loan Ass’n v. Blaisdell, 290 U.S. 398, 431 (1934). “The first step is to inquire whether the
challenged statute has ‘operated as a substantial impairment of a contractual relationship’” (case cites omitted). Chappy v. LIRC, 136 Wis. 2d 172, 187, 401 N.W.2d 568 (1987). “There is some indication that, where only a minimal alteration is present, ‘the inquiry ends as no constitutional violation has occurred’” (case cites omitted). Chappy, 136 Wis. 2d at 188, n.9.

Wisconsin common law holds that participants have no vested right to retirement benefits absent a specific statutory or contractual provision creating vested rights. State ex rel. McCarty v. Gantter, 240 Wis. 548, 555, 4 N.W.2d 153 (1942). Whatever rights are established contractually or by statute are determined as they exist at the time of retirement. State ex. rel. Smith v. Annuity & Pension Board, 241 Wis. 625, 629, 6 N.W.2d 676 (1942). State Teachers' Retirement Board v. Giessel, 12 Wis. 2d 5, 10, 106 N.W.2d 301 (1960), held that the contractual rights included the right to earnings (the teachers’ retirement system was a money-purchase benefit system in 1960). Neither that case nor any later Wisconsin case negates the concept that the vested rights are fixed at retirement absent a statute giving greater or lesser rights.

Section 40.19(1) provides vesting of contractual rights during employment by stating that:

Rights exercised and benefits accrued to an employe under this chapter for service rendered shall be due as a contractual right and shall not be abrogated by any subsequent legislative act. The right of the state to amend or repeal, by enactment of statutory changes, all or any part of this chapter at any time, however, is reserved by the state and there shall be no right to further accrual of benefits nor to future exercise of rights for service rendered after the effective date of any amendment or repeal deleting the statutory authorization for the benefits or rights. This section shall not be interpreted as preventing the state from requiring forfeiture of specific rights and
benefits as a condition for receiving subsequently enacted rights and benefits of equal or greater value to the participant.

I find no contractual violation resulting from the increased employe contribution rate of .01 percent of payroll since 1989 Wisconsin Act 13 provided rights and benefits which can be considered to be of equal or greater value. Assuming that the employe contribution as set by sections 40.05(1)(a)1. and (2m) is a vested contractual right under section 40.19(1), the unreduced early retirement and reduction of exposure to unfavorable employe contribution increases set forth in 1989 Wisconsin Act 13 provide the *quid pro quo* required in the language of section 40.19(1).

The Pennsylvania cases cited by WEAC do not apply to our situation since the increased employe contribution the court was concerned with, had the sole effect of lowering the employer contribution with no offsetting advantage to the employes. See *Ass'n of Pa. State College v. State System*, 505 Pa. 369, 479 A. 2d 962, 964-65 (1984), referred to in *Pa. Federation of Teachers v. Sch. Dist.*, 506 Pa. 196, 484 A. 2d 751, 753 (1984).

1989 Wisconsin Act 13, at sections 26 and 47(1), provides an "early retirement window" until June 30, 1990, and a general reduction in the amount of the early retirement penalty for those who retire after such date. These early retirement provisions thus provided a *quid pro quo* for any potential detriment to WRS participants since the Legislature required in the same act that future employer contribution increases be shared by both employers and employes.

A second potential benefit to WRS participants results from the actual legislated mechanics of the splitting of employer contribution increases between employer and employe contributions (1989 Wisconsin Act 13 at section 18). Potential benefit could result since section 40.05(2n) also provides for the crediting of one-half of any decrease in employer contribution rates to employe contributions. Additionally, section 40.05(2n)
requires that future increases in contribution rates are to be shared between employer and employee contributions, thus precluding the Legislature itself from increasing future employee contributions without providing offsetting increased benefits.

The "early retirement window" and reduction in early retirement penalty (after closure of the window on June 30, 1990) could, by itself, be held sufficient justification for any "forfeiture of specific rights and benefits." Section 40.19(1) states that "[t]his section shall not be interpreted as preventing the state from requiring forfeiture of specific rights and benefits as a condition for receiving subsequently enacted rights and benefits of equal or greater value to the participant."

The Wisconsin courts have not interpreted the term, "participant," as used in section 40.19(1), in regard to whether the offsetting advantage is to be balanced against detriment to the group or to an individual employee. Courts of other states are divided on this question. See Singer v. City of Topeka, 227 Kan. 356, 607 P. 2d 467, 475 (1980) ("[R]easonableness of legislative changes is to be measured by the advantage or disadvantage to the affected employees as a group or groups . . . .") and Abbott v. City of Los Angeles, 50 Cal. 2d 438, 326 P. 2d 484, 492 (1958) ("[I]t is by advantage or disadvantage to the individual employees whose already earned and vested pension rights are involved that the validity of attempted changes in those rights depends . . . ."). I have no facts or actuarial studies, before me, that indicate that any individual participant or group of participants is substantially disadvantaged when balancing the advantages against the disadvantages of 1989 Wisconsin Act 13. Without clear indication of a "substantial" alteration of contractual rights without an offsetting benefit, the presumption of constitutionality of legislative acts controls.

A party who challenges the constitutionality of an act carries a heavy burden of persuasion. Our cases make it clear that
"[i]t is not enough that respondent establish doubt as to the act's constitutionality nor is it sufficient that respondent establish the unconstitutionality of the act as a probability. Unconstitutionality of the act must be demonstrated beyond a reasonable doubt. Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973); *County of Portage v. Steinpreis*, 104 Wis. 2d 466, 478, 312 N.W.2d 731 (1981). We affirm our previous statement that:

"If there is any reasonable basis upon which the legislation may constitutionally rest, the court must assume that the legislature had such fact in mind and passed the act pursuant thereto. The court cannot try the legislature and reverse its decision as to the facts. All facts necessary to sustain the act must be taken as conclusively found by the legislature, if any such facts may be reasonably conceived in the mind of the court." *State ex rel. Carnation Milk Products Co. v. Emery*, 178 Wis. 147, 160, 189 N.W. 564 (1922); *State v. Interstate Blood Bank, Inc.*, 65 Wis. 2d 482, 489, 222 N.W.2d 912 (1974).

*Treiber v. Knoll*, 135 Wis. 2d 58, 64-65, 398 N.W.2d 756 (1987). Absent any showing that the facts as found by the Legislature are not reasonable, it appears that there is no "substantial" alteration of contract rights not offset by "benefits of equal or greater value." I therefore find no contract clause violation by enactment of 1989 Wisconsin Act 13.

You also ask:

Is there authority under Wisconsin law which would allow the Board to add the increased cost to the "unfunded accrued actuarial liability" (UAAL) provided for in
s. 40.05(2)(b) through (bw) as proposed by WEAC in its December 14 correspondence?

WEAC suggests that the shortfall resulting from the error in reporting of creditable service to the actuary could be remedied without an increase in the employe contribution rate by increasing the UAAL and amortizing it over a thirty-nine year period (WEAC presentation to ETFB on December 14, 1990 at 1). As you state in explanation of this question at page 3 of your January 7, 1991 letter:

If permissible under the law, the use of the UAAL approach would almost certainly result in an increase in contribution rates but these increases would apply only to employers.

It is my opinion that the authority to adjust the UAAL and establish a new forty-year amortization period, utilized by the ETFB in setting calendar 1990 contribution rates, was a one-time grant of authority and once used could not again be used to reallocate liabilities. The ETFB thus had no statutory authority to adjust the UAAL in setting 1991 or later contribution rates.

The UAAL results from unfunded prior service liability of participating employers, the unfunded costs of system benefit increases (not fully paid for by the enacting legislation) and interest on both of these liabilities. Section 40.05(2)(b) provides:

Contributions shall be made by each participating employer for unfunded prior service liability in a percentage of the earnings of each participating employe. A separate percentage rate shall be determined for the employe occupational categories under s. 40.23(2m) as of the employer’s effective date of participation. The rates shall be sufficient to amortize as a level percent of payroll over a period of 40 years from the later of that date or January 1, 1986, the unfunded prior service liability for the categories of employes of each employer determined under s. 40.05(2)(b), 1981 stats., increased to reflect any
creditable prior service granted on or after January 1, 1986, increased to reflect the effect of 1983 Wisconsin Act 141, increased at the end of each calendar year after January 1, 1986, by interest at the assumed rate on the unpaid balance at the end of the year and adjusted under par. (bw).

In addition, section 47(2) (nonstatutory provisions) of 1989 Wisconsin Act 13 provides:

As of the last day of the first full month occurring after the effective date of this subsection, $500,000,000 shall be distributed from the transaction amortization account of the fixed retirement investment trust to the appropriate reserves of the fixed retirement investment trust in an amount equal to a percentage of the total distribution determined by dividing each reserve's balance on the prior January 1 by the total balance of the fixed retirement investment trust on the prior January 1. The resulting increase in the employer accumulation reserve shall, on recommendation of the actuary, be first applied to funding any liabilities created by this act, and the balance shall be equitably allocated among employers that were participating employers under the Wisconsin retirement system on December 31, 1985, based on each employer's share of the total covered payroll in 1985. The individual employer unfunded prior service liability amounts and rates may be adjusted, a new 40-year amortization period shall be established to reflect this distribution, and liabilities may be reallocated between current and prior service liabilities as recommended by the actuary to meet the objective of stabilizing future total contribution rates.

Nonstatutory section 47(2) thus authorized the ETFB to adjust the UAAL to fund any liabilities created by 1989 Wisconsin Act 13 remaining after crediting the indicated portion of the $500,000,000 distribution from the transaction amortization account to the employer accumulation reserve. Based on the general effective date of 1989 Wisconsin Act 13, May 16, 1989,
the actuary recommended and the ETFB utilized such a UAAL adjustment in setting the calendar 1990 rates. *See* Wisconsin Department of Employe Trust Funds 8th Annual Actuarial Valuation, December 31, 1988, at 23. The actuary was required to take UAAL adjustment into consideration in recommending the calendar 1990 contribution rate since such rates are “determined on the basis of the information available at the time the determinations are made.” Sec. 40.05(2)(am), Stats. I find this action by the actuary and ETFB to be consistent with section 47(2) of Wisconsin Act 13.

This authority to adjust the UAAL and fund it over a “new 40-year amortization period” was a one-time authority. The Legislature did not intend that authority to be exercised thereafter when setting annual contribution rates. Such authority was included in 1989 Wisconsin Act 13 under the “nonstatutory provisions.” As stated at page 144 of the Legislative Reference Bureau’s Wisconsin Bill Drafting Manual 1989-90, section 12.01:

1) **Law of continuing application.** It is the policy of this state to incorporate law of continuing application into the statutes.

2) **Types of nonstatutory provisions.** In general, the following types of provisions need not be incorporated into the statutes:

   (k) A temporary transitional provision, not extending beyond July 1 of the even-numbered year of the legislature’s next biennial session.

   (l) A provision affecting the timing of a law’s application or nonapplication, not extending beyond July 1 of the even-numbered year of the legislature’s next biennial session.

   (m) Any other provision that is narrow in scope and intended to be temporary.
It appears that adjustment of the UAAL and establishment of a new forty-year amortization period was intended to be a transitional provision to be utilized by the actuary and ETFB in the next rate-setting period, 1990. Had the Legislature intended otherwise, such authority would have been incorporated in the statutory provisions.

WEAC’s suggestion that the ETFB was granted the authority to adjust the UAAL in the determination of the 1991 contribution rates amortizing the .2 percent liability over a thirty-nine-year period appears contrary to the specific requirement of nonstatutory section 47(2) which requires amortization over “a new 40-year period.” While the actuary did discuss the possibility of amortizing part of the 1991 rate increase over a thirty-nine-year period, this was not in the context of changing the UAAL nor was such amortization recommended.

The actuary, at page 5 of the September 14, 1990 Special Considerations in 1991 WRS Rate Development memorandum to the ETFB, discusses some “possibilities” for dealing with the increase in contribution rate resulting from the service credit error. Among these possibilities was “Amortization of Supplemental Liability” which is described as follows:

Under statutory authority provided in s. 40.04(1), a supplemental liability account could be created with respect to the service adjustment and amortized over a 39 year period. The immediate effect would be to reduce the rate increase in the General division from 0.8% to 0.3%. The special amortization account would not necessarily have to be added to the present UAAL, but could be treated as a portion of the normal cost. In future years, if net gains occur, this account could be reduced or, hopefully, eliminated. This continues to be a possibility. It has the disadvantage of continuing to highlight a current data adjustment far into the future.
While this approach bears some similarity to the "Experience Amortization Reserve" already utilized in the contribution rate determination, we need not consider whether this "Amortization of Supplemental Liability" is a permitted method since it was not recommended by the actuary for adoption by the ETFB. See Wisconsin Department of Employee Trust Funds 9th Annual Actuarial Valuation, December 31, 1989, at 42, for the actuary’s explanation of the Experience Amortization Reserve.

Section 40.03(1)(e) empowers the ETFB to "approve the contribution rates and actuarial assumptions determined by the actuary under sub. (5)(b) . . . ." Subsection (5)(b) provides that the actuary shall "certify, as a result of each investigation, the actuarial assumptions to be used for computing employer contribution rates . . . ." Section 40.05(2)(am) provides that the employer current service contribution shall be determined "on the assumptions the actuary recommends and the board approves." Since the actuary has not recommended "amortization of supplemental liability" but recommended "the increased interest assumption . . . as the basis for completing the December 31, 1989 actuarial valuation," the ETFB lacks the basis to consider an "amortization of supplemental liability" method of valuation. See Special Considerations in 1991 WRS Rate Development, at 5, last sentence. The ETFB lacks the authority to adopt a method of actuarial valuation that is not recommended by the actuary.

JED:WMS
Residence, Domicile And Legal Settlement; Sheriffs; In counties that have imposed no local residency requirement, only deputy sheriffs or undersheriffs appointed pursuant to section 59.21(1), Stats., are required to be county residents at the time of initial employment. OAG 18-91

September 13, 1991

DENNIS E. KENEALY, Corporation Counsel
Ozaukee County

You ask whether, in light of the amendments to section 17.03(4), Stats., contained in 1989 Wisconsin Act 241, county residency is still required of deputy sheriffs at the time of their appointment in those counties that have imposed no local residency requirement.

In my opinion, the answer is yes only with respect to an undersheriff or deputy sheriff appointed pursuant to section 59.21(1).

Section 59.21 provides in part:

Sheriff; undersheriff; deputies. (1) Within 10 days after entering upon the duties of his office the sheriff shall appoint some proper person, resident of his county, undersheriff . . . and within such time the sheriff shall appoint deputy sheriffs for his county as follows:

(a) One for each city and village therein having one thousand or more inhabitants.

(b) One for each assembly district therein, except the district in which the undersheriff resides, which contains an incorporated village having less than one thousand inhabitants and does not contain a city or incorporated village having more than one thousand inhabitants.

(c) Each deputy shall reside in the city or village for which he is appointed, or if appointed for an assembly district, shall reside in the village in such district.
(2) He may appoint as many other deputies as he may deem proper.

(3) He may fill vacancies in the office of any such appointee, and may appoint a person to take the place of any undersheriff or deputy who becomes incapable of executing the duties of his office.

(4) A person appointed undersheriff or deputy for a regular term or to fill a vacancy or otherwise shall hold office during the pleasure of the sheriff.

(5) The sheriff or his undersheriff may also depute in writing other persons to do particular acts.

....

(8)(a) In any county having a population of less than 500,000, the county board, by ordinance, may fix the number of deputy sheriffs to be appointed in that county at not less than that number required by sub. (1)(a) and (b) and may set the salary of those deputies. The county board may provide by ordinance that deputy sheriff positions be filled by appointment by the sheriff from a list of all persons with the 3 highest scores for each position based on a competitive examination of persons residing in this state for at least one full year prior to the date of such examination.

Section 17.03, as amended by 1989 Wisconsin Act 241, provides in part:

Vacancies, how caused. Except as otherwise provided, a public office is vacant when:

(1) The incumbent dies.
(2) The incumbent resigns.
(3) The incumbent is removed.
(4) The incumbent ceases to be a resident of:
(a) This state; or
....
(d) If the office is local and appointive, and residency is a local requirement, the county, city, village, town, district or area within which the duties of the office are required to be discharged.

State residency is required of all deputy sheriffs by virtue of section 17.03(4)(a). State residency is also required of applicants for the position of deputy sheriff under the competitive examination process authorized by section 59.21(8)(a).

Prior attorney general opinions have consistently indicated that local residency is also required of deputy sheriffs. See 66 Op. Att'y Gen. 315 (1977); 62 Op. Att'y Gen. 250 (1973); and 45 Op. Att'y Gen. 267 (1956). Each of those opinions was based in part upon prior versions of section 17.03(4) which provided that any local public office was vacated whenever the incumbent ceased to be a resident of the municipality within which he or she was appointed or elected. With the passage of 1989 Wisconsin Act 241, that requirement remains only with respect to elected offices. Local appointive public offices are now automatically vacated only when "residency is a local requirement." Sec. 17.03(4)(d), Stats. Prior opinions indicating that state law contains a residency requirement for all local public offices are therefore no longer applicable, since section 17.03(4)(d) now applies only when a county has imposed a residency requirement for the office of undersheriff or deputy sheriff.

Specific statutes containing residency requirements for deputy sheriffs are controlling over general statutes such as section 17.03(4)(d), but all statutes should be "harmonize[d] . . . so as to give each one full force and effect" when it is possible to do so. Kettner v. Milwaukee Mut. Ins., 146 Wis. 2d 636, 642, 431 N.W.2d 737 (Ct. App. 1988). Despite the provisions of section 17.03(4)(d), under section 59.21(1), an undersheriff still must be a "resident of his [the sheriff's] county" and each deputy appointed under that statute must "reside in the city or village..."
for which he is appointed, or if appointed for an assembly
district, shall reside in the village in such district.”
Sec. 59.21(1)(c), Stats. Since the Legislature did not alter the
residency requirements contained in section 59.21(1), they still
must be satisfied.

An undersheriff or deputy sheriff who violates a residency
requirement contained in section 59.21(1) no longer
automatically vacates office under section 17.03(4)(d), but still
does automatically vacate office under that statute if he or she
violates a residency requirement imposed by the county. An
undersheriff or deputy sheriff subject to a residency requirement
contained in section 59.21(1) “hold[s] office during the pleasure
of the sheriff.” Sec. 59.21(4), Stats. That terminology means
that the sheriff may remove such an undersheriff or deputy for
any reason except an unlawful reason. 72 Op. Att’y Gen. 161,
166 (1983).1 In addition, an undersheriff or deputy sheriff who
violates a residency requirement contained in section 59.21(1)
may also be removed from office in a quo warranto action
commenced by an affected citizen or by the attorney general
pursuant to chapter 784. See, e.g., Henning v. Waterford, 78
Wis. 2d 181, 253 N.W.2d 893 (1977).

The legislative history concerning the recent amendments to
section 17.03 suggests that the intent of those amendments was
to reverse the result reached in Wellnitz v. Wauwatosa
Fire/Police, 151 Wis. 2d 306, 444 N.W.2d 412 (Ct. App. 1989).
While that result has been accomplished, I am taking this
opportunity to invite the Legislature to review the provisions of
section 59.21, since that statute contains residency requirements
for deputies appointed under some provisions, but not others.
The one-year durational residency requirement contained in
section 59.21(8)(a) for individuals desiring to take the civil
service examination is also in need of review, since a similar

1Whether municipal ordinances or collective bargaining agreements may
impose a more stringent removal standard is an issue not raised in your request.
requirement has, in at least one instance, been subjected to successful constitutional attack. *See Grace v. City of Detroit, 760 F. Supp. 646 (E.D. Mich. 1991).*

I, therefore, conclude that in counties that have imposed no local residency requirement, only deputy sheriffs or undersheriffs appointed pursuant to section 59.21(1) are required to be county residents at the time of appointment.

JED:FTC
Administrative Code; Residence, Domicile And Legal Settlement; Wisconsin Racing Board; Words And Phrases; Under 1987 Wisconsin Act 354 and section 562.05(3w)(a), Stats., residency for purposes of owning and operating a racetrack does not require fifty-one percent ownership by individuals. Wisconsin Administrative Code section RACE 1.01(9) (1990) is consistent with this legislative intent. OAG 19-91.

November 5, 1991

TERENCE M. DUNLEAVY, Executive Director
Wisconsin Racing Board

In creating 1987 Wisconsin Act 354, the Legislature did not define "residency" for purposes of owning and operating a racetrack. As a result, the Wisconsin Racing Board (hereafter "Board") used its emergency rulemaking authority to create a definition. Because of controversy over whether the Board's definition is consistent with legislative intent, the Board has asked whether Wisconsin Administrative Code section RACE 1.01(9) (1990) is consistent with the statute. For the reasons which follow, I conclude that the rule promulgated by the Board is consistent with the legislative intent in enacting 1987 Wisconsin Act 354.

1987 Wisconsin Act 354, section 562.05(3w), Stats., provides:

the board may issue a license . . . if the board determines that . . .

(a) At least 51% of the ownership interest in the racetrack is held by residents of this state.

The Board promulgated Wisconsin Administrative Code section RACE 1.01(9) which provides:

"Resident of this state" means for purposes of s. 562.05 (3w) (a), Stats.:
(a) Any person who is and has been domiciled in this state for at least 1 year immediately prior to the filing of an application for a license under s. 562.05 (1) (a), Stats.

(b) Any corporation, partnership, association or other entity which is incorporated or otherwise formed in this state, has its principal place of business in this state, and is and has been actively doing business in this state for at least 1 year immediately prior to the filing of any application for a license under s. 562.05 (1) (a), Stats.

The controversy focuses on Wisconsin Administrative Code section RACE 1.01(9)(b). Some contend that, contrary to the Board’s rule, fifty-one percent of the shareholders, partners or members of the organizations to which Wisconsin Administrative Code section RACE 1.01(9)(b) refers must be Wisconsin residents.

The primary source for construction of a statute is the language of the statute itself. State v. Burkman, 96 Wis. 2d 630, 638, 292 N.W.2d 641 (1980). If the statutory language is unambiguous, one arrives at the intention of the Legislature by giving language its ordinary and accepted meaning. Vigil v. State, 76 Wis. 2d 133, 142, 250 N.W.2d 378 (1977). Only where a statute is not clear on its face as to its meaning or application does one look to the legislative intent in construing a statute. McLeod v. State, 85 Wis. 2d 787, 792, 271 N.W.2d 157 (Ct. App. 1978).

A statute is ambiguous if two or more reasonably well-informed persons could understand the language in different senses. Allen v. Juneau County, 98 Wis. 2d 103, 295 N.W.2d 218 (Ct. App. 1980). I believe that reasonably well-informed persons can differ over whether, for non-natural persons, the entity or its members or shareholders must be fifty-one percent Wisconsin residents.

The ultimate purpose of statutory construction is to give effect to the legislative intent. Madison v. Southern Wis. R. Co., 156 Wis. 352, 360, 146 N.W. 492 (1914). Since there is no
single document evidencing the legislative intent of the language of the statute, legislative intent must be construed from changes and modifications made during the legislative process in relation to the subject matter and intended purpose of the statute. *Pittman v. Lieffring*, 59 Wis. 2d 52, 62, 207 N.W.2d 610 (1973). I, therefore, employ an analysis of such information to determine the intended definition of residency for the purposes of section 562.05(3w)(a).

**LEGISLATIVE HISTORY OF 1987 WISCONSIN ACT 354**

1987 Wisconsin Act 354 began as Senate Bill 444. In its original draft, SB 444 used the language, “At least 51% of the beneficial ownership interest in the racetrack is held by residents of this state.” Sub. 1, SB 444 at 20, lines 5-6 (engrossed 1987 SB 444, March 3, 1988). “Beneficial ownership” applies to those who enjoy ownership and receive profits but do not have legal title. Therefore, with the language “beneficial ownership” in the statute, the fifty-one percent Wisconsin resident requirement would have applied to the residence of the individual shareholders of the corporation rather than the residence of the corporation itself.

With Assembly Amendment Number 2, the language was changed to “51% of the ownership interest,” deleting the word “beneficial.” Legislators are aware of the significance of each word in a statute “the studied omission of a word or words in the [amendment] of a statute indicates an intent to alter its meaning.” *Pittman*, 59 Wis. 2d at 64. The fact that the word “beneficial” was removed could therefore only mean that the Legislature decided that the residence of individual shareholders need not be included in defining the residence of a corporation. To say that such an important change in the language had no effect on the meaning of the statute would be injudicious. “[W]e cannot read into statutory language that which is not there to reach a desirable result.” *Dept. of Natural Resources v. Clintonville*, 53 Wis. 2d 1, 8, 191 N.W.2d 866 (1971).
Moreover, emergency rule Wisconsin Administrative Code section RACE 1.01(9) has gone through an extensive review process by the Legislature. On March 23, 1989, the Board submitted Wisconsin Administrative Code section RACE 1.01(9) to the Legislative Council for review. From there it was referred to the Senate Committee on Labor, Business, Insurance, Veterans’ and Military Affairs. No action was taken by the committee, thereby effecting a silent approval. The rule was also referred to the Assembly Committee on State Affairs, where an objection was raised. As a result of the objection, the rule was then referred to the Joint Committee for Review of Administrative Rules. After holding a public hearing and an executive session, the Joint Committee for Review of Administrative Rules nonconcurred with the Assembly’s objection and approved the Board’s definition of residency. Wisconsin Administrative Code section RACE 1.01(9) became effective June 1, 1990.

Further support for this interpretation is found in Senate Bill 23 of the 1989-90 session. Senate Bill 23 was proposed in an effort to create a definition of residency of corporations for purposes of owning racetracks in Wisconsin. It stated that when dealing with a corporate owner, the Board must look at the residency of the individual shareholders. This bill died in the 1989-90 session and was never reintroduced. If SB 23 truly reflected the legislative intent of 1987 Wisconsin Act 354 and section 562.05(3w)(a), then Senate Bill 23 would likely have become law.

The Legislature intended that the creation of racetracks benefit the State of Wisconsin to the greatest extent possible. The Board’s interpretation of residency is not in conflict with such intent. The Board rule states that to be a resident a corporation must: (1) be incorporated in Wisconsin; (2) have its principal place of business in Wisconsin; and (3) have been actively doing business in the state for at least one year.
It is my opinion that the Board’s rule, Wisconsin Administrative Code section RACE 1.01(9), is consistent with the legislative intent of 1987 Wisconsin Act 354 and section 562.05(3w)(a). A Wisconsin corporation that meets the Board’s qualifications as a Wisconsin resident therefore should be allowed to participate in the licensing process. Because section 562.05(3w)(a) and Wisconsin Administrative Code section RACE 1.01(9) do not require fifty-one percent ownership by Wisconsin individuals when corporations are involved, there is no need to address the constitutionality of the statute.

You have also asked whether that portion of the statute which requires eighty-five percent of the employees at the track to be Wisconsin residents is constitutional under various provisions of the United States Constitution. As you know, I have a statutory obligation to defend the constitutionality of the Wisconsin statutes. I therefore decline to opine on the constitutionality of that portion of the statute. I prefer to defend the statute in the context of a concrete fact situation.

JED:WDW
Open Meeting; Words And Phrases; The term "quasi-governmental corporation" in section 19.82(1), Stats., includes private corporations which closely resemble governmental corporations in function, effect or status. As currently organized, the Milwaukee Economic Development Corporation and Metropolitan Milwaukee Enterprise Corporation constitute "quasi-governmental" corporations within the meaning of section 19.82(1) and are, therefore, subject to the open meetings law. OAG 20-91

November 18, 1991

ROBERT G. OTT, Corporation Counsel
Milwaukee County

You have asked for my opinion on the applicability of the open meetings law, sections 19.81-19.98, Stats., to the Milwaukee Economic Development Corporation and the Metropolitan Milwaukee Enterprise Corporation.

The Milwaukee Economic Development Corporation was originally incorporated in 1971, under the name Milwaukee Model Cities Development Corporation ("MMCDC"), as a chapter 181 nonstock, nonprofit corporation. Two of MMCDC's incorporators were private citizens and one was the assistant director of the City of Milwaukee, Department of City Development ("Department of City Development"). The purpose of the corporation, apparently, was to provide economic development loans to private citizens with funds the City of Milwaukee ("city") obtained under the Federal Model Cities Program.

In 1974, MMCDC changed its name to the Milwaukee Economic Development Corporation ("MEDC"). In 1975, the federal government phased-out the model cities program. Pursuant to a phase-out plan, the Milwaukee City Council authorized the mayor to execute a contract with MEDC permitting MEDC to retain the assets and interest it derived from model cities program funds provided that MEDC maintain
a management agreement with the city. See City of Milwaukee Resolution, file number 73-1948-j.

MEDC currently operates under restated articles of incorporation, filed with the Secretary of State on December 5, 1985, which state that the purpose of the corporation is to “further the economic development of the City of Milwaukee and to promote job creation in the metropolitan Milwaukee area.” The 1989 annual report for MEDC, which was published by the Department of City Development, describes MEDC as a “City-sponsored corporation” which provides financing to businesses that promise to create job opportunities and new investment in Milwaukee. MEDC currently has a contract with the city to administer funds the city obtains under the federal Community Development Block Grant and Urban Development Action Grant programs. City of Milwaukee, Contract No. 88-26 (CM), dated August 23, 1988. Although MEDC has obtained some money from commercial sources, the vast majority of money MEDC uses to make loans is derived from public funds.

The bylaws for MEDC set the number of directors of the corporation at nine. The bylaws reserve four of the nine directors positions for specified city officials: 1) the mayor, 2) the comptroller, 3) the president of the common council and 4) a member of the common council, other than the president.

The bylaws for MEDC also provide that the corporation shall have six officers: 1) chairman of the board, 2) vice chairman of the board, 3) president, 4) vice president, 5) secretary and 6) treasurer. The bylaws state that the chairman and vice-chairman of the board cannot be directly affiliated with the city government. The bylaws also state that the president, vice president, secretary and treasurer may be selected by the city pursuant to a contract between the city and MEDC, and that the city shall determine the salary for MEDC officers selected by the city. MEDC’s bylaws and articles of incorporation list the address for the Department of City Development as MEDC’s principal office.
All of MEDC's offices are located in city-owned buildings. Pursuant to the contract MEDC currently has with the city, the Commissioner of the Department of City Development selected the current president, vice president, secretary and treasurer of the corporation. All of those officers are city employees. Some of MEDC's staff members are also city employees. The officers and staff are permitted to conduct MEDC business during the hours for which they are paid a city salary. The city provides MEDC with all of the office space, equipment and supplies needed by the corporation. Under the terms of the contract, MEDC is responsible for reimbursing the city for the salaries and benefits the city pays for the time city employees spend working for MEDC, and the cost of providing office space, equipment and supplies to MEDC. MEDC's obligation to reimburse the city is offset against grants MEDC receives from the city.

The Metropolitan Milwaukee Enterprise Corporation ("MMEC") is a chapter 181 nonstock, nonprofit corporation created in 1985. MMEC provides economic development loans with funds the city obtains under the federal Small Business Administration loan program. The articles of incorporation for MMEC, which were filed with the Secretary of State on November 1, 1985, set the number of directors of the corporation at fourteen. Neither MMEC's articles of incorporation nor its bylaws reserve any directors positions for city officials or employees. However, two of MMEC's current directors are city council members and one is a city employee.

In all other relevant respects, MMEC's relationship to the city is similar to that of MEDC. MMEC's articles of incorporation and bylaws list the Department of City Development as MMEC's principal office. All of MMEC's offices are located in city-owned buildings. MMEC's bylaws state that its president, vice president, secretary and treasurer may be selected by the city under a contract between the city and MMEC. Pursuant to that provision, a city official selected all of MMEC's current
officers. All of MMEC’s officers and some of its staff members are city employes. The city provides all office space, equipment and supplies needed by MMEC. The cost the city incurs in supplying staff and other resources to MMEC is offset against grants MMEC receives from the city.

The open meetings law applies to MEDC and MMEC if they are “governmental bod[ies]” within the meaning of section 19.82(1), which provides:

“Governmental body” means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation created under ch. 232; any public purpose corporation, as defined in s. 181.79(1); a nonprofit corporation operating an ice rink which is owned by the state; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. IV or V of ch. 111.

You ask three questions regarding the proper interpretation of the phrase “governmental or quasi-governmental corporation.” Those questions can best be answered by directly addressing the question whether MEDC and MMEC are “quasi-governmental” corporations within the meaning of section 19.82(1).

The open meetings law does not define “governmental or quasi-governmental corporation.” The drafting file for chapter 426, Laws of 1975, which created the current open meetings law, contains no information on the intended meaning of “governmental or quasi-governmental corporation.” There is no Wisconsin case law interpreting that phrase.

In 66 Op. Att’y Gen. 113 (1977), my predecessor concluded that the Palmyra Volunteer Fire Department, which was organized as a chapter 181 nonstock, nonprofit corporation, was
not a "governmental or quasi-governmental corporation" within the meaning of section 19.82(1). The fire department received money from the Palmyra Fire Protection District for providing fire protection to the district. My predecessor stated that "[e]ven though a corporation may serve some public purpose, it is not a 'governmental or quasi-governmental corporation' under sec. 19.82(1), Stats., unless it also is created directly by the Legislature or by some governmental body pursuant to specific statutory authorization or direction." 66 Op. Att'y Gen. at 115. See also Informal Opinion, dated February 26, 1987, and Informal Opinion, dated July 13, 1987 (concluding that chapter 181 nonstock, nonprofit corporations created by private citizens to promote economic development are not "quasi-governmental" corporations under section 19.82(1)).

My predecessor applied a different analysis in 73 Op. Att'y Gen. 54 (1984). That opinion addressed whether the Historic Sites Foundation, Inc. ("HSF") was a "quasi-governmental corporation" within the meaning of section 19.82(1). HSF was a chapter 181 nonstock, nonprofit corporation organized to manage the Circus World Museum. Members of the board of curators for the State Historical Society of Wisconsin served as directors of HSF.

After noting that HSF was created by private individuals, id. at 56, the opinion went on to consider other factors to determine whether HSF was a "quasi-governmental corporation." The opinion cited the definition of "quasi" in Webster's New Collegiate Dictionary 700 (7th ed. 1977): "1) having some resemblance . . . by possession of certain attributes." The opinion then noted that HSF had no sovereign power, was not controlled by the Legislature and had no other governmental attributes. The opinion further noted that while members of the board of curators were also directors of HSF, they held their positions with HSF as private citizens, not as state officials. As a result, the opinion stated that HSF was not a
"quasi-governmental corporation" within the meaning of section 19.82(1).

In 74 Op. Att'y Gen. 38 (1985), my predecessor concluded that chapter 181 nonstock, nonprofit corporations created by private individuals to provide financial support to public radio and television stations are not "quasi-governmental" corporations within the meaning of section 19.82(1). That opinion followed the same analysis as did the HSF opinion. The opinion, however, went on to state: "[T]he term 'quasi-governmental corporation' is limited to nonstock body politic corporations created by the Legislature to perform essentially governmental functions." In support of that conclusion the opinion referred to McQuillin, Municipal Corporations § 2.13 (3rd ed. 1971), providing that "a quasi-municipal corporation is a public agency created or authorized by the legislature to aid the state in, or take charge of, some public or state work, other than community government, for the general welfare." 74 Op. Att'y Gen. at 43.

Thus, prior attorney general opinions have reached inconsistent conclusions with respect to whether the term "quasi-governmental corporation" in section 19.82(1) is limited to nonstock body politic corporations created directly by the Legislature or some other governmental body, or whether the term also includes corporations that were not created directly by a governmental body, but have some other attributes that resemble a governmental corporation. For the reasons set forth below, I am of the opinion that the term includes corporations that have other governmental attributes.

The Legislature has declared that the provisions of the open meetings law must be liberally construed to ensure that the public has the "fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Sec. 19.81(1) and (4), Stats. The primary source in construing a statute is the statutory language itself. Non-technical words in a statute must be given their
ordinary and accepted meanings unless the statute specifies otherwise. In addition, a statute should be construed so as not to render any portion of it superfluous. *State v. Sher*, 149 Wis. 2d 1, 8-9, 437 N.W.2d 878 (1989).

Webster's Third New International Dictionary 1861 (1986) defines “quasi” as: “1: having some resemblance (as in function, effect, or status) to a given thing.” Thus, the ordinary and accepted meaning of “quasi” suggests that the term “quasi-governmental corporation” is not limited to corporations created directly by a governmental body. Moreover, the definition of “governmental body” within section 19.82(1) includes: “a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order.” Interpreting the term “quasi-governmental corporation” as being limited to nonstock body politic corporations created directly by the Legislature or some other governmental body would render the term superfluous. For these reasons, I conclude that the term “quasi-governmental corporation” in section 19.82(1) is not limited to corporations created directly by a governmental body. The term also includes private corporations which, for other reasons, closely resemble a governmental corporation in function, effect or status. This conclusion is supported by the section of McQuillin, *Municipal Corporations* cited in 74 Op. Att’y Gen. 38 (1985), which has since been revised to explain that:

The term “quasi-public [or quasi-governmental] corporation” is not per se public or governmental. On its face, the term connotes that it is not a public corporation but a private one. But “quasi” indicates that the private corporation has some resemblance to a public corporation in function, effect or status.

Whether a particular private corporation resembles a governmental corporation closely enough to be a "quasi-governmental corporation" within the meaning of section 19.82(1) must be determined on a case by case basis, in light of all the relevant circumstances. The fact that MEDC and MMEC serve a public purpose by promoting economic development in the City of Milwaukee is not, in itself, sufficient to make the corporations "quasi-governmental." See 66 Op. Att’y Gen. 113, 115 (1977); Informal Opinion, dated February 26, 1987; and Informal Opinion, dated July 13, 1987. Nor is the fact that MEDC and MMEC receive most of their funding from public sources. Compare section 19.32(1) (including certain nonprofit corporations that receive more than fifty percent of their funds from a county or municipality as an authority subject to the public records law) with section 19.82(1) (omitting receipt of public funds from definition of "governmental body" subject to the open meetings law). However, in addition to these facts, four of MEDC’s nine directors are city officials. They serve as directors by virtue of their positions as city officials, not as private citizens. The city selected the president, vice president, secretary and treasurer of MEDC and MMEC. All of those officers are city employees. The day-to-day operations of both corporations are, therefore, subject to the control of city employees. Further, the Department of City Development is the principal place of business for both MEDC and MMEC. Both corporations enjoy the privilege of being housed in city-owned buildings, using city equipment and supplies and having corporate officers and staff included on the city payroll and in the city employee benefit plan. In light of all these facts, I conclude that MEDC and MMEC resemble a governmental corporation in purpose, effect or status closely enough to constitute a "quasi-governmental corporation" within the meaning of section 19.82(1).

I reach this conclusion despite the fact that a majority of directors of both corporations are private citizens not directly
affiliated with the city and that the corporations are free to alter their relationship to the city by amending their articles of incorporation and bylaws. The open meetings law declares that the public is entitled to the “fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.” Sec. 19.81(1), Stats. The city has obtained authority to appoint the president, vice president, secretary and treasurer of MEDC and MMEC. All of the officers the city appointed are city employees. Further, the city has agreed to house, staff and provide equipment and supplies to the corporations. In making all these arrangements, the city has transformed MEDC’s and MMEC’s business into governmental business, about which the public has a right to be informed. The fact the city has been able to find private corporations to acquiesce in such an arrangement cannot work to deprive the public of its right to knowledge about governmental affairs.

I am aware that adopting a fact-based test to determine whether a corporation is a “quasi-governmental corporation” within the meaning of section 19.82(1) creates some uncertainty as to the applicability of the open meetings law in particular cases. This result is necessitated by the Legislature’s use of the term “quasi-governmental corporation.” Moreover, the resultant uncertainty can be avoided without undue burden by resolving any question as to the applicability of the open meetings law in favor of complying with the law.

JED:MWS
Regents, Board Of; Salaries And Wages; University; The University of Wisconsin Board of Regents’ proposed action to raise by one percent the pay range minima and maxima of the academic staff for the 1991-1992 fiscal year requires prior approval by the Secretary of the Department of Employment Relations. OAG 21-91

November 19, 1991

KATHARINE LYALL, Acting President
University of Wisconsin System

Your predecessor asked on behalf of the Board of Regents of the University of Wisconsin System the following questions:

. . . . First, does increasing the dollar values of pay range minima and maxima constitute a pay range change under s. 36.09(1)(k), Stats., and thus require that the Board obtain the approval of the Secretary of the Department of Employment Relations prior to increasing the dollar values of the minima and maxima of the academic staff pay ranges, or is the increase in dollar values a compensation plan matter which the Board is authorized to take pursuant to s. 36.09(1)(j) (setting salaries) without the approval of the Secretary under the compensation plan requirements of s. 230.12, Stats.? Second, is s. 36.09(1)(k), Stats., applicable only to academic staff category or pay range structure changes which may adversely affect pay equity based on gender or race and thereby require separate annual reports to JCOER outside of the biennial compensation plan proposals to that committee?1

1985 Wisconsin Act 29, which inter alia created section 36.09(1)(k) is at issue in litigation in two separate Dane County Circuit Court cases. Moylan, et al. v. The University of Wisconsin System, et al., Case No. 87-CV-0421 and Barbara Meyer v. University of Wisconsin-Madison, Case No. 91-0217. Because the issues in those cases are sufficiently dissimilar from the issues you raise, the policy against issuing an opinion on matters in litigation is not applicable.
In your letter you indicate that the board would like to increase the pay range minima and maxima dollar values for all academic staff by one percent for the 1991-1992 fiscal year. The board did not submit this proposed action to the Department of Employment Relations secretary. The secretary, in his compensation plan recommendations to the Legislature’s Joint Committee on Employment Relations for 1991-1992, made no mention of increasing the pay range minima and maxima. The secretary did state in his recommendations for the 1992-1993 fiscal year that the board may increase the pay range minima and maxima by three percent. You also note that previously the board has used sections 230.12(3)(e) and 36.09(1)(j) as its authority to effect new academic staff pay ranges without Department of Employment Relations approval. In view of recent changes in the law, the board is uncertain whether such pay range changes are compensation and salary adjustment matters not subject to Department of Employment Relations approval or are the type of “pay range” changes within the scope of section 36.09(1)(k) and therefore subject to the secretary’s authority. For the following reasons, it is my opinion that changes in the minima and maxima require secretarial approval.

The questions presented involve two separate statutory procedures for preparing, approving, modifying and implementing academic staff pay rates. The University of Wisconsin staff are outside the classified service and are compensated by a separate compensation plan under section 230.12(3)(e). Under this section the compensation plan, which is based on the Board of Regent’s recommendations, is proposed by the secretary and ultimately approved by the Legislature’s Joint Committee on Employment Relations.

The other statutory procedure, section 36.09(1)(k) was created by the Legislature in 1985 to correct pay inequities as they existed in the University of Wisconsin compensation system. Section 36.09(1)(k) serves a dual function: One, as a
mechanism to establish job categories and pay ranges that are gender and race neutral; and two, as a mechanism to review any changes in the job categories or the pay ranges as part of the ongoing implementation of the University of Wisconsin academic staff salary structure. This statute requires the board to establish job categories that are race and gender neutral and assign these job categories to one of the thirteen pay ranges generated by the Hayes/Hill report. Sec. 36.09(1)(k)2. a.-d., Stats. The initial categorization and assignment by the board was to be approved by the secretary, as well as any future changes in the categorization or pay range structure. Section 36.09(1)(k) provides:

1. The board shall, with respect to academic staff, correct pay inequities based on gender or race.

2. The board shall do all of the following:
   a. Establish and maintain job categories in which to place academic staff positions. The job categories shall be described in sufficient detail to enable the board to comply with subd. 1.
   b. Establish and maintain pay ranges, each of which has a minimum and a maximum rate of pay and, using the job evaluation system developed by the secretary of employment relations, assign the job categories established under subd. 2. a to those pay ranges. . . .
   c. Submit the job categories and pay ranges established under subd. 2. a and b to the secretary of employment relations for review and approval. In reviewing the job categories and pay ranges, the secretary of employment relations shall determine whether the board complied with subd. 1 in establishing the job categories and pay ranges.
   d. Submit a request for any change in the job categories or the pay ranges established under subd. 2. a and b to the secretary of employment relations for review and approval. In reviewing a request for such a change, the
secretary of employment relations shall determine whether the requested change requires the board to comply with subd. 1. The secretary of employment relations shall annually report to the joint committee on employment relations regarding any approved changes in the job categories or pay ranges.

Whether changes in the dollar values of the pay range minima and maxima are subject to Department of Employment Relations review and approval turns on the construction of section 36.09(1)(k)2.d. Statutory construction begins with an examination of the language used by the Legislature. *State v. Denter*, 121 Wis. 2d 118, 357 N.W.2d 555 (1984). In *Denter*, the court held, "In construing a statute the primary source of construction is the language of the statute itself. [Case citation omitted.] If the meaning of the statute is clear and unambiguous on its face, resort to extrinsic aids for the purpose of statutory construction is improper." 121 Wis. 2d at 123. See also *State v. Derenne*, 102 Wis. 2d 38, 45, 306 N.W.2d 12 (1981).

The language in section 36.09(1)(k)2.d. is clear and unambiguous on its face. The statute specifically requires the board to "[s]ubmit a request for *any change* in the job categories or the pay ranges established . . . to the secretary of employment relations for review and approval." From this language, it is clear that the Legislature intended that *any change*, including an increase in the dollar values of the pay range minima and maxima, be subject to review by the secretary. There is nothing in this statutory language to suggest that increasing the dollar values of the pay range minima and maxima is not a "pay range change" within the meaning of this statutory language. Quite simply, it is.

Notwithstanding the clear mandate of section 36.09(1)(k), the board suggests that the statute is ambiguous with regard to what it defines as a pay range change. The board apparently makes a distinction between a "structural change" of a pay range and the adjustment of the dollar values of a pay range minima and
maxima. Based on this distinction, the board interprets section 36.09(1)(k) to require Department of Employment Relations approval only for "structural changes" but not for other pay range changes. The changes in the dollar values of pay ranges are viewed by the board as equivalent to the setting and adjusting of the dollar values for the academic staff salaries which the board asserts it has authority to do without the secretary’s approval.

Even if the language of section 36.09(1)(k)2.d. is assumed to be ambiguous as the board suggests, the rules of statutory construction concerning legislative intent, (see Miller Brands-Milwaukee v. Case, 156 Wis. 2d 800, 811, 457 N.W.2d 896 (Ct. App. 1990), and State v. Pham, 137 Wis. 2d 31, 34, 403 N.W.2d 35 (1987)), compel the same conclusion. To ascertain legislative intent the Wisconsin Supreme Court has allowed the use of extrinsic materials as interpretative aids including: “the scope, history, context, subject matter and purpose of the statute.” Employers Ins. of Wausau v. Smith, 154 Wis. 2d 199, 226, 453 N.W.2d 856 (1990). The legislative purpose in enacting section 36.09(1)(k) and an example showing the consequences of an increase in the pay range minima and maxima to the University of Wisconsin pay range structure, make it clear that the board’s proposed increase in the dollar values of the pay ranges constitutes a "structural change" which is subject to the secretary’s independent review.

In 1985 the Legislature identified existing inequities in the University of Wisconsin compensation system. Several of the problems identified dealt with the large pay discrepancies between women and minorities in relation to the rest of the University of Wisconsin staff system, the large pay discrepancies between different positions having the same functions and duties and the lack of a salary structure which was competitive in the marketplace. In order to remedy these deficiencies the Legislature created section 36.09(1)(k) and adopted a new job categorization and compensation structure for
the University of Wisconsin academic staff based on the Hayes/Hill report. See 1985 Wis. Act 29, sec. 3053. See also Academic Staff Title and Compensation Study, May 28, 1986. The purpose of these actions was to accomplish the legislative goals of promoting greater consistency, greater competitiveness and affirmative action in regard to academic staff salaries.

To meet the legislative goal of making academic salaries more competitive in the marketplace, thirteen pay ranges were developed under the Hayes/Hill Plan in 1985. This goal was achieved once the job titling and categorization process for academic staff positions had been completed. To create the pay ranges, Hayes/Hill determined the average market salary of every job title. Academic Staff Title and Compensation Study, May 1986 at 27-32. The average market salary became the midpoint around which Hayes/Hill built the University of Wisconsin job title salary ranges of 50 percent. Id. at 43. Thus, the minimum salary of an academic staff member for a given job title would be 80 percent of the average market salary, and the maximum would be 120 percent of the market-based average salary. The creation and implementation of these pay ranges derived from the average market salary made academic salaries competitive in the marketplace.

Because the minima, midpoint and maxima are the essence of the pay range system created by Hayes/Hill and adopted by the Legislature, it is my opinion that the board’s proposed action of adjusting the dollar values of the minima and maxima not only effects a change in the pay ranges but also in the entire salary structure. An unreviewed change in pay ranges could potentially contravene the Legislature’s goals of greater competitiveness, greater consistency and affirmative action. Consideration of some of the effects of an increase in the pay range minima and maxima are instructive.

Although at first blush the proposed change appears to be a simple increase in the dollar amount of the minima and maxima, major internal and external structural changes will
likely occur. First, internally the employee at the minimum presumably would move up to the new minimum, thereby realizing a salary adjustment. The other employees do not move however because the change is only an increase in the minimum, midpoint and maximum and not an across-the-board adjustment throughout the pay range where every employee's salary would be increased accordingly. Nevertheless, the effect of this change is to compress the gap between the salary level of the employee at the minimum and the salary levels of the other employees. In addition, the gap increases between the salary levels of all other employees and the new maximum salary level. This effect also may create internal inequities within the pay range because more employees will tend toward the minimum salary level.

Second, externally, the increase may or may not be consistent with competitive market salaries. Clearly, the lack of competitiveness with the marketplace would contravene legislative intent.

Also, long-term effects could potentially occur. If several years of unchecked increases in the pay ranges are allowed, the internal and inequitable gap between different salary levels could increase and the University of Wisconsin's ability to keep its salary levels competitive with the market could be impaired. Thus, over time some of the problems that the Legislature attempted to remedy with the University of Wisconsin pay range structure could return. In view of these possible effects, it is apparent that an increase in the minima and maxima of the pay ranges is not just a salary matter, but is a structural change.

Although the proposed change appears simple vis-a-vis single pay range, the picture becomes slightly more complicated where there are thirteen pay ranges as in the University of Wisconsin structure. With each additional pay range, there is a need to maintain internal equity and consistency within each pay range as well as equity and consistency between pay ranges. Nevertheless, the effects of an increase in the minima and maxima of one pay range is equally applicable to all thirteen pay ranges.
Because a change of this nature could potentially contravene legislative goals in establishing and maintaining the University of Wisconsin compensation structure, it is clear that a pay range change must be reviewed by the secretary under section 36.09(1)(k)2.d.

Overall, it is my opinion that the board’s proposed increase in the dollar values of the pay range minima and maxima for the academic staff is not merely a compensation plan and salary adjustment matter under sections 230.12(3)(e) and 36.09(1)(j). Rather, it is a major structural change subject to section 36.09(1)(k) and review by the secretary. This conclusion is compelled by the clear language of section 36.09(1)(k), the legislative intent surrounding the creation of the University of Wisconsin compensation system, the importance of the Hayes/Hill pay range structure and the potential effects of a pay range increase on the entire University of Wisconsin compensation system.

In his second question your predecessor asked: “[I]s s. 36.09(1)(k), Stats., applicable only to academic staff category or pay range structure changes which may adversely affect pay equity based on gender or race and thereby require separate annual reports to JCOER outside of the biennial compensation plan proposals to that committee?” In view of the answer to your first question, it follows that the board must comply with the provisions of section 36.09(1)(k) concerning any pay range change regardless of any other mandated reporting and review procedures.

JED:JDN
Building Commission, State; Corrections, Department Of;
The Building Commission’s actions authorizing Department of
Corrections building projects did not violate section 20.924,
Stats. OAG 1-92

January 8, 1992

WALTER J. KUNICKI, Speaker
Assembly Organization Committee

On behalf of the Assembly Committee on Organization, you
have asked for an opinion on the validity of certain actions
taken by the state Building Commission ("Commission") at a
meeting on September 4, 1991. The questions involve the
Commission’s authority under section 20.924, Stats., the statute
which provides that the Commission shall supervise and
authorize the implementation of the state building program.

Section 20.924(1)(a) provides that the Commission may
authorize the design and construction of any building, structure
or facility costing in excess of $250,000 regardless of funding
source, “only if that project is enumerated in the authorized
state building program.” You ask whether certain projects
authorized at the September 4, 1991, meeting were
“enumerated” in the authorized state building program.

The Governor vetoed parts of the 1991-93 authorized state
building program, 1991 Wisconsin Act 39, section 9108. The
projects in question were projects authorized for the Department
of Corrections in section 9108(1)(b). The partial vetoes changed
the specificity of certain projects. In particular, an authorization
to spend $62 million on a “[m]edium security correctional
institution in the town of Brockway in Jackson county to
provide 750 beds” was changed by use of the partial veto to
authorize $62 million to be spent for “[m]edium security
correctional beds.” The Governor also used his partial veto
authority to change an appropriation for $11,600,000 for
“[a]lcohol and other drug abuse correctional institution in the
city of Milwaukee to provide 200 beds” to read “[a]lcohol and
other drug abuse correctional beds.” Other partial vetoes had similar effects.

I conclude that the projects, as vetoed, are “enumerated in the authorized state building program” for purposes of section 20.924(1)(a). The word “enumerated” is not defined in the statute. Words should be construed according to their common and approved usage. Sec. 990.01(1), Stats. The common and approved meaning of a statutory term can be ascertained by reference to a recognized dictionary. State v. Kay Distributing Co., Inc., 110 Wis. 2d 29, 327 N.W.2d 188 (Ct. App. 1982). Webster’s Third New International Dictionary 759 (1986) defines “enumerate” to mean “to relate one after another: LIST, SPECIFY.” Even after the partial vetoes the projects are sufficiently specified so as to distinguish one from another. The partial vetoes did not change the enumeration or listing of the projects; they changed only the specificity of the descriptions of the projects. The law does not require a specific project description in the authorized building program; it only requires that a project be “enumerated.”

This interpretation is consistent with the practice when section 20.924 was adopted. Section 20.924 was created in chapter 154, section 122(m), Laws of 1969, the biennial budget bill. Section 375(m) of chapter 154, the authorized state building program, enumerated projects such as “Wisconsin state reformatory—food service renovation $300,000—locking system $370,000” and “[s]ystem—minor projects $2,000,000.” Similarly, the authorization for state office facilities contained an enumeration for “[p]arking facilities” of $2,700,000.

The next biennial budget bill, chapter 125, section 518, Laws of 1971, authorized $525,500 for “[r]eformatory—food service renovation” and $2,156,000 to “[s]ystem--auxiliary projects.” In the 1979 authorized building program, the Legislature appropriated $20 million for “[m]edium/[m]inimum security correctional facility construction.” Ch. 34, sec. 2006m(1), Laws of 1979. That $20 million was increased to $36 million. Ch.
221, sec. 903g, Laws of 1979. Neither law specified a site for the correctional facility. I conclude that the descriptions in the authorized state building program are sufficient enumeration for the purposes of section 20.924.

You also ask whether the Commission has the authority to determine where a prison or prison expansion project should be sited when no site is specified in the authorized state building program. The grant of authority to the Commission is plenary: "The building commission shall have all the powers necessary to carry out its duties . . . ." Sec. 13.48(2)(b)1., Stats. Under section 13.48(10), the Commission has the right of prior approval over construction contracts. "Because the commission possesses that right, it exercises an immense control over state construction." J.F. Ahern Co. v. Building Commission, 114 Wis. 2d 69, 105, 336 N.W.2d 679 (Ct. App. 1983).

Neither section 20.924 nor any other statute prohibits the Commission from authorizing construction of an enumerated project simply because the site for that project is not contained in the enumeration. As noted above, the authorization to build the correctional facility which resulted in the construction of the Columbia Correctional Institution, chapter 34, section 2006m(1)c, Laws of 1979, provided no site for the prison. The Commission selected the site. Both the grant of authority to the Commission and past practice support the conclusion that the Commission has the authority to select a site for construction when no site is specified in the authorized state building program.

The authorized state building program provided an appropriation of $62 million for "medium security correctional beds." The Commission plan adopted on September 4, 1991, allocates $80 million to construct 450 beds by expanding the Oshkosh Correctional Institution and constructing 450 beds in what is to be a new institution in Jackson County. The Commission obtained the $18 million difference between its
plan and the budget plan by reducing other Department of Corrections’ authorized projects. You ask if this is proper.

Section 20.924(1)(d) provides that the Commission shall exercise considered judgment in supervising the implementation of the state building program, and may authorize limited changes in the project program, and in the project budget if the commission determines that unanticipated program conditions or bidding conditions require the change to effectively and economically construct the project. However, total state funds for major projects under the authorized state building program for each agency shall not be exceeded.

The question is whether the changes made by the Commission are “limited changes in the project program.” “Limited” means “confined within limits: restricted in extent, number or duration.” Webster’s Third New International Dictionary 1312 (1986).

In 61 Op. Att’y Gen. 332, 341 (1972), this office opined that the authorization for limited changes in section 20.924(1)(d) could not be construed as permitting the Commission to not construct one enumerated project and then use the money authorized for that project for another project in the same agency. The opinion concluded that that would be more than a limited change. That opinion did note, however, that “[t]he Building Commission may, to a limited extent, use these earmarked funds for another enumerated project by changing the scope of the project or the budget.” 61 Op. Att’y Gen. at 336.

The Commission’s September 4 plan does not delete authorized projects and attempt to use those funds for the medium security correctional beds construction. Rather, the Commission reduced the funding for other projects and used those “savings” to fund the difference between the $62 million provided for medium security correctional beds in the budget and the $80 million required by the Commission’s plan. The
$18 million difference is approximately twelve percent of the Department of Corrections' authorized building program. The changes increase the number of medium security beds from 750 as authorized before the veto to 900. I conclude that the Commission's changes do comport with the statute's requirement that the changes be "limited."

Section 20.924(1)(d) which authorizes limited changes conditions that authorization on the Commission determining "that unanticipated program conditions or bidding conditions require the change to effectively and economically construct the project." In the J.F. Ahern Co. case the court of appeals concluded that the Commission's decision to waive bidding requirements for state construction did not require a formal record and would be reversed only if it were arbitrary or capricious. J.F. Ahern, 114 Wis. 2d at 91-99. I conclude that same standard is applicable to the Commission's decision to make limited changes under section 20.924. The minutes of the September 4, 1991, Commission meeting revealed that the Commission's actions on the Department of Corrections' major projects were unanimous. The approval was based on a report by a special committee which was "set up to prepare recommendations and report back to the September 4 meeting." (Commission minutes of September 4, 1991.) The subcommittee's recommendations were also unanimous. The decision to make limited changes in the authorized building program, like the waiver decision in the J. F. Ahern Co. case, "involved matters of policy and discretion rather than adjudicative fact." J.F. Ahern Co., 114 Wis. 2d at 96. There is no need, therefore, for the Commission to undertake a factual inquiry, no need for a hearing before the decision is made, and no need for a formal record. I am not aware of any facts which would support a conclusion that the Commission's decision to reallocate funding among projects for the Department of Corrections was arbitrary or capricious.

JED:AL
Fees; Municipalities: A municipality must pay the five dollar fee imposed under section 814.63(2), Stats., upon disposition of a forfeiture action in circuit court for a municipal ordinance violation. The fee may not be passed on to the defendant. OAG 2-92

February 6, 1992

J. DENIS MORAN, Director of State Courts
Supreme Court of Wisconsin

You request my opinion whether the five dollar nonrefundable fee charged to a municipality under section 814.63(2), Stats., may be passed on to the defendant. The fee is charged upon disposition of a forfeiture action in circuit court for violation of a municipal ordinance. You report that some municipalities pass the fee on to defendants by enacting an ordinance adding the fee to the uniform deposit schedule amounts set by the Judicial Conference pursuant to section 345.26(2)(a). In addition, some courts assess the fee as costs against the defendant in cases where the municipality prevailed.

I am of the opinion that the municipality must pay the five dollar fee imposed under section 814.63(2); the fee may not be passed on to the defendant.

Section 814.63(2), (3) and (4) provide that:

(2) Upon the disposition of a forfeiture action in circuit court for violation of a municipal ordinance, the municipality shall pay a nonrefundable fee of $5 to the clerk of circuit court.

(3) In addition to any forfeiture imposed, the defendant shall be required to pay any applicable:

(a) Penalty assessment imposed by s. 165.87.

(ag) Jail assessment imposed by s. 302.46(1).

(aj) Automatic reinstatement assessment imposed by s. 345.54(1).

(ar) Domestic abuse assessment imposed by s. 973.055(1).
(b) Driver improvement surcharge imposed by s. 346.655.

(bm) Uninsured employer assessment imposed by s. 102.85(4).

(bs) Environmental assessment imposed by s. 144.992.

(c) Natural resources assessment imposed by s. 29.997.

(d) Natural resources restitution payment imposed by s. 29.998.

(e) Wild animal protection assessment imposed by s. 29.9965.

(eg) Fishing shelter removal assessment imposed by s. 29.9967.

(er) Snowmobile registration restitution payment imposed by s. 350.115.

(f) Weapons assessment imposed by s. 167.31(5).

(4) In forfeiture actions in which a municipality prevails, costs and disbursements shall be allowed to the municipality subject only to sub. (2) and such other limitation as the court may direct.

The above sections were created by chapter 317, Laws of 1981, which included a number of provisions for increased fees to be collected in circuit courts to cover part of the cost of operation of such courts.

As originally enacted, section 814.63(4) provided: “In forfeiture actions in which a municipality prevails, costs and disbursements shall be allowed to the municipality subject only to such limitations as the court may direct.” Based on that language, my predecessor stated that the section authorized a municipality to recover the five dollar fee imposed under section 814.63(2) from a defendant in actions where the municipality prevailed. 72 Op. Att’y Gen. 129, 130 (1983).
Subsection 814.63(4) was subsequently amended by 1987 Wisconsin Act 399. As indicated above, the section now provides that costs and disbursements shall be allowed to the municipality "subject only to sub. (2) [of section 814.63] and such other limitation as the court may direct." Sec. 814.63(4), Stats.

The language in section 814.63, as amended, is clear. Subsection (2) provides that the municipality "shall" pay a five dollar fee to the clerk of circuit court. The subsection contains no language permitting the defendant to pay the fee. Subsection (4) refers to the requirement in subsection (2) as a "limitation" on the costs and disbursements allowed to a municipality. This limitation is susceptible of only one interpretation—that the five dollar fee imposed on a municipality under subsection (2) may not be included in costs and disbursements awarded to a municipality in cases where the municipality prevailed.

Moreover, as you point out, the apparent purpose of the fee is to require municipalities to contribute toward the cost of handling municipal cases in circuit court or, alternatively, to encourage municipalities that prosecute a high volume of municipal ordinance violations to establish a municipal court. The purpose of having the judicial conference establish a deposit schedule pursuant to section 345.26(2) is to ensure that the amounts of deposit assessed against persons arrested for traffic offenses are uniform throughout the state. 61 Op. Att’y Gen. 401 (1972). Interpreting section 814.63 to permit the five dollar fee imposed under section 814.63(2) to be passed on to defendants would defeat those purposes.

For the above reasons, I conclude that the municipality must pay the five dollar nonrefundable fee imposed under section 814.63(2). The fee may not be passed on to a defendant by adding the fee to the uniform deposit schedule amounts or by assessing the fee as costs against the defendant in actions where the municipality prevailed.

JED:MWS
Corporations; Employer And Employee; Unemployment Compensation; Words And Phrases; Strict compliance with all criteria in section 108.02(12m), Stats., and section 108.065 is required before a company will qualify as an employe service company and the employer for unemployment compensation purposes. OAG 3-92

February 7, 1992

FRED A. RISSER, Chairperson
Senate Organization Committee

On behalf of the Senate Organization Committee you have requested my opinion on the following question:

[How]ow must a company meet the criteria of [section] 108.02(12m) to be defined as an employe service company in order to make use of the provision of [section] 108.065?

Additionally, you list several different fact situations and ask for my opinion as to which of the situations, if any, would qualify a company as an employe service company.

Your question involves two separate but related statutory provisions for determining employer liability for employe service companies under the Wisconsin state unemployment compensation system. Section 108.02(12m), Stats., was created by the Legislature in 1987 and sets forth the criteria which a company must meet in order to be considered an employe service company. Section 108.02(12m) provides:

EMPLOYE SERVICE COMPANY. "Employe service company" means a leasing company or temporary help service which contracts with clients or customers to supply individuals to perform services for the client or customer and which, both under contract and in fact:

(a) Negotiates with clients or customers for such matters as time, place, type of work, working conditions, quality, and price of the services;
(b) Determines assignments or reassignments of individuals to its clients or customers, even if the individuals retain the right to refuse specific assignments;

(c) Sets the rate of pay of the individuals, whether or not through negotiation;

(d) Pays the individuals from its account or accounts; and

(e) Hires and terminates individuals who perform services for the clients or customers.

The other statutory provision, section 108.065, was created by the Legislature in 1987 to correct the existing lack of uniformity among determinations of which employe service companies were considered "employers" for state unemployment compensation (UC) purposes. Whether a service company qualified as an "employer" before section 108.065 was enacted was determined by using the statutory test in sections 108.02(12) and 108.02(13a). Section 108.065 thus carved out an exception and a different test to determine whether an employe service company qualifies as an "employer." To be considered an "employer" under the statute, an employe service company must be taxed under the federal unemployment tax act (26 U.S.C. §§ 3301 to 3311). Section 108.065 states:

Determination of employer. An employe service company is the employer of an individual who is engaged in employment performing services for a client or customer of the employe service company if the employe service company is taxed under the federal unemployment tax act (26 USC 3301 to 3311) on the basis of that employment.

---

1For the history behind this legislation, see Draft, Employer Status in the Leasing Industry for UC Purposes (hereinafter "Draft"), at 2-4, 6-7, Statute Drafting File to 1987 Act 255, LRB 5433/7, Wisconsin Legislative Reference Bureau, State Capitol, Madison, Wis.
Whether a company qualifies as an employe service company under section 108.02(12m) and an employer under section 108.065 turns on how these sections are construed in pari materia. Statutory construction begins with an examination of the language used by the Legislature. *State v. Denter*, 121 Wis. 2d 118, 357 N.W.2d 555 (1984). In *Denter*, the court held, "If the meaning of the statute is clear and unambiguous on its face, resort to extrinsic aids for the purpose of statutory construction is improper." 121 Wis. 2d at 123. See also *State v. Derenne*, 102 Wis. 2d 38, 45, 306 N.W.2d 12 (1981).

The language in section 108.02(12m) is clear and unambiguous on its face. The statute specifically defines an employe service company as "a leasing company or temporary help service which contracts with clients or customers to supply individuals to perform services for the client or customer." In addition, the statute requires the company to meet five conditions "both under contract and in fact" in order to be considered an employe service company. See sec. 108.02(12m)(a)-(e), Stats. There is nothing in this statutory language which indicates that there is an alternative method to

---

2The employer-employe relationship has also been addressed by the courts in an analogous situation. The issue of whether an employer-employe relationship exists typically arises in cases involving independent contractors and workers' compensation. In order to determine whether an "employer-employe" relationship exists in the independent contractor situation for the purposes of state workers' compensation, the company and the individual must meet certain statutory qualifications. This has been characterized by reviewing courts as a question of fact. *See United Way of Greater Milwaukee v. DILHR*, 105 Wis. 2d 447, 453, 313 N.W.2d 858 (Ct. App. 1981).

Similarly, in the unemployment compensation situation, a company or an individual must meet certain statutory qualifications to be considered an employer or an employe. *Cf., Keeler v. LIRC*, 154 Wis. 2d 626, 453 N.W.2d 902 (Ct. App. 1990); *Tri-State Home Improvement v. LIRC*, 107 Wis. 2d 748, 322 N.W.2d 700 (Ct. App. 1982), *aff'd*, 111 Wis. 2d 103, 104-05, 330 N.W.2d 186 (1983); and *Princess House, Inc. v. DILHR*, 105 Wis. 2d 743, 314 N.W.2d 922 (Ct. App. 1981), *aff'd*, 111 Wis. 2d 46, 49, 330 N.W.2d 169 (1983).
qualify as an employe service company in lieu of meeting the five conditions. Therefore, it is my opinion that all of the conditions in the statute must be fulfilled by a company claiming status as an employe service company.

With regard to section 108.065, the language also is clear and unambiguous on its face. Before an employe service company will be considered an "employer" of an individual, the employe service company must be "taxed under the federal unemployment tax act (26 USC 3301 to 3311)" on the basis of that individual's employment. Thus, it is my opinion that the clear statutory language of section 108.065 mandates a company first qualify as an employe service company and then be taxed under the federal unemployment tax act in order to be considered an employer for state UC purposes.

Even if, as your request implies, the language and interrelationship between sections 108.02(12m) and 108.065 is ambiguous, the rules of statutory construction concerning legislative intent compel the same conclusion. (See Miller Brands-Milwaukee v. Case, 156 Wis. 2d 800, 811, 457 N.W.2d 896 (Ct. App. 1990) and State v. Pham, 137 Wis. 2d 31, 34, 403 N.W.2d 35 (1987)). To ascertain legislative intent, the Wisconsin Supreme Court has allowed the use of extrinsic materials as interpretative aids including: "the scope, history, context, subject matter and purpose of the statute." Employers Ins. of Wausau v. Smith, 154 Wis. 2d 199, 226, 453 N.W.2d 856 (Ct. App. 1990). The use of "the written comments of those involved in drafting the legislation" is also considered an appropriate aid in evaluating legislative intent. Robert Hansen Trucking, Inc. v. LIRC, 126 Wis. 2d 323, 336, 377 N.W.2d 151 (1985). See also State v. Barkdoll, 99 Wis. 2d 163, 176, 298 N.W.2d 539 (1980); and Muench v. Public Service Commission, 261 Wis. 492, 510-11, 53 N.W.2d 514, 55 N.W.2d 40 (1952).

The legislative purpose in enacting sections 108.02(12m) and 108.065, and the comments in the statutes' drafting files, reinforce the conclusion that a company first must satisfy all of
the requirements under section 108.02(12m) in order to be considered an employe service company, and then must satisfy the requirements of section 108.065 in order to be considered an "employer."

In 1987, representatives of the leasing industry requested that the Legislature amend the existing UC laws to remedy problems within the state UC structure with regard to leasing companies and employe service companies. In response, the Legislature identified several problems and attempted to resolve these problems by, inter alia, enacting sections 108.02(12m) and 108.065.

First, the Legislature concluded that there was a lack of a clear definition of an "employe service company" and a lack of a clear test to determine whether an employe service company was an employer. Wisconsin's existing statutory test not only determined whether an individual performing services for an employer was an employe of that employer, but also determined what employing unit was the employer (also known as the direction and control test). See sec. 108.02(12), Stats.

According to the comments made in the Legislative Reference Bureau analysis of sections 108.02(12m) and 108.065, and the comments made in the drafting record policy paper, the direction and control test did not adequately treat the issue of unemployment compensation liability for leasing companies and employe service companies. In fact, when the test was applied to the leasing industry in Wisconsin, "the on-site employing unit—not the leasing company was in most but not all cases found to be the employer." Given the lack of uniformity of the test, it was difficult for the Department of Industry, Labor and Human Relations, the state agency which

1See Statute Drafting File to 1987 Wisconsin Act 255, LRB 5433/7, Wisconsin Legislative Reference Bureau, State Capitol, Madison, Wis. See also Draft, at 1 and 4.

2See Draft, at 1.
administrates ch. 108, to determine whether a leasing company was an employer for state UC purposes.\(^5\)

Second, a leasing company's "employer" status for state UC purposes was often different than its status for federal UC tax contributions.\(^6\) This lack of coordination also impacted on the client of the leasing company. Sometimes the client was considered the employer for federal purposes but not for state purposes. Other times, the client was considered an employer for both federal and state purposes.

Also, it was suggested to the Legislature, in a memorandum concerning the policy of leasing firms in the drafting record, that the integrity of the state UC trust fund could be in jeopardy due to the existing lack of a clear definition and a clear test of employer status for leasing companies.\(^7\) In addition, it was asserted that tax avoidance could result under existing laws. According to the memorandum, companies pay unemployment compensation into the fund based on experience with employment and unemployment.\(^8\)

If a company which had a high UC tax rate created a leasing arrangement with a company which had a low UC tax rate, tax avoidance could result. Under this scheme, the high UC tax rate company would be designated as the leasing company and under the existing law, the company would probably not be considered the employer and not be subject to the UC tax. The company with the low UC tax rate, however, would be designated as the client company and under the existing law would probably be considered the employer and be subject to

\(^5\)Additionally, the representatives of the leasing industry requested that the law be changed so that the leasing company was considered the employer. See Draft, at 1.

\(^6\)See Draft, at 8-10.

\(^7\)See Memorandum, Policy Paper on Leasing Firms, at 1-2, Statute Drafting File to 1987 Wisconsin Act 255, LRB 5433/7, Wisconsin Legislative Reference Bureau, State Capitol, Madison, Wisconsin.

\(^8\)Id., at 2-3.
the UC tax. Basically, a high tax rate company could stay in business but avoid paying the UC tax.

To resolve these problems and to satisfy the request of the representatives of the leasing industry that leasing companies be considered the employer for state UC purposes, the Legislature adopted sections 108.02(12m) and 108.065. The effect of both statutory provisions is to exempt leasing companies from the direction and control test under section 108.02(12), to create a statutory definition of an employe service company and to create a method to determine employer status for UC purposes. With respect to these objectives, in order to be considered an employer, an employe service company must be taxed under the federal unemployment tax act. Because the leasing company is exempted from the direction and control test and has its own statutory method to determine employer status, it follows that strict compliance with the definitions and requirements of both sections 108.02(12m) and 108.065 is essential. In my opinion, the legislative history compels this conclusion.

In view of the above it is my opinion that none of the hypothetical fact situations you pose would likely qualify a company as an employe service company and the employer. Your first fact situation provides:

Can the company declare itself to be an employe service company and obtain a binding ruling on its employes that work at clients' locations that states that those employes are considered to be employes of the

---

9Section 108.02(12m) created by 1987 Wisconsin Act 255 § 5. Section 108.065 created by 1987 Wisconsin Act 255 §§ 34 and 44.
10See Statute Drafting File to 1987 Wisconsin Act 255, LRB 5433/7, Analysis by the Legislative Reference Bureau, at 1-2, Wisconsin Legislative Reference Bureau, State Capitol, Madison, Wisconsin. See also Draft, at 6-12.
11This provision was included to resolve the lack of coordination between the federal and state determinations of employer status with regard to leasing companies. See Draft, at 11.
employe service company for federal unemployment purposes? Is that sufficient to meet the definition under [section] 108.02(12m) and then invoke 108.065 making all of the employes covered under the Federal Unemployment Act its employes under the State Unemployment Act?

In my opinion, the company in this fact situation does not qualify as an employe service company. As indicated, based on the clear language of sections 108.02(12m) and 108.065 and the expressed legislative intent, a company must meet all of the criteria listed in section 108.02(12m) "in fact" to be considered an employe service company.

A company's declaration that it is an employe service company and a binding ruling that the employes who work at clients' locations are considered employes of the employe service company for federal unemployment purposes has no effect on meeting the statutory definition of section 108.02(12m). First, the clear statutory language states that a company can be considered an employe service company only if the company makes a factual showing with regard to the five conditions listed in section 108.02(12m). Once the five conditions are met in section 108.02(12m) and a company is considered an employe service company, a company may invoke section 108.065 only if the company is taxed under the federal unemployment tax act on the basis of the employment surrounding the employe service company. Only after conditions in section 108.065 have been met will a company be considered an "employer" for state UC purposes. To allow a company to circumvent the clearly stated requirements under sections 108.02(12m) and 108.065 obviously contravenes legislative intent.

Second, the fact that a company has a binding ruling making it, in effect, the "employer" for federal unemployment purposes has no bearing on whether a company is considered an employe service company for state UC purposes. The federal and state determinations of employer status for employe service
companies are separate and distinct. Just because a company is considered an “employer” for federal unemployment purposes does not necessarily mean that the state will consider the company an employer under section 108.065. To be considered an employer for state unemployment purposes under section 108.065, a company must be an employe service company as defined by section 108.02(12m) and then meet the additional requirements in section 108.065.

In the second fact situation, you ask:

If the company can show that at least one employe meets the criteria listed under [section] 108.02(12m), does that then qualify the company to use [section] 108.065 to assume sole liability for the State Unemployment for all its employes who have been determined to be its employes under the Federal Unemployment Act?

In my opinion it does not. Your question involves a two-step analysis. First, a company must meet all of the requirements of section 108.02(12m). Second, once the company is defined as an employe service company, the requirements of section 108.065 must be met.

In terms of section 108.02(12m) and the first step of analysis, I conclude that one employe’s compliance with the five requirements, where there are several employes, does not automatically mean that the entire company qualifies under section 108.02(12m). The clear statutory language of section 108.02(12m) states that a company must satisfy the five conditions “in fact.” It therefore is apparent that the Legislature intended that the company make a factual showing with regard to all of its employes who are engaged in the type of employment contemplated in the statutory definition. If the Legislature had intended the factual showing to be satisfied by only one individual’s compliance with the five conditions, it would have been clearly stated.

If, however, a company could meet all five conditions with all covered employes, the second step of analysis and section
108.065 would be invoked. Section 108.065 provides that, "An employe service company is the employer of an individual who is engaged in employment performing services for a client or customer of the employe service company if the employe service company is taxed under the federal unemployment tax act (26 USC 3301 to 3311) on the basis of that employment." It is clear that the phrase "on the basis of that employment" refers to the individual’s work which qualifies the company as an employe service company. If the federal government taxed the company on the basis of an individual’s work not performed in connection with the employe service company, this would be outside the statutory provision of section 108.065. Thus, the employe service company would not qualify as an "employer" for state UC purposes because it would not meet the section 108.065 criteria.

This conclusion also accords with the expressed legislative purpose. As discussed earlier, one of the problems identified by the Legislature before adopting section 108.065 was the fact that the federal determination of employer status of an employe service company did not always coincide with the state determination of employer status for employe service companies. It is my understanding that sometimes the federal determination would make the client of the employe service company the employer while the state would determine the employe service company to be the employer. The requirement in section 108.065 that an employe service company be taxed under the federal unemployment tax act on the basis of an individual’s employment with the employe service company before the state would consider the employe service company an employer, better ensures that the federal and state determinations would coincide. Thus, only when the federal government determines an employe service company to be the employer will the state recognize an employe service company as the employer.
You also ask whether a qualified employe service company could use the provisions of section 108.065 "to assume sole liability for the State Unemployment for all its employes who have been determined to be its employes under the Federal Unemployment Act?" Based on the above discussion, it is my opinion that an employe service company could qualify as an employer and assume liability for state UC taxes as long as the employe service company is taxed under the federal unemployment tax act on the basis of an individual’s employment in connection with the employe service company. See sec. 108.065, Stats.

In your third fact situation, you ask:

If the client, the employe, and the company all agree that the company is acting as the employe service company and the company has a binding Federal ruling to that effect, is that enough for the company to meet the definition of an employe service company which will then allow the company to make use of the provisions of [section] 108.065?

In view of the answers to your previous questions, I conclude that these facts, standing alone, would not qualify a company as an employe service company. As already indicated, a company must, at minimum, satisfy the criteria of section 108.02(12m) with a factual showing. An agreement between the client, the employe and the company that the company is acting as an employe service company and a binding federal ruling to that effect may or may not be relevant to meeting the specific requirements of section 108.02(12m).

In the fourth fact situation, you ask:

Does the fact that all agencies of both the State and Federal government, other than the Wisconsin Unemployment division, including the Wage and Hour Division and Workers Compensation Division, both operating under the same umbrella of the Department of Industry, Labor, and Human Relations, all recognize the
company to be the employer lend any weight to its meeting the definition of an employe service company which will allow the company to make use of the provisions of [section] 108.065?

Weight, yes; controlling effect, not necessarily. The fact that all agencies of both state and federal government except the Wisconsin unemployment compensation division recognize the company to be the employer, does not relieve the Wisconsin unemployment compensation division from its responsibilities under the statutes to determine employer status as an employe service company. First, notwithstanding the other federal and state agency determinations, the Legislature created specific statutory provisions to define an employe service company and to determine employer status for UC tax purpose. It is presumed that the Legislature was aware of the other agency statutes, such as workers' compensation, when sections 108.02(12m) and 108.065 were adopted in 1987. Kindy v. Hayes, 44 Wis. 2d 301, 314, 171 N.W.2d 324 (1969), citing Town of Madison v. City of Madison, 269 Wis. 609, 614, 70 N.W.2d 249 (1955). Thus, the Legislature clearly intended for a company to comply with the specific statutory mandates in terms of unemployment compensation. Therefore, the other federal and state agency determinations have limited relevance with respect to the Wisconsin unemployment compensation division's application of the statutes to a given set of facts.

Second, the clear language of section 108.02(12m) requires that a factual determination be made that the five conditions are satisfied before the company can be considered an employe service company. Other agency determinations of employer status are not included within the required factual showing of section 108.02(12m).12 Thus, I conclude that a showing by the company of other agency determinations which found the

12Whether administrative res judicata or collateral estoppel can be applied in a particular case is beyond the scope of this opinion.
company to be an employer is not necessarily sufficient to meet the *specific* statutory requirements of section 108.02(12m).

Overall, it is my opinion that the unambiguous statutory language and the legislative history clearly set out the interrelationship between sections 108.02(12m) and 108.065 for unemployment compensation purposes. Section 108.02(12m) states the criteria which must be met in order for a company to be considered an employe service company. Once these requirements are met, a company can invoke section 108.065 which determines whether an employe service company qualifies as an employer for state UC purposes. It is clear that a company must satisfy all of the requirements in sections 108.02(12m) and 108.065 to be considered an employe service company and an employer.

JED:JDN
Legislation; Wisconsin Retirement System; Words And Phrases; Section 1148m of 1991 Wisconsin Act 39 does not violate article IV, sections 18 or 31 of the Wisconsin Constitution. OAG 4-92

February 19, 1992

GARY I. GATES, Secretary

Department of Employe Trust Funds

You request my opinion as to whether section 1148m of 1991 Wisconsin Act 39 (section 1148m) (the 1991 budget bill) violates article IV, sections 18 and 31 of the Wisconsin Constitution. Section 1148m deletes the special cost provisions which applied to those state elected officials and their appointees who purchased creditable Wisconsin Retirement System (WRS) service not previously credited because of age limitations set forth in section 40.02(17)(c), Stats. (1985). Article IV, sections 18 and 31 of the Wisconsin Constitution deal with the enactment of special, private or local laws.

As you state in your letter requesting my opinion at page 1:
Prior to May 3, 1988, s. 40.02 (17) (c), 1985 Stats., prohibited executive participating employes designated under s. 20.923 (4), (8), and (9) from receiving creditable service towards a Wisconsin Retirement System (WRS) benefit for service performed on and after the first day of the fourth month after the employe attained age 62. Affected employes included secretaries and other agency heads of state agencies, their deputies and executive assistants, and university presidents, vice presidents, and chancellors.

In 1986, changes to the federal Age Discrimination in Employment Act prohibited reduction or elimination of benefit accruals for participating employes based on age. 1987 Wisconsin Act 372 conformed state statutes governing the WRS with the federal law by removing the age limit on creditable service accrual.
Act 372 also permitted participating employees (regardless of their current employment category) to purchase executive service which was previously uncredited due to the age limitation. The cost, as specified in s. 40.02 (17) (e), 1988 Stats., is "5.5% of one-twelfth of the employee's highest earnings in a single earnings period" for each month of service purchased, except that present or former elected officials or appointees of such officials were required to pay the full actuarial cost of the service.

Section 1148m of 1991 Wisconsin Act 39, as passed by the Legislature and signed by the Governor, amends s. 40.02 (17) (e), Stats., to delete the special cost provisions for elected officials and their appointees.

First you ask:

Is Section 1148m a special or private law prohibited by Art. IV, Section 31, Wis. Constitution?

It is my opinion that section 1148m is not in violation of Article IV, section 31 of the Wisconsin Constitution.

Article IV, section 31 of the Wisconsin Constitution states:

The legislature is prohibited from enacting any special or private laws in the following cases:

1st. For changing the name of persons or constituting one person the heir at law of another.

2d. For laying out, opening or altering highways, except in cases of state roads extending into more than one county, and military roads to aid in the construction of which lands may be granted by congress.

3d. For authorizing persons to keep ferries across streams at points wholly within this state.

4th. For authorizing the sale or mortgage of real or personal property of minors or others under disability.

5th. For locating or changing any county seat.
6th. For assessment or collection of taxes or for extending the time for the collection thereof.

7th. For granting corporate powers or privileges, except to cities.

8th. For authorizing the apportionment of any part of the school fund.

9th. For incorporating any city, town or village, or to amend the charter thereof.

Section 31 thus "prohibit[s] the legislature from enacting any special or private laws in nine different classes of cases."

Brookfield v. Milw. Sewerage, 144 Wis. 2d 896, 904-05, 426 N.W.2d 591 (1988). The subject matter of section 1148m does not fit within any of the nine classes specified. Such Budget Bill section thus cannot violate article IV, section 31 of the Wisconsin Constitution.

Your second question is:

Does this legislation constitute a "private or local bill" and therefore violate the requirements of Art. IV, Section 18, Wis. Constitution?

Article IV, section 18 of the Wisconsin Constitution states:

No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title.

It is my opinion that section 1148m is not a private or local law and thus not in violation of article IV, section 18 of the Wisconsin Constitution notwithstanding its enactment as part of the 1991 budget bill.

Section 1148m provides:

40.02(17)(e) of the statutes is amended to read:

40.02(17)(e) Each executive participating employe whose creditable service terminates on or after May 3, 1988, and each participating employe who is a present or former elected official or an appointee of a present or
former elected official and who did not receive creditable service under s. 40.02(17)(e), 1987 stats., or s. 40.02(17)(e), 1989 stats., and whose creditable service terminates on or after the effective date of this paragraph . . . [revisor inserts date], who was previously in the position of the president of the university of Wisconsin system or in a position designated under s. 20.923(4), (8) or (9), but did not receive creditable service because of age restrictions, may receive creditable service equal to the period of executive service not credited if the participant pays to the department a lump sum payment equal to 5.5% of one-twelfth of the employee’s highest earnings in a single annual earnings period multiplied by the number of months of creditable service granted under this paragraph, except a participant who is a present or former elected official or an appointee of such an official may receive creditable service equal to the period of executive service not credited if the participant pays to the department a lump sum payment equal to the present value of the creditable service requested, in accordance with rates actuarially determined to be sufficient to fund the full cost of the increased benefits which will result from granting the creditable service. That amount shall be credited and treated as an employee required contribution for all purposes of the Wisconsin retirement system.

Wisconsin case law provides two tests to be used to determine whether a bill is “private or local” within the meaning of article IV, section 18 of the Wisconsin Constitution. The first test applies to a bill which is “specific to any person, place or thing.” Milwaukee Brewers v. DH&SS, 130 Wis. 2d 79, 115, 387 N.W.2d 254 (1986); Davis v. Grover, 159 Wis. 2d 150, 159-60, 464 N.W.2d 220 (Ct. App. 1990), petition for review granted. A second and different test applies to
“classification” bills. *Brookfield*, 144 Wis. 2d at 910-12; *Davis*, 159 Wis. 2d at 160-61.

“Classification” legislation is that which “is not specific on its face to a particular person, place or thing.” *Brookfield*, 144 Wis. 2d at 908, 912; *Davis*, 159 Wis. 2d at 161. Section 1148m is “classification” legislation. Such section does not refer to any specific person but relates to all that fit within the defined class. Nor is it a class closed at time of enactment. While you suggest, at page 2 of your letter, that entitlement to section 1148m benefits is limited to those who “[c]ontinue to be participating employes as of the effective date of 1991 Wisconsin Act 39,” I find no such specific limitation in the legislation. While section 1148m applies only to those “whose creditable service terminates on or after the effective date of this paragraph,” there is no requirement that such individuals be employed by a participating employer on the effective date. For example, one who was a former elected official or an appointee of a present or former elected official, but not a “participating employe” on the effective date of section 1148m would qualify under such section if he or she again became a participating employe after such effective date. As long as such individual had not commenced receiving a retirement annuity and thus become subject to the limitations of section 40.26(3)(b), such reemployment would provide eligibility for the section 1148m creditable service payment method.

Your letter states, at page 2, that “only one known participant has service which would have been priced at its full actuarial value under s. 40.02 (17)(e) prior to the amendment by 1991 Wis. Act 39” (emphasis supplied). This estimate does not appear to consider any individuals who terminated employment prior to the effective date but could be included by again becoming a “participating employe.”

Section 1148m is not facially specific as to any one or more persons. That the class may, presently, apply only to a single individual does not make the legislation person specific. *Davis*,
159 Wis. 2d at 160-62. "[A]n 'at present' effect is tested by determining whether the class is open. If so, its current single-member status is legally unobjectionable." Brookfield, 144 Wis. 2d at 903. Since section 1148m is "general on its face and applicable only to a certain class" and "legislation that is not specific to a person, place or thing" it is "classification" legislation. Davis, 159 Wis. 2d at 161.

"Classification" legislation must be analyzed consistent with the classification concepts developed under article IV, sections 31 and 32 of the Wisconsin Constitution. A multi-rule was developed by the court "to determine whether legislation which is general on its face is impermissibly local or private because the generality is simply a surface sham." Brookfield, 144 Wis. 2d at 912, 914.

The Brookfield court held that for purposes of art. IV, sec. 18, classification legislation is "private or local" unless it satisfies a six-part test. (1) The classification must be based on substantial distinctions between the classes it creates. (2) The classification must be germane to the purpose of the law. (3) The classification must be open to additional members and not based on existing circumstances only. (4) The law must apply equally to all members of a class. (5) The characteristics of each class must be so different from those of the other classes as to reasonably suggest the propriety of substantially different legislation. (6) Curative legislation is general if it applies equally to all members of the class. 144 Wis. 2d at 907-08, 426 N.W.2d at 597.

Davis, 159 Wis. 2d at 161.

The first part of the test concerns whether the classification is based on substantial distinctions between the classes it creates. There is a substantial distinction between the two classes in section 1148m. At the time of the repeal of the retirement system provision that executive plan participants could not gain creditable service after reaching age 62, most
state executive participants were allowed to purchase creditable service not previously granted because of this age 62 provision by paying 5.5 percent of current wages for each month to be credited. State-elected officials or appointees of such elected officials could purchase the creditable service only by paying the present value of the increased benefits that the additional creditable service provided, a much higher payment than that required for the state executive participants generally. Clearly there is a substantial distinction between these classes.

The fact that this distinction was eliminated by, rather than created by, section 1148m does not preclude the legislation from being general. As stated in the sixth part of the test "[c]urative legislation is general if it applies equally to all members of the class." Section 1148m is curative legislation since "it may be viewed as removing discriminatory treatment." Joint Survey Committee on Retirement Systems report on 1991 Assembly Bill 91 and Assembly Substitute Amendment 1 thereto, at p. 12. The sole requirement for curative legislation is that it apply to all members of the class. Brookfield, 144 Wis. 2d at 908; Madison Metropolitan Sewerage Dist. v. Stein, 47 Wis. 2d 349, 364-65, 177 N.W.2d 131 (1970). Section 1148 applies to all members of the class defined and is therefore not "private or local" legislation.

Part two of the test requires that the classification be germane to the purpose of the law. "In order for the challenged legislation to pass this 'germaneness' test the classifications to which the provisions apply . . . must be closely akin to, or have a close relationship with, the purposes of the provisions." Brookfield, 144 Wis. 2d at 917. Section 1148 satisfies this test since its apparent purpose is to correct discriminatory treatment. Legislation allowing elected officials and their appointees to purchase creditable service on the same terms as other executive employe participants is clearly germane to and a logical method of correcting the inequity perceived by the Legislature. Section 1148m satisfies the second part of the test since it corrects
discriminatory treatment caused by the previous classification of executive participating employes into two different groups.

The third part of the test provides that "[t]he classification must be open to additional members and not based on existing circumstances only." As previously stated herein in the discussion of whether section 1148m was "specific" or "classification" legislation, the class covers not only individuals employed on the effective date but individuals not then employed and not receiving a retirement benefit who thereafter become participating employes. The classification is therefore an open class and satisfies this part of the test. I also note that even if this were not an open class, part six of the test provides that status as curative legislation causes the legislation to be considered general as long as it applies equally to all members of the class.

Section 1148m applies equally to all members of the established class and thus satisfies the fourth part of the test. Use of the 5.5 percent of highest earnings rather than present value of the creditable service is granted to any participating employe 1) who is a present or former elected official or appointee thereof, 2) who did not receive creditable service because of age restrictions, 3) who did not purchase creditable service under the 1987 or 1989 versions of the statute, 4) who is not affected by section 40.26(3)(b) limits, and 5) whose creditable service terminates on or after August 15, 1991. The amendment set forth in section 1148m applies equally to all members of the class defined.

Similarly the fifth test is satisfied since the difference between the two classes addressed by section 1148m requires separate treatment to cure the inequity perceived by the Legislature. The principal group addressed in section 1148m was already granted the 5.5 percent of highest earnings purchase method. The characteristics of the classification are necessary to expand this method to the present or former elected participants and their appointee participants.
The final and probably most important test provides that "curative legislation is general if it applies equally to all members of the class." As previously shown herein, the JSCRS report specifically stated that section 1148m "may be viewed as removing discriminatory treatment." Analysis of the changes by section 1148m also indicates that the section was curative in the sense that it changed unequal buyback rights between certain groups of executive participating employes to the same rights for all in the specified executive group. Since the curative provision applies to all members of the class it is considered to be general rather than special or local for article IV, section 18 purposes.

Section 1148m is classification legislation which satisfies all parts of the six part test specified by the supreme court. Such section therefore is not in violation of article IV, section 18 of the Wisconsin Constitution even though it was enacted as part of the 1991 budget bill.

JED:WMS
Open Meeting: The exemption in section 19.85(1)(c), Stats., of the open meetings law only authorizes a governmental body to convene in closed session to consider employment, compensation, promotion or performance evaluation of a specific public employe or employes. The purpose of the exemption is to protect the public employe who is being considered, not to protect the governmental body. The exemption does not permit a governmental body to convene in closed session to consider employment, compensation, promotion or performance evaluation policies to apply to a position of employment in general, but may permit a governmental body to convene in closed session to apply those general policies to a specific employe or employes. OAG 5-92

February 25, 1992

RAYMOND L. PELRINE, District Attorney
Eau Claire County

You have requested my interpretation of section 19.85(1)(c), Stats., of the state’s open meetings law. You report that the city manager for the city of Eau Claire recently announced his resignation. Thereafter, the city council held a meeting at which it convened in closed session. The public notice of the meeting stated that the common council would convene in closed session “to consider the employment and compensation of a public employee, namely, the City Manager . . . pursuant to Section 19.85(1)(c) of the Wisconsin Statutes.”

You report that the minutes from the closed session revealed that the city council discussed the qualifications and salary for the position of city manager in general, not the qualifications of or salary to offer any particular applicant or applicants. You request my opinion on whether the city council properly convened in closed session under section 19.85(1)(c) for that purpose. I am of the opinion that the city council did not properly convene in closed session because I interpret the exemption in section 19.85(1)(c) to be limited to considerations
of employment, compensation, promotion and performance evaluations of a specific employee or employees, not considerations pertaining to employment, compensation, promotion and performance evaluation policies to apply to a position of employment in general.

The purpose of interpreting a statute is to discern the Legislature's intent. The primary source of the Legislature's intent is the language of the statute itself. If the language is ambiguous, it is permissible to discern the legislative intent by looking to the language of the statute in relation to its scope, history, context, subject matter and object intended to be accomplished. *Wis. Environmental Decade v. Public Service Comm.*, 81 Wis. 2d 344, 350, 260 N.W.2d 712 (1978).

The language of section 19.85(1)(c) permits a governmental body to convene in closed session for the purpose of "[c]onsidering employment, promotion, compensation or performance evaluation data of any public employe over which the governmental body has jurisdiction or exercises responsibility." The section refers to a public employe, as opposed to a position of public employment.

The predecessor to the current open meetings law contained a similar provision. Section 14.90(3)(b), Stats. (1959), permitted a closed session for:

Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employe or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employe or person charged, investigated or otherwise under discussion.

In a SYNOPSIS OF OPINIONS INVOLVING ANTI-SECRECY LAW, published in 49 Op. Att’y Gen. v (1960), the attorney general concluded that the above exception
does not apply where personnel or management policies are discussed generally. The purpose of the exception is to protect a particular employee who is being considered or discussed and not to protect the public agency involved. . . . The mere fact that items of public policy or future personnel relations are to be discussed is not a sufficient reason for a secret meeting. It is, in fact, a reason for holding an open meeting.

Id. at viii. The attorney general went on to state that the section “is not to be used for the concealment of information or to prevent employees as a group from knowing what personnel or compensation policies are being considered by [a governmental body].” Id. at x. The attorney general further stated:

Similarly we have said that a meeting to discuss generally the salaries for teachers should be open to the public. The provisions of sec. 14.90(3)(b), which provide that there may be closed executive sessions, refer to individual cases and do not give the right to a public body to close the meeting where salary schedules in general are being discussed.

Id. at xi.

The Legislature has amended the open meetings law six times since publication of the attorney general’s SYNOPSIS OF OPINIONS INVOLVING ANTI-SECRECY LAW. Ch. 297, Laws of 1973; ch. 426, Laws of 1975; 1983 Wisconsin Act 84; 1985 Wisconsin Act 26, sec. 6; 1985 Wisconsin Act 29, sec. 153m; 1987 Wisconsin Act 305, secs. 2-5. The personnel exemption was amended by chapter 297, Laws of 1973. In that law, the state Legislature split the exemption in section 14.90(3)(b), renumbered to section 66.77(3)(b), into the two exemptions which appear in section 19.85(1) of the current open meetings law:

(b) Considering dismissal, demotion, licensing or discipline of any public employee 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.

(c) Considering employment, promotion, compensation or performance evaluation data of any public employe over which the governmental body has jurisdiction or exercises responsibility.

The purpose of the amendment was to "clarify that preliminary discussions of personnel problems may be held at closed session without notice to the effected employe(s)." Analysis by the Legislative Reference Bureau, LRB 10637/5 (June 1976 special session). Section 19.85(1)(b) allows closing a meeting when a governmental body is "[c]onsidering dismissal, demotion, licensing or discipline of any public employe or person licensed" but provides "[t]he notice shall contain a statement that the person has the right to demand that the evidentiary hearing or meeting be held in open session." That wording makes clear that the term "public employe" in section 19.85(1)(b) refers to "a person." There is nothing to indicate that the Legislature intended that the same term in section 19.85(1)(c) be interpreted differently.

In chapter 426, Laws of 1975, the Legislature also exempted collective bargaining sessions from the requirements of the open meetings law. See sec. 19.82(1), Stats. The Legislature did not
enact a similar exemption for salary negotiations involving non-union employees.

The Legislature has amended the open meetings law several times, but made no change in the law in response to the attorney general's interpretation that the personnel exemption is limited to consideration of employment, compensation, promotion and performance evaluations of a specific employee or employees, not consideration of employment policies to apply to a position of employment in general. That interpretation must, therefore, be regarded as presumptively correct. See Staples v. Glienke, 142 Wis. 2d 19, 28, 416 N.W.2d 920 (Ct. App. 1987); Wisconsin Valley Imp. Co. v. Public Serv. Comm., 9 Wis. 2d 606, 617, 101 N.W.2d 798 (1960).

The interpretation is consistent with the purpose of the open meetings law. The purpose is to ensure that the public has the "fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Sec. 19.81(1), Stats. The law explicitly provides that its terms must be liberally construed in favor of ensuring the public has access to information about the affairs of its government. The law requires that a governmental body conduct all of its business in open session, unless an exemption in section 19.85(1) expressly permits the governmental body to conduct the business in closed session. See State ex rel. Schaeve v. Van Lare, 125 Wis. 2d 40, 53, 370 N.W.2d 271 (Ct. App. 1985).

There can be no doubt that the public has a right to information about the qualifications that a governmental body is seeking in applicants for positions of public employment and about the general salary range that a governmental body will apply to positions of employment. To interpret section 19.85(1)(c) to permit a governmental body to convene in closed session when considering such matters, without discussing an individual employee or employees, would create a virtually limitless exemption, permitting a governmental body to set all
of its general policies related to the hiring, compensation and evaluation of its public employes behind closed doors.

Thus, in order to protect the public's right to information about the conduct of governmental business, the personnel exemption must be narrowly construed to apply only when a governmental body is discussing the employment, promotion, compensation or performance evaluation of a specific employe or employes. This proposition is widely recognized in other states that have enacted an open meetings law. No state has enacted a law that specifically allows a governmental body to go into closed session to consider general policies to apply to a group or class of employes. Oakes, The Personnel Matters Exception to the Mississippi Open Meetings Act—A Cloud Over The Sunshine Law, 7 Miss. College L. Rev. 181, 188. "A general rule is that personnel exceptions apply to specific individuals and not to groups or classes of employees. Discussions of personnel questions involving general policy towards a group or class of employees, without reference to an individual employee, fall outside the provisions of every personnel exception." Id. at 190-91 (quoting the National Association of Attorneys General, Open Meetings: Exceptions to State Laws (1979)).

For all of the above reasons, I conclude that section 19.85(1)(c) only authorizes a governmental body to convene in closed session to consider the employment, promotion, compensation or performance evaluation of a specific employe or employes. "Employe" for purposes of that section includes applicants for public employment. Wisconsin Open Meetings Law, a Statutory Summary and a Digest of Opinions of the Attorney General, July 31, 1979 at 37. The section does not, however, authorize a closed session to consider employment policies to apply to a position of employment in general.

With specific reference to the facts underlying your request for advice, it is my opinion that section 19.85(1)(c) does not authorize a closed session to discuss the qualifications a
governmental body is looking for in candidates for a position of public employment or the general salary scale to apply to a position of employment. If a governmental body is considering a single salary to offer, regardless of the experience or qualifications of the job applicant, the governmental body must do so in open session. If the governmental body is considering a range of salaries to offer, based on the qualifications and experience of an applicant, the governmental body must establish the range in open session but may convene in closed session to discuss what salary to offer a specific applicant or applicants.

JED:MWS
 Ethics, State Board Of; Public Officials; An individual who is required to file a Statement of Economic Interests and who is a beneficiary of a trust which provides that the individual will receive a share of the trust’s corpus upon the death of the individual’s parent if he or she survives the parent, must identify on his or her Statement of Economic Interests, the securities held by the trust if the individual’s interest in the securities is valued at $5,000 or more. OAG 6-92

March 2, 1992

R. ROTH JUDD, Executive Director
Ethics Board

You ask whether an individual who is required to file a Statement of Economic Interests with the Ethics Board and who is a beneficiary of a trust which provides that the individual will receive a share of the trust’s corpus upon the death of the individual’s parent if he or she survives the parent, must identify on his or her Statement of Economic Interests, the securities held by the trust if the individual’s interest in the securities is valued at $5,000 or more. The answer is yes.

Section 19.44, Stats., requires that every Statement of Economic Interests must contain “[t]he identity of every organization or body politic in which the individual who is required to file or that individual’s immediate family, severally or in the aggregate, owns, directly or indirectly, securities having a value of $5,000 or more . . . .” Sec. 19.44(1)(b), Stats.

It has been suggested that the statutory reporting requirement applies only to individuals with a present right to receive income from, or other present enjoyment of, a trust and should not apply to someone who is presently receiving nothing from the trust. That argument ignores the plain words of the statute and the Ethics Board’s rules. The statute requires the reporting of securities which are owned, either directly or indirectly, if the official’s interest is valued at $5,000 or more. As you note, the majority view in the United States is that the beneficiary of
a trust has a form of ownership in the trust corpus. 2A Scott, *The Law of Trusts* § 130 at 406 (4th ed. 1987). The board’s rule, Wisconsin Administrative Code § ETH 2.06, provides that “[e]conomic interests held in the name of a . . . trustee . . . for the account of a person are owned by the person for whose benefit they are held.” The board has held, in a formal opinion, that an individual has a calculable, reportable interest in trust property if the individual has a legal right to benefit from the trust either in the present or the future. 8 Op. Eth. Bd. 69 (1985). The board’s interpretation and application of laws it is charged with enforcing is entitled to great weight. *Kimberly-Clark Corp. v. Public Service Comm.*, 110 Wis. 2d 455, 329 N.W.2d 143 (1983).

This situation is very little different from an individual to whom a note is payable sometime in the future. That individual has a direct interest in that note and has a present interest in that note. In that case, or in the case of the beneficiary of the trust, the future interest has a present value which reflects the individual’s interest. It is immaterial that the note holder or the beneficiary of the trust may die before the note is paid or the corpus of the trust becomes available. The issue is not whether there is a definite future interest. The issue is whether there is a present interest.

Section 19.44(3)(b), which determines how an interest in a trust is apportioned, provides in pertinent part that:

> An individual who is eligible to receive income or other beneficial use of the principal of a trust is the owner of a proportional share of the principal in the proportion that the individual’s beneficial interest in the trust bears to the total beneficial interests vested in all beneficiaries of the trust.

On its face this statute applies not only to someone who is actually receiving income but also to someone “who is eligible to receive income or other beneficial use.” The Legislature did not intend to limit reporting requirements to present income.
Under Wisconsin law the beneficiary of this trust has an interest which is vested subject to complete defeasance because "the interest is created in favor of one or more ascertained persons in being and would become a present interest on the expiration of the preceding interests but may end or may be completely defeated as provided by the transferor at, before or after the expiration of the preceding interests." Sec. 700.05(3), Stats. The beneficiary has a future interest, section 700.03(2), but a future interest is transferable. Sec. 700.07, Stats. There is no doubt that this future interest has vested and has value. If the instrument creating the trust is unclear with respect to whether the right to receive the benefit is vested or contingent, the issue is resolved in favor of a vested, rather than a contingent, interest. See Estate of Scherffius, 62 Wis. 2d 687, 697a, 215 N.W.2d 547 (1974).

It could be argued that if this trust creates a remainder which is subject to a condition precedent, that is, if the interest is created in favor of one or more unborn or unascertained persons, section 700.05(4), there would be no need to identify the trust on the Statement of Economic Interests because the interest has not vested. See Will of Wehr, 36 Wis. 2d 154, 152 N.W.2d 868 (1967). If the interest created by the trust is an interest subject to a condition precedent as opposed to an interest vested subject to complete defeasance, the question is much closer. I would conclude, however, based on the language of the statute and the board's consistent interpretations, that even a contingent interest must be reported on the Statement of Economic Interests. I would recommend, however, that the board seek statutory clarification on that issue.

Requiring an official to report an interest in the trust which he or she will receive if the official survives the parent is consistent with the other reporting requirements of the ethics code and consistent with the public policy reflected in the ethics code. As you note, the law contemplates making public the identity of securities and property in which public officials have
a substantial interest in order to avoid conflicts between private interests and official responsibilities and also to promote public confidence. Sec. 19.41, Stats. Interpreting the law as not requiring disclosure in these circumstances would frustrate those goals.

JED:AL
Employe Trust Funds Board; Legislation; Statutory changes to the state accumulated sick leave conversion credit program contained in 1991 Wisconsin Act 39 (1991 budget bill) which determine the conversion credit based on a salary rate determined after terminating employment violate article IV, section 26 of the Wisconsin Constitution.

The Employe Trust Funds board has the standing to allege that the statutory changes are unconstitutional notwithstanding the general rule that state agencies or public officers cannot question the constitutionality of a statute. OAG 7-92

March 18, 1992

GARY I. GATES, Secretary
Department of Employe Trust Funds

You request my opinion as to whether the changes to the state Accumulated Sick Leave Conversion Credit (ASLCC) program, enacted by 1991 Wisconsin Act 39 (1991 budget bill), violate article IV, section 26 of the Wisconsin Constitution (article IV, section 26). As you state at page 1 of your request letter:

The pertinent provisions in the bill are SECTION 1149 g [40.02 (22f)], SECTION 1152h [40.02 (25) (b) 6g], SECTION 1153 r [40.02 (49)], SECTION 1154 ky [40.04 (10)], SECTION 1154 Le [40.05 (4) (ad)], SECTION 1154 Lg [40.05 (4) (b)], SECTION 1154 Li [40.05 (4) (bc)], SECTION 1154 Lj [40.05 (4) (br)], SECTION 1154 p [40.51 (2)] and SECTION 1154 q [40.51 (10m)].

The effective date of such changes is January 1, 1992. Sec. 9419(1g) of the 1991 budget bill.

The ASLCC program allows state employes to convert accumulated sick leave to health insurance premium coverage during retirement. A state employee's accumulated sick leave is converted into a credit equal to the employee's final hourly wage multiplied by the employee's total hours of unused sick leave.
Health insurance premiums are paid from this credit for the employe and surviving dependents until the credit is exhausted. Sec. 40.05(4)(b), Stats. In order to continue under the state health insurance plan, the employe must be eligible for an immediate Wisconsin Retirement System (WRS) annuity (age 55 for the general, elected and executive employes; age 50 for protective employes). This immediate annuity requirement is waived for state employes with twenty years of creditable service who are eligible for an immediate annuity, but elect to defer application. Sec. 40.02(25)(b)6., Stats. ASLCC premium payments may be delayed "for up to 10 years . . . if the employe or surviving insured dependents are covered by a comparable health insurance plan." Sec. 40.05(4)(b), Stats., as amended by 1991 Wisconsin Act 107.

The changes to the ASLCC program in the 1991 budget bill affect only the group defined as "[a]ny state constitutional officer, member or officer of the legislature, head of a state department or state agency who is appointed by the governor with senate confirmation, or head of a legislative service agency as defined in s. 13.90(1m)(a)." Sec. 40.02(25)(b)6g, Stats., as created by the 1991 budget bill. As you state at page 1 of your request letter:

Under these changes, an individual in one of the specified positions would be entitled to use of accumulated sick leave conversion credits to pay health insurance after reaching age 55 regardless of the person’s age at termination of employment including an unconditional right to re-enroll in the state’s group health insurance program. The person would also have the amount of that person’s ASLCC benefit determined not by the salary actually received by that person, but instead by a salary rate determined after the person’s period of service had ended. [see s. 40.05 (4) (bc)]. These changes apply to each person in one of the specified positions whose service terminates on or after January 1, 1992 [see s. 40.02 (25) (b) 6g].
Your first question asks:

Does basing the ASLCC benefit on a salary rate to be determined after a person leaves office violate the prohibition in article IV, section 26 of the Wisconsin Constitution prohibiting granting of extra compensation for any public officer after the service has been rendered?

It is my opinion that the ASLCC program health insurance premium payments constitute part of compensation and that article IV, section 26, precludes the Legislature from establishing that portion of compensation based on a salary to be determined after the person is no longer employed.

Article IV, section 26 provides:

*The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into;* nor shall the compensation of any public officer be increased or diminished during his term of office except that when any increase or decrease provided by the legislature in the compensation of the justices of the supreme court or judges of any court of record shall become effective as to any such justice or judge, it shall be effective from such date as to each of such justices or judges. This section shall not apply to increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system when such increased benefits are provided by a legislative act passed on a call of ayes and noes by a three-fourths vote of all the members elected to both houses of the legislature, which act shall provide for sufficient state funds to cover the costs of the increased benefits.

Payment of health insurance premiums under the ASLCC program is "compensation" as that term is used in article IV, section 26. While the Wisconsin Supreme Court has stated that words "salary" and "compensation" as used in article IV, section 26, are employed synonymously, that statement was
made in the context of determining whether reimbursement of expenses constituted “compensation.” *Geyso v. Cudahy*, 34 Wis. 2d 476, 485, 149 N.W.2d 611 (1967); *Milwaukee County v. Halsey*, 149 Wis. 82, 86-87, 136 N.W. 139 (1912). When the court was faced with the question as to whether retirement systems were covered by the article IV, section 26 prohibition, it had no difficulty finding such “deferred and diffused” compensation to be within the prohibition. *State ex rel. Thomson v. Giessel*, 262 Wis. 51, 63-64, 53 N.W.2d 726 (1952). The Legislature and electorate thereafter apparently construed the prohibitions of article IV, section 26 to apply to compensation in addition to salary by enacting and adopting an amendment to allow “increased benefits” under specified conditions.

While the payment of health insurance premiums has not been considered by the Wisconsin courts in interpreting article IV, section 26, other states have held such payments to be compensation under their similar constitutional provisions.

Fringe benefits, such as the payment of group medical and hospital plans, are valuable prerequisites of an office, and are as much a part of the compensations of office as a weekly pay check; such payments for fringe benefits may not constitute “salary,” in the strictest sense of the word, but they are compensation.

63A Am. Jur. 2d Public Officers and Employees § 450 at 1000 (1984). *See also State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692, 694 (1976) and *Opinion by the Justices*, 249 Ala. 88, 30 So.2d 14, 17 (1947). Having decided that ASLCC payment of health insurance premiums is compensation, I must now determine whether basing the amount of the payment on a salary rate established after terminating employment makes such premium payment “extra compensation” under the constitutional prohibition. I need not consider whether the compensation increase is permitted by the exception in the last sentence of article IV, section 26 which

It is my view that the subject premium payments based on salaries to be determined in the future after the person has left the office are “extra” compensation after the “services shall have been rendered or the contract entered into” and prohibited by article IV, section 26. The statutory change enacted by section 1154Li of the 1991 budget bill states in material part:

Section 40.05(4)(bc) of the statutes is created to read:

40.05(4)(bc) The accumulated unused sick leave of an eligible employe under s. 40.02(25)(b)6g [any state constitutional officer, member or officer of the legislature, head of a department or state agency who is appointed by the governor with senate confirmation or head of a legislative service agency] shall be converted to credits for the payment of health insurance premiums on behalf of the employe on the date on which the department receives the employe’s application for a retirement annuity or for lump sum payment under s. 40.25(1). The employe’s unused sick leave shall be converted at the salary rate that the employe would be receiving on the date of the conversion if the employe had continued to be employed in the position described in s. 40.02(25)(b)6g that the employe held immediately before the employe terminated all creditable service or, if the employe is a state elected official who would have been prohibited by law from receiving an increase in compensation during the official’s term of office, at the salary rate that would have been payable to the employe on the date of the conversion if the employe had not been prohibited by law from receiving an increase in compensation during his or her term of office.
Under this statutory provision the amount of the ASLCC credit will be determined by salaries to be paid in the future after the affected employee is no longer employed. Because there is no method provided to determine the amount of such ASLCC credit when service is terminated, any increase in such credit after a person is no longer employed violates article IV, section 26.

This is not a situation where compensation is to be determined by a cost-of-living index or some other standard established while the affected individual was still employed. The court in *Giessel*, 262 Wis. at 56, suggested that article IV, section 26 might not be violated by an employment contract “whereby compensation is governed by a ‘cost of living’ index or some other standard.” The majority of states that have considered the issue have held that a change in compensation under application of a pre-legislated formula does not violate state constitution provisions similar to article IV, section 26. *Stiftel v. Malarkey*, 384 A.2d 9, 16 (Del. 1977).

Benefit rights vest at the time the employment is completed. *Giessel*, 262 Wis. at 55, 65. While article IV, section 26 does not generally prohibit the increasing of benefits (to be paid after employment) while one is still employed, any such increase to take effect after employment is terminated must be ascertainable by reference to a fixed objective basis in place prior to termination. Absent such fixed objective basis, an increase in compensation violates both the plain wording and historical genesis of article IV, section 26.

Article IV, section 26 provides that “[t]he legislature shall never grant any *extra* compensation . . . after the services shall have been rendered or the contract entered into.” “[A]dditional compensation is extra compensation;--that is, compensation outside of that previously agreed upon.” *Giessel*, 262 Wis. at 55.

Under the present constitutional provision any pay adjustments during a term must be clearly provided for in specific amount or be ascertainable by reference to a salary range schedule which was in effect on the date of appointment of such official and which is not subject to discretionary change thereafter. Neither the schedule or plan, or the implementation of the schedule or plan, can be dependent upon the exercise of legislative or administrative discretion during the term. The proposed amendatory language does not meet this test and in my opinion, if enacted, would be violative of article IV, section 26 of the Wisconsin Constitution.

Even though the question there answered related to the article IV, section 26, prohibition against changing the salary of a public officer during his or her term, the rationale is similar to our question. My predecessor properly held that where there are sufficient standards established which preclude the future exercise of legislative or administrative discretion to determine the increase (or decrease), the change effectively occurs when those standards are enacted. Thus the change occurs before and not during the public official’s term. In contrast, where the change does not result from objective standards beyond the control of the Legislature, or administrative agencies delegated the compensation setting authority, the change occurs during the term or after employment as the case may be, both prohibited by article IV, section 26. Absent objective standards, the change is prohibited. State ex rel. Sullivan v. Boos, 23 Wis. 2d 98, 110, 126 N.W.2d 579 (1964).

Section 40.05(4)(bc) as created by section 1154Li of the 1991 budget bill, determines the amount of the ASLCC benefit by basing it on a salary rate determined after the person benefitted is no longer employed. Such prospective salary rate is not based on specific standards but is a result of the myriad of elements
that go into salary establishment. As section 20.923 provides, in part:

The purpose of this section is to establish a consistent and equitable salary setting mechanism for all elected officials, appointed state agency heads, division administrators and other executive-level unclassified positions. All such positions shall be subject to the same basic salary establishment, implementation, modification, administrative control and application procedures. The salary-setting mechanism contained in this section shall be directed to establishing salaries that are determined on a comprehensive systematic basis, bear equitable relationship to each other and to the salaries of classified service subordinates, and be reviewed and established with the same frequency as those of state employes in the classified service.

(1) . . . The dollar value of the salary range minimum and maximum for each executive salary group shall be reviewed and established in the same manner as that provided for positions in the classified service under s. 230.12(3).

Section 230.12(3) sets forth the basis for establishing compensation for classified employes by stating:

The proposal [for compensation plan changes] shall be based upon experience in recruiting for the service, the principle of providing pay equity regardless of gender or race, data collected as to rates of pay for comparable work in other public services and in commercial and industrial establishments, recommendations of agencies and any special studies carried on as to the need for any changes in the compensation plan to cover each year of the biennium. The proposal shall also take proper account of prevailing pay rates, costs and standards of living and the state's employment policies.
Since the basis for determining compensation, set forth in section 230.12(3) appears to contain all of the various elements to be considered in setting salaries generally, such statutory section does not provide the objective standard necessary to satisfy the prohibition of article IV, section 26. Absent the basis for objective certainty in establishing the amount of compensation during employment, such employment contract could change after the service was rendered and the employment terminated. "Such a construction would go far towards surrendering the substantial prohibition [of article IV, section 26] for an uncertain shadow." Carpenter v. The State, 39 Wis. 271, 283 (1876).

The language of the Article admits of no doubt that it was the intent of the draftsmen who prepared it and the electors who adopted it that, when a person rendered public service for compensation agreed upon, his right to compensation depended upon and was limited by his agreement. "The exact measure of his right is determined absolutely by his contract, under the constitution; and there exists nowhere a discretion to vary it." Carpenter v. State (1876), 39 Wis. 271, 283.

Giessele, 262 Wis. at 63-64. Since the elements that go into establishment of compensation are many and under the control of the Legislature or agencies granted the authority by the Legislature, they are not an objective standard. A standard for determining ASLCC premium credits based on future salaries of persons in the same positions precludes interpreting the compensation agreed upon during employment as including these ASLCC premium credits. The accumulated sick leave conversion credit program amendments enacted by 1991 Wisconsin Act 39 therefore violate the first sentence of article IV, section 26.

Your second through sixth questions, as well as an additional question asked by your letter of November 1, 1991, concern and relate to implementation of the new method of determining
ASLCC benefits. Since I have determined that section 1154Li of the 1991 budget bill, providing this new method, violates the first sentence of article IV, section 26, there is no need to consider questions relating to the implementation of section 1154Li. The prohibition set forth in the first sentence of article IV, section 26 does not distinguish between public officers and employes. Such section precludes payment of extra compensation to "any public officer, agent, servant or contractor, after the services have been rendered or the contract entered into."

Similarly, your seventh and eighth questions ask whether "implementation of this provision [would] violate the rights of others in the trust fund" or violate article IV, section 18, relating to private and local laws. Again there is no need to consider these questions in light of my determination of unconstitutionality.

Your final question states:

Regardless of your answers to the above questions, what further steps might the Board take to best ensure against any breach of fiduciary duty?

Sections 40.04 and 40.05, as created or amended by sections 1154ky, 1154Li and 1154Lj of the 1991 budget bill, set forth the mechanics of the ASLCC program as follows:

40.04(10) An accumulated sick leave conversion account shall be maintained within the fund, to which shall be credited all money received under s. 40.05(4)(b), (bc) and (bm) for health insurance premiums, as dividends or premium credits arising from the operation of health insurance plans and from investment income on any reserves established in the fund for health insurance purposes for retired employes and their surviving dependents. Premium payments to health insurers authorized in s. 40.05(4)(b), (bc) and (bm) shall be charged to this account.
40.05(4)(bc) The accumulated unused sick leave of an eligible employe under s. 40.02(25)(b) 6g shall be converted to credits for the payment of health insurance premiums on behalf of the employe on the date on which the department receives the employe's application for a retirement annuity or for lump sum payment under s. 40.25(1).

40.05(4)(br)1. Employers shall pay contributions that shall be sufficient to pay for the present value of the present and future benefits authorized under pars. (b) and (bc). Subject to subd. 2, the board shall annually determine the contribution rate upon certification by the actuary of the department.

2. Beginning in 1985, the initial contribution rate determined under subd. 1 may not exceed the employer's costs under pars. (b) and (bc) for the previous calendar year by more than 0.2% of covered payroll. Each subsequent contribution rate determined under subd. 1 may not exceed the employer's costs under this paragraph for the previous calendar year by more than 0.2% of covered payroll.

"Fund" as used in section 40.04(10) is the public employe trust fund. Secs. 40.01(1) and 40.02(35), Stats. The Employe Trust Funds Board (ETFB) members are trustees of the fund. Sec. 40.01(2), Stats. In addition, the ETFB has the duty to establish the contribution rate for ASLCC purposes. Sec. 40.05(4)(br), Stats. These duties as trustees of the fund and specifically the establishment of the contribution rate are affected by the question of constitutionality of the changes to the ASLCC program which are the subject of this opinion.

The parameters of the exceptions to the general rule that a state agency or public officer cannot question the constitutionality of a statute were first set forth in the seminal case Fulton Foundation v. Department of Taxation, 13 Wis. 2d
1, 11, 14b, 108 N.W.2d 312, 109 N.W.2d 285 (1961). Such parameters were described in State ex rel. Sullivan v. Boos, 23 Wis. 2d at 100-02, wherein the court stated:

In Fulton Foundation v. Department of Taxation we said:

"The general rule is that state agencies or public officers cannot question the constitutionality of a statute unless it is their official duty to do so, or they will be personally affected if they fail to do so and the statute is held invalid."

We also recognized that there is a further exception where the question raised is of great public concern, particularly where the circumstances are such that there is little likelihood that a taxpayer or other person whose interests are affected would take the steps required to get a determination of the question.

In deciding that a particular officer could raise the constitutional question, this court has readily found in statutory language an implication of duty to determine the lawfulness of the act or expenditure. Thus in mandamus actions to compel the state director of budget and accounts to make disbursements, the director was permitted to challenge constitutionality because his statutory duties were deemed to include passing on the legality of the purpose of the expenditure.

... . .

Courts frequently permit an officer who controls the disbursement of public funds to challenge the validity of a statute or ordinance which appears to require payment, upon the theory that he has a personal interest to protect, in that he may be held liable if he permits the disbursement of public funds in what proves to be an unlawful manner.
In *State ex rel. Singer v. Boos*, 44 Wis. 2d 374, 171 N.W.2d 307 (1969), the governing body of the Annuity & Pension Board of the Employees' Retirement System of the county of Milwaukee (Milwaukee Board) challenged the constitutionality of a home rule ordinance increasing benefits to retired members. The Milwaukee Board alleged that increasing benefits to persons already retired violated article IV, section 26 and authorized the expenditure of public funds for private purposes. In applying the *Fulton* exceptions, the court stated:

As we view this case, the fundamental question to be resolved is whether public funds are being diverted for a private purpose. This is a question of great public concern and interest.

"When we apply the test of great public concern to the two issues of unconstitutionality raised by the department in the instant case we find one falls within such category and one does not. The issue of whether public funds are being diverted to a private purpose clearly is a matter of great public interest..." *Fulton Foundation v. Department of Taxation* (1961), 13 Wis. 2d 1, 13, 108 N.W.2d 312, 109 N.W. 2d 285.

In addition, the issues raised by appellants will probably not be raised by an individual taxpayer, since the expense and trouble would be too great. In this connection, this court has held:

"We also recognized that there is a further exception where the question raised is of great public concern, particularly where the circumstances are such that there is little likelihood that a taxpayer or other person whose interests are affected would take the steps required to get a determination of the question." *State ex rel. Sullivan v. Boos*, supra, 101.
Therefore, we determine that the appellants have standing to raise the issues presented in this case.

*Boos*, 44 Wis. 2d at 379-80.

It therefore appears that the ETFB has the standing to contest the constitutionality of the ASLCC program changes. It has standing since it has the statutory duty to establish the employers’ ASLCC contribution rate and because diversion of public funds for a private purpose is a question of great public concern or interest which will probably not be raised by an individual taxpayer.

JED: WMS
On behalf of the Ethics Board you ask whether a state public official may purchase items and services from an organization which the organization is making available to the official because of the official’s holding a state office. I conclude that a state public official may purchase items and services from an organization, other than a lobbying principal, if the opportunity to purchase the items or services is not itself something of substantial value.

Section 19.45(2), Stats., prohibits a state public official from using his or her public position to obtain financial gain or anything of substantial value for his or her private benefit or the benefit of his or her immediate family or an organization with which he or she is associated. Section 19.45(3m) states: “No state public official may accept or retain any transportation, lodging, meals, food or beverage, or reimbursement therefor, except in accordance with s. 19.56(3).” Section 19.56(3) provides specific exceptions to the law. For purposes of this discussion, I am assuming that none of the exceptions in section 19.56(3) apply.

The first issue presented is whether section 19.45(3m) prohibits a state public official from purchasing any food, drink, transportation or lodging that is made available to the official because of the official holding a public office. On its face, section 19.45(3m) would prohibit a state public official from attending, for example, a meeting with lunch at a company’s
executive dining room, a chamber of commerce dinner or a trade association golf outing even if the state public official paid the full cost of the lunch, dinner or golf outing. Under section 19.56(3)(a), however, a state public official may accept reimbursement of actual and reasonable expenses for participating in a meeting. Moreover, section 19.56(3)(b) provides that an official may receive and retain anything of value if the activity or occasion for which it is given is unrelated to the official’s public office. Indeed, under section 13.625(7) a state public official may even accept reimbursement from a lobbying organization for attending a meeting.

Interpreting section 19.45(3m) as prohibiting a public official from paying fair market value for an item unless expressly permitted by section 19.56(3) would lead to the anomalous conclusion that the Legislature was permitting a public official to accept reimbursement for certain expenses under section 19.56(3) when a public official attended a meeting, but would not even allow a state public official to purchase the same items if the public official was simply meeting constituents over lunch but not engaging in a “meeting.” I conclude that the statute must be interpreted as prohibiting the acceptance of the listed items only when those items are offered as gifts.

As you note, the ethics law, chapter 19, subchapter III, does not define the word “accept.” The word is certainly broad enough to apply to both receiving items as gifts as well as to purchasing items. The lobby law, chapter 13, subchapter III, uses the same term but the concomitant prohibition in the lobby law is a prohibition against “furnishing,” a term that includes both giving and selling.

The legislative history of section 19.45(3m) indicates that the word “accept” was intended to apply only to receiving gifts. You state that the purpose of the sponsors of 1989 Wisconsin Act 338, which resulted in section 19.45(3m), was to end the practice of legislators accepting food and drink at legislative receptions sponsored by organizations which had an interest in
matters before the Legislature. Certainly a blanket prohibition against accepting or paying for that hospitality would serve that legislative purpose. The more reasonable interpretation, however, is that the Legislature intended to stop the practice of public officials accepting free food and drink but did not intend to prohibit the state officials from attending these functions if the state public official paid for his or her own food and drink. Section 19.56(1) encourages public officials to meet with groups to discuss matters before the Legislature. It would make no sense to encourage officials to attend those functions but prohibit them from purchasing refreshments at the functions.

This interpretation is consistent with the balance of the ethics law which, in contrast to the lobby law, focuses on prohibiting officials from using their public offices to obtain benefits, and achieves a reasonable construction of the statute which effectuates the statute’s purpose. *State ex rel. Melentowich v. Klink*, 108 Wis. 2d 374, 321 N.W.2d 272 (1982). Allowing a public official to purchase items is consistent with the statute’s language and consistent with the public policy evidenced in the balance of the ethics code, especially the policy reflected in section 19.56(3) which encourages public officials to attend meetings of organizations and allows those organizations to reimburse public officials for that attendance.

The question remains whether section 19.45(2) prohibits an official from purchasing an item at full value if the item is not generally accessible to the public, when the access itself may have substantial value. For example, in an opinion issued March 29, 1989, EB 438, the Ethics Board recognized that an invitation to a private club or a private suite at a sports arena can itself have value beyond the cost of the meal or the price of entrance to the arena. The ethics code itself defines “anything of value” as including “favors” and “services.” Sec. 19.42(1), Stats. You state that the board has taken the position that if a facility is not generally available to the public then the cost of membership at, or the purchase or lease price of, the facility
must be viewed as part of the total value of attendance at the facility. I agree. I also agree that whether this value is substantial is a question of fact that must be resolved after looking at all the relevant evidence. The ethics code is violated if the access itself is something of substantial value that is if, e.g., the access to the private suite or the private club is itself something of substantial value over and above the cost of the ticket or the meal.

JED:AL
Lobbying; Public Officials; Words And Phrases; The lobbying law prohibition against furnishing anything of pecuniary value to state officials includes fair market exchanges unless the fair market exchange is between a principal and a state official and the item or service is available to the general public. A lobbyist cannot sell to or purchase from a state official anything of pecuniary value even if it is also available to the general public under the same terms and conditions. The exception in section 13.625(7), Stats., for the furnishing and receipt of certain expenses applies to officials, employes and candidates who are not state public officials under chapter 19, subchapter III. An organization which employs a lobbyist may not furnish food or drink to a state official who is a member, officer or director of the organization unless it also furnishes those items to the general public. "Available to the general public" discussed. OAG 9-92

March 23, 1992

R. ROTH JUDD, Executive Director
Ethics Board

You have asked for my opinion on several provisions of Wisconsin's lobbying law, chapter 13, subchapter III of the Wisconsin statutes. You first ask whether section 13.625, Stats., which prohibits lobbyists and persons or organizations who employ lobbyists (principals) from "furnishing" items of pecuniary value to agency officials, legislative employes, elective state officials and candidates for elective state office (state officials), means that a lobbyist or a principal cannot sell items, services, securities and the like to a state official.

Words in a statute must be construed according to common and approved usage. Sec. 990.01(1), Stats. That can be determined by consulting a recognized dictionary. Ervin v. City of Kenosha, 159 Wis. 2d 464, 464 N.W.2d 654 (1991). Webster's Third New International Dictionary 923 (1986) gives the first definition of furnish as "to provide or supply with what
is needed, useful, or desirable.” Wisconsin cases involving the word “furnish” follow that ordinary usage. In *State ex rel. Milwaukee G.L. Co. v. Arnold*, 190 Wis. 602, 604, 209 N.W. 601 (1926), the court held that the phrase “furnishing gas for lighting or fuel or both” included “the means by which the gas is supplied to the customer for use.” In *Adams v. Feiges*, 206 Wis. 183, 186, 239 N.W. 446 (1931), the court held that a contractor who agreed to furnish architectural services had simply agreed “to supply or provide” those services. Finally, in *State v. Graves*, 257 Wis. 31, 34, 42 N.W.2d 153 (1950), the court held that a bartender who had sold and delivered beer to an adult with the knowledge that the adult was going to give the beer to a minor had “furnished” the beverage to the minor. It certainly is no defense to a charge of furnishing alcohol to a minor that the alcohol was sold, not given.

In 77 Op. Atty. Gen. 160 (1988), this office opined that a state officer or employe could not accept compensation from a principal in exchange for services as a member of the board of directors of the principal. In 1989 Wisconsin Act 338, the Legislature amended the lobbying law to limit its application to elected state officials, legislative employees, candidates for state office and agency decision-makers. The fact that the Legislature amended the statute in response to the attorney general opinion, but did not change the general prohibition against a lobbyist or principal furnishing something of pecuniary value and a state official from accepting something of pecuniary value, is persuasive evidence that the Legislature wanted to prohibit the furnishing of a thing of pecuniary value even if something of pecuniary value was furnished in return.

If the Legislature thought that section 13.625 allowed fair-value compensation for services rendered, it would not have been necessary to amend section 66.884(6) which provides that each commissioner of the Milwaukee Metropolitan Sewerage District, “including any commissioner who serves as a member of the legislature, shall receive actual and necessary expenses
incurred while in the performance of the duties of the office and, in addition, shall receive a salary in an amount the commission specifies by resolution." The italicized portion of that statute was added by 1987 Wisconsin Act 417, section 1, effective June 17, 1988. The amendment was necessary because the sewerage district was a registered principal. 78 Op. Att’y Gen. 149 (1989).

As you note in your request, if the statute were interpreted as permitting the acceptance of items in exchange for fair value, the Ethics Board would need to determine the fair market value of goods or services exchanged. If a principal hired a legislator as a consultant or offered a legislator an opportunity to buy stock in a closely-held corporation, the board would have to determine the value of the services and the value of the stock in order to attempt to determine whether there had been a fair exchange. The potential for abuse inherent in that interpretation is obviated by giving the statute its common and ordinary interpretation. I conclude, therefore, that the prohibition on furnishing things of pecuniary value also prohibits the sale of such things to or purchase of such things from state officials. Section 13.625(2) provides a limited exception to this rule for things of value furnished by or to principals which are normally available to the general public on the same terms and conditions.

Under section 13.625(2) a principal may furnish something of pecuniary value to a state official if the item or service is normally available to the general public on the same terms and conditions. Section 13.625(1) prohibits lobbyists from furnishing and officials from accepting anything of pecuniary value. There is no exception in that subsection for things of pecuniary value which are also made available to the general public. The law is unambiguous; lobbyists may not furnish to an official, and an official may not accept from a lobbyist, an item or service of pecuniary value even if that item or service is available to the general public. Therefore, an official may purchase banking
services and may receive loans from a bank which hires a lobbyist if the services and loans are provided to the official on the same terms and conditions that the services and loans are provided to the general public. Similarly, an official could purchase legal services from or sell legal services to an association, corporation or partnership that employs a lobbyist if such services are provided on the same terms or conditions to the general public. Sec. 13.62(12), Stats. A lobbyist cannot, however, provide legal services to an official or purchase legal services from an official even if the services are available to the general public on the same terms and conditions.

The question of whether a lobbyist who is furnishing something of pecuniary value to an official’s employer, relative or corporation is actually furnishing the item or service to the state official will always be a question of fact. I agree with your conclusion that the law not only prohibits a lobbyist from furnishing things of pecuniary value directly to an official, but also prohibits a lobbyist from furnishing those things indirectly if the official will receive something of pecuniary value from the transaction. Therefore, an official would not be in violation of the law if the official’s employer did business with a lobbyist but the official’s compensation from the company was totally unrelated to and not determined by the income derived from that business. On the other hand, if a lobbyist were purchasing products from a company which employed an official, knowing that the official’s compensation from the company would be enhanced by the purchases, a violation of the law would occur.

Your third question arises because of the difference in coverage between the lobbying law and the ethics law. Section 13.625(7) provides that the prohibited practices section of the lobbying law “does not apply to the furnishing or receipt of a reimbursement or payment for actual and reasonable expenses authorized under s. 19.56 for the activities listed in that section.” Section 19.56 is part of the ethics law and applies to state public officials as defined in that law. Sec. 19.42(13) and
The lobbying law, on the other hand, applies to elected state officials, legislative employes, agency officials and candidates for elective state office. The lobbying law will apply to some state employes who are not state public officials under the ethics law.

The question arises, therefore, whether the exception in section 13.625(7) for expenses authorized under section 19.56 applies only to those individuals who are included within the ethics code in the first place, and therefore could have "expenses authorized under s. 19.56" or whether the exception is meant to apply to the kinds of expenses which would be authorized under section 19.56. I agree with your conclusion that there is no public policy which would explain a legislative intention to treat state public officials who are covered by both the lobbying law and the ethics law differently from officials who are covered only by the lobbying law. Indeed, if the law were interpreted as providing an exception only for officials covered by the ethics code, we would have an anomalous situation in which officials covered by the ethics law could accept actual and reasonable expenses from principals and lobbyists but individuals not covered by the ethics law could not. There is no reason to interpret the statute to provide such an anomalous result.

You next ask whether section 13.625(7) which provides an exception for expenses authorized under section 19.56 includes all of the activities listed in section 19.56. The question arises because section 19.56 authorizes the receipt of payments in six paragraphs of subsection (3):

(3) Notwithstanding s. 19.45:

(a) A state public official may receive and retain reimbursement or payment of actual and reasonable expenses and an elected official may retain reasonable compensation, for a published work or for the presentation of a talk or participation in a meeting related to a topic specified in sub. (1) if the payment or reimbursement is
paid or arranged by the organizer of the event or the publisher of the work.

(b) A state public official may receive and retain anything of value if the activity or occasion for which it is given is unrelated to the official’s use of the state’s time, facilities, services or supplies not generally available to all citizens of this state and the official can show by clear and convincing evidence that the payment or reimbursement was unrelated to and did not arise from the recipient’s holding or having held a public office and was paid for a purpose unrelated to the purposes specified in sub. (1).

(c) A state public official may receive and retain from the state or on behalf of the state transportation, lodging, meals, food or beverage, or reimbursement therefor or payment or reimbursement of actual and reasonable costs that the official can show by clear and convincing evidence were incurred or received on behalf of the state of Wisconsin and primarily for the benefit of the state and not primarily for the private benefit of the official or any other person.

(d) A state public official may receive and retain from a political committee under ch. 11 transportation, lodging, meals, food or beverage, or reimbursement therefor or payment or reimbursement of costs permitted and reported in accordance with ch. 11.

As you suggest, the exception in section 13.625(7) clearly applies to expenses allowed under section 19.56(3)(a). I also agree that the exception does not apply to the payment of other expenses under section 19.56(3). The statute is ambiguous because section 13.625(7) provides an exception for “expenses” authorized under section 19.56 but only one subsection, section 19.56(3)(a) involves what would usually be considered expenses. The reference to section 19.56, without any subsection reference, therefore, creates an ambiguity. Because the law is ambiguous, we must determine the Legislature’s

1989 Assembly Bill 611, section 17, which became 1989 Wisconsin Act 338, section 17, as passed by the Legislature, amended section 13.625(7) to read:

This section does not apply to the furnishing or receipt of a reimbursement or payment for actual and reasonable expenses for a published work or for the presentation of a talk or program, the topic of which concerns legislative, administrative, executive or judicial processes or proposals initiated by or affecting state government as authorized under s. 19.56 for the activities listed in that section.

Quite clearly, the Legislature's intention was to make the exception under section 13.625(7) parallel the exception in section 19.56(3)(a).

The Governor exercised a partial veto of 1989 Assembly Bill 611, section 17, by deleting the words "for a published work or for the presentation of a talk or program, the topic of which concerns legislative, administrative, executive or judicial processes or proposals initiated by or affecting state government as" and deleting the Legislature's striking of the words "for the activities listed in that section." The Governor explained his actions in his veto message:

Sections 17 and 70 of the bill, as they affect ss. 13.625(7) and 19.56 of the Statutes, substitute "program" for "meeting." I have vetoed this minor modification because I am uncertain what the term "program" may mean and I prefer the certainty of current law over the uncertainty of further ambiguity in this area of law.

The Legislature intended to refer only to the payment of actual and reasonable expenses authorized under section 19.56(3)(a). The Governor never expressed any intention of
broadening the exception. Indeed, the Governor's concern was that the insertion of new terms might create ambiguity.

Interpreting the reference to section 19.56 as encompassing only section 19.56(3)(a) is consistent with the legislative history of the statute and consistent with the spirit or intention of the statute. *City of Madison v. Town of Fitchburg*, 112 Wis. 2d 224, 332 N.W.2d 782 (1983). This interpretation is also consistent with the words of the statute. Section 13.625(7) creates an exception for the "reimbursement or payment for actual and reasonable expenses" authorized under s. 19.56 for the activities listed in that section." The phrase "reimbursement or payment for actual and reasonable expenses" is used only in section 19.56(3)(a); it does not appear elsewhere in section 19.56.

Your last question concerns the meaning of "available to the general public" as used in section 13.625(2). As your request notes, no Wisconsin statutes or court cases have interpreted the phrase "general public." The legislative history of the statute is not helpful. Cases from other jurisdictions involve interpretations of specific statutes and are not generally helpful.

I agree with your conclusion that the phrase need not be interpreted as including everyone in the world or even all residents of Wisconsin. On the other hand, something is not made available to the general public simply because the prerequisites to receiving it do not turn on state employment. Something is available to the general public only if it is accessible to the general public. *See American Mut. Liability Ins. Co. v. Fisher*, 58 Wis. 2d 299, 303, 206 N.W.2d 152 (1973). Whether something is available to the general public will always be a question of fact.

I agree that the criteria you suggest are appropriate for determining whether an item or service is available to the general public under section 13.625(2). Under those criteria, something is available to the general public if:

1. It is available to anyone who wants it and who meets the criteria for eligibility;
2. The criteria are: (a) established and readily identifiable; and (b) drawn without the purpose or effect of giving a preference to or conferring an advantage upon an agency official, legislative employe or elective state official; and

3. There is no offer or notice of availability directed to an agency official, legislative employe or elective state official with the effect of conferring an advantage not also given others who meet the criteria.

Under these criteria, a legislator who is an alumnus of a university which is also a principal could purchase school memorabilia from the school but the school could not hire the official as a "consultant."

JED:AL
Appropriations And Expenditures; County Executive; A veto of an appropriation by the county executive under section 59.031(5), Stats., does not restore the appropriation to the level in the county executive’s proposed budget. OAG 10-92

April 2, 1992

CAL W. KORNSTEDT, Corporation Counsel
Dane County

You ask for an opinion on the meaning of that part of section 59.031(5), Stats., which states that the county executive “may exercise the power to veto any increases or decreases in the budget under sub. (6).” Your question arises because a former Dane County corporation counsel interpreted the statute as meaning that a county executive’s veto of a county board appropriation, absent an override of the veto, would restore the appropriation to the level the county executive proposed in his or her executive budget. For example, if the county executive proposed $100,000 for parks and the county board appropriated only $50,000, the county executive’s veto of the $50,000 would result in an appropriation of $100,000 unless the county board overrode the veto.

The Legislature immediately responded to this interpretation of the statute by enacting chapter 92, Laws of 1975. That chapter amended section 59.032(5) by providing that “[n]o money may be appropriated for any purpose unless approved by the county board. The failure of the county board, upon reconsideration under sub. (6), to approve any appropriation vetoed by the county executive does not operate to appropriate the amount specified in the proposed budget submitted by the county executive.” The Legislative Reference Bureau’s drafting file for 1975 Assembly Bill 425, which became chapter 92, Laws of 1975, includes a resolution of the Dane County Board informing the Legislature of the Dane County corporation counsel’s opinion and requesting the amendatory legislation. It also includes a letter from the corporation counsel of
Milwaukee County disagreeing with the opinion from Dane County. Chapter 92, Laws of 1975 amended only section 59.032(5), the statute for all counties other than Milwaukee. The Legislature did not amend section 59.031(5), the identical provision for Milwaukee County, apparently because the Milwaukee County corporation counsel was of the opinion that no amendment was necessary.

In 1985 the Legislature combined the statutory sections for the Milwaukee County executive and other county executives into one section that is now section 59.031. 1985 Wisconsin Act 29, sections 1150-61. The corrective language requested by the Dane County Board when chapter 92, Laws of 1975 was enacted was not included in the 1985 amendments and is no longer part of the statute. In the 1985 amendments the Legislature essentially reenacted the statute concerning the Milwaukee County executive’s veto power but made the section applicable to all county executives. In so doing it repealed what had been section 59.032(5), the statute containing the Dane County Board’s requested amendment.

When a statute is capable of being understood by reasonably well-informed persons in two or more different senses the statute is ambiguous. Ervin v. City of Kenosha, 159 Wis. 2d 464, 464 N.W.2d 654 (1991). The meaning of the phrase “may exercise the power to veto any increases or decreases in the budget under sub. (6)” is unclear. Certainly, the corporation counsel of Milwaukee County and the corporation counsel of Dane County differed as to its meaning. When a statute is ambiguous, ambiguity should be resolved in a way that gives effect to legislative intent and purpose. Carkel, Inc. v. Lincoln Cir. Ct., 141 Wis. 2d 257, 414 N.W.2d 640 (1987). In order to determine that intent and purpose, we should examine the statute’s scope, history, context and subject matter. State v. Pham, 137 Wis. 2d 31, 403 N.W.2d 35 (1987). I agree with your conclusion that the statute’s history evidences a legislative
intent to accept the Milwaukee, not the Dane County, interpretation of the veto authority of the county executive.

There is no evidence that the Legislature intended to increase the county executive's existing veto authority in counties with a population of less than 500,000 when it combined the two statutes. The Legislature is presumed to have known that section 59.031(5) had been interpreted as meaning that a veto did not restore the executive's proposed appropriations. It also knew that section 59.032(5) had been given a contrary interpretation since it had specifically rejected that interpretation by amending section 59.032(5). In my opinion the Legislature's repeal of section 59.032(5) and retention of section 59.031(5) suggests its acceptance of the Milwaukee County corporation counsel's interpretation of section 59.031(5) and its rejection of the Dane County corporation counsel's interpretation of section 59.032(5) as it read before chapter 92, Laws of 1975, was enacted.

There is another compelling reason to interpret section 59.031(5) as meaning that a veto does not restore the executive's proposed appropriations. Article IV, section 23 of the Wisconsin Constitution provides in part: "[T]he Legislature may provide for the election . . . of a chief executive officer in any county with such powers of an administrative character as they may . . . prescribe." Appropriating funds is quintessentially a legislative, not an administrative, function. Legislative authority rests with the county board. Wis. Const. art. IV, § 22; sec. 59.07(5), Stats.

If section 59.031(5) is interpreted as meaning that the county executive's veto restores the level of appropriation originally set by the county executive's proposed budget, the statute would purport to give the county executive extra-constitutional "legislative" authority. If section 59.031(5) is interpreted as meaning that a county executive veto restores the county executive's proposed appropriation, the county executive would be appropriating money without county board action.
Article IV, section 23a of the Wisconsin Constitution provides that if the county executive approves a resolution ordinance
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.

The county executive's authority is the authority to veto, not the authority to appropriate. Under article IV, section 23a of the Wisconsin Constitution if the county executive approves the county board appropriation it becomes law; if he or she does not approve, it is returned to the county board for further action and becomes law only if two-thirds of the members override the veto. Nothing in the constitution suggests that a failure to override that veto means that the county executive's proposed appropriation becomes law. Although the county executive's partial veto authority with respect to appropriations is legislative in nature, the authority granted is the authority to change the policy of the law as originally envisaged by the county board. 77 Op. Att'y Gen. 113, 118 (1988). The constitution does not grant the county executive the legislative authority to appropriate funds without county board action.

Given a choice of possible interpretations of a statute, we must select the construction that results in constitutionality rather than possible invalidity. State ex rel. Lynch v. Conta, 71 Wis. 2d 662, 689, 239 N.W.2d 313 (1976). Interpreting section 59.031(5) as providing the county executive with the authority to appropriate county funds would raise serious questions about the law's constitutionality. That interpretation, therefore, should be avoided.

JED:AL
Bed And Breakfast; Intoxicating Liquors; Licenses And Permits; An owner of a bed and breakfast establishment who does not hold an alcohol beverages license may personally consume alcohol beverages or serve alcohol beverages at social events held on the premises without violating section 125.09(1), Stats., provided that consumption of alcohol beverages occurs in a portion of the bed and breakfast establishment that is not open to the public or to renters.

Proprietors of a bed and breakfast establishment may solicit and accept voluntary contributions from guests at a social event held on the premises to defray costs of alcohol beverages, but bed and breakfast proprietors who do not hold an alcohol beverages license may not serve alcohol beverages at a social event where alcohol beverages are served only to those who pay an admission fee, without violating section 125.04(1).

OAG 11-92

April 9, 1992

FRED A. RISSER, Chairperson

Senate Organization Committee

You requested, on behalf of the Senate Organization Committee, a formal opinion regarding the application of alcohol beverage license laws to bed and breakfast establishments. Your specific questions are set forth in an attached letter from Senator Tim Weeden.

The first question is whether a bed and breakfast establishment is considered a “public place,” within the meaning of section 125.09(1), Stats., at which the proprietors of the establishment would be prohibited from either personally consuming alcohol beverages or serving alcohol beverages to personal friends if the establishment does not hold a liquor license. Your related question is whether a bed and breakfast proprietor and his or her personally invited guests may be permitted to consume alcohol beverages on the premises under
certain circumstances, such as where the consumption occurs in areas of the establishment that are off-limits to paying guests.

In my opinion, section 125.09(1), which states in part “[n]o owner, lessee or person in charge of a public place may permit the consumption of alcohol beverages on the premises of the public place, unless the person has an appropriate retail license or permit,” prohibits consumption of alcohol beverages by proprietors of a bed and breakfast establishment, by their friends, or by their personal guests in areas of the building that are open to the public or to renters, if the proprietors do not hold an alcohol beverage license. This section does not prohibit consumption of alcohol beverages by proprietors, by their friends or their personal guests in areas of the building that are off-limits to the public or to renters.

The term “public place,” as used in section 125.09(1) is not defined. Nontechnical words and phrases are to be construed according to their common and ordinary usage. Ervin v. City of Kenosha, 159 Wis. 2d 464, 464 N.W.2d 654 (1991). The ordinary and common meaning of a word may be established by definition of a recognized dictionary. Id. Black’s Law Dictionary 1107 (5th ed. 1979) defines “public place” as “[a] place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public.” A “bed and breakfast establishment” is defined, in part, for purposes of public health and safety licensing statutes, as a place of lodging that “[p]rovides 8 or fewer rooms for rent to no more than a total of 20 tourists or transients” and that “[i]s the owner’s personal residence.” Sec. 50.50(1)(a) and (c), Stats.

A bed and breakfast establishment generally meets the definition of a public place, since the public must have access to the establishment for the purpose of renting or seeking to rent rooms within the establishment. See sec. 101.22(1m)(bo)1.
and (bp)1., Stats., which defines “public place of accommodation or amusement” as including a bed and breakfast establishment for purposes of the equal rights statute. However, certain portions of the premises of a bed and breakfast establishment presumably are not accessible to the public, since, by definition, such an establishment is the owner’s personal residence. Any portions of the building other than rooms to be rented or common areas open to the public or to renters are private in character. Those private portions of the establishment do not constitute the premises of a “public place” within the common and ordinary meaning of that term. Thus, section 125.09(1) does not prohibit consumption of alcohol beverages by the owners of the bed and breakfast establishment or by their personally invited guests in those areas of the building not open to the public or to renters. However, consumption of alcohol beverages is prohibited in areas that are open to the public or to renters, unless an alcohol beverage license is obtained.

This reasoning is consistent with that of the Wisconsin Supreme Court in State v. Becker, 201 Wis. 230, 229 N.W. 857 (1930). In that case defining “premises” for purposes of a prohibition-era warrantless search, the living quarters were physically separated from the saloon. The court ruled that the living quarters were not part of the “premises” in the absence of a showing that the entire building was used by all occupants in common.

In the first part of your second question you inquire as to whether the proprietor of a bed and breakfast establishment that does not hold any alcohol beverage license may host a social event where alcohol beverages are served, if attendance is limited to the proprietor’s personally invited guests, no admission fee is charged and no monetary contribution is required. In my opinion, a bed and breakfast establishment owner may serve alcohol beverages at such a social event, provided that the alcohol beverages are served in a portion of
the bed and breakfast establishment that is not open to the public or to renters.

The second part of your second question is whether contributions from invited guests at such a social event may be solicited and accepted to defray costs, as long as the contributions are voluntary and the serving of alcohol beverages is not restricted to those making a contribution. My opinion is that contributions from the proprietor’s invited guests at a social event in the private residence portion of the establishment may be solicited and accepted if the contributions are voluntary and the serving of alcohol beverages is not restricted to those making a contribution.

Section 125.04(1) provides that no person may sell, manufacture, rectify, brew or engage in any other activity for which chapter 125 provides a license or permit without holding the appropriate license or permit. The term “sell” is defined in section 125.02(20) as “any transfer of alcohol beverages with consideration or any transfer without consideration if knowingly made for purposes of evading the law.” The circumstances you have described do not suggest a “transfer” made for purposes of “evading the law.” Moreover, I conclude that solicitation of voluntary contributions from invited guests does not constitute a transfer “with consideration.”

“Consideration” is the “cause, motive, price, or impelling influence which induces a contracting party to enter into a contract.” Black’s Law Dictionary 277 (5th ed. 1979). Under the circumstances you have specified, the serving of alcohol beverages to those who attend a private social event does not constitute a transfer “with consideration.” The contribution is not an inducement to obtain the alcohol beverages, since such beverages are served regardless of whether a contribution is made. Accordingly, this type of serving of alcohol beverages does not violate chapter 125.

Your third question is whether a bed and breakfast establishment of which the owner does not hold any alcohol
beverage license may serve alcohol beverages at a social event which it hosts and to which an open invitation has been issued to members of an organization who are also charged an admission fee to the event. You also ask the related question as to whether it is presumed that the alcohol beverages are being sold as long as an admission fee is charged to the event.

Based upon the previous logic, I conclude that serving alcohol beverages at a social event for which an admission fee is charged, on premises at which the proprietors do not hold an alcohol beverage license, constitutes a sale of alcohol beverages in violation of section 125.04(1) if alcohol beverages are served only to those who pay the admission fee. An admission fee constitutes consideration where payment of the fee is required to obtain alcohol beverages. Therefore, at such an event the owner of the establishment must hold the appropriate alcohol beverage license.

JED:ARK
Clerk Of Courts; County Board; Fees; Forfeiture; Neither the clerk of court nor the county board has the authority to adopt a non-refundable processing fee for persons desiring to pay a fine or forfeiture imposed by the court through installment payments in the absence of a statute specifically providing for such processing fee. OAG 12-92

April 30, 1992

CAL W. KORNSTEDT, Corporation Counsel
Dane County

The Dane County Clerk of Courts has proposed that the county board adopt a non-refundable processing fee for persons desiring to make installment payments under certain court orders. Under this apparently judicially created system of installment payments, a defendant might be granted up to one year to pay a fine or forfeiture imposed by the court. Under the clerk's proposal, the processing fee of $10 would be retained by the county in its general fund. It is your understanding that other counties apparently are in the process of enacting a similar fee for either the same or somewhat similar payments.

With this background, you ask whether the county board has authority to adopt such a processing fee and, in the alternative, whether the clerk of court possesses direct authority to impose such a fee even if the county board does not act.

It is my opinion that both the county board and the clerk of courts lack the authority to impose such a non-refundable processing fee.

As a public officer, the clerk of courts has only those powers expressly conferred by statute or those additional implied powers that are necessary for the due and efficient exercise of the powers expressly granted or powers that may be fairly inferred from such express powers. Pacific Nat. Fire Ins. Co. v. Irmiger, 254 Wis. 207, 211-12, 36 N.W.2d 89 (1949); 66 Op. Att'y Gen. 358, 360 (1977). Even at a time when the clerk of circuit court was not a salaried officer but received
compensation only in fees, the court held that payment by the county to the clerk in addition to the statutory fees could not be justified by merely allowing unauthorized charges or items in the fee bills presented by the clerk. *St. Croix County v. Webster*, 111 Wis. 270, 87 N.W. 302 (1901). *See also Green Lake Co. v. Waupaca Co.*, 113 Wis. 425, 438-41, 89 N.W. 549 (1902). Today, the clerk of court's powers and duties are largely found in sections 59.39 to 59.42, Stats.

Section 59.42(1) provides that the clerk of circuit court shall collect the fees prescribed in sections 814.60 to 814.63. This necessarily implies that the clerk is to collect no other fees. The clerk may refuse to accept any paper for filing or recording under section 59.42(1) only until the applicable statutory fee is paid.

It has been suggested by others that the clerk is authorized to impose this fee under section 59.395(8) which requires the clerk to "perform such other duties as required by law." It specifically has been suggested in at least one county that (1) one of the duties required by law is the management of the office of clerk of court, and (2) if as part of the management function a service is provided which is not statutorily required, there is no statutory prohibition to charging a fee to offset the cost of that service. I reject this conclusion as contrary to the principle that the clerk has only those powers expressly conferred by statute or fairly inferred from such expressed powers. Moreover, the Legislature has set the fees the clerk is entitled to retain for services rendered. For example, see sections 814.60(1) and 814.61 authorizing retention for the use of the county of either a percentage or a specific amount of certain fees collected.

Although each circuit court clerk is required to exercise some discretion in the performance of certain duties (e.g., accepting or refusing to accept a paper for filing or recording before a prescribed fee is paid under section 59.42(1)), it is my opinion that the Legislature intended a uniform fee schedule throughout
the state. Sections 814.60 to 814.635 provide with great specificity the many fees to be collected by the clerk of court. It is clear that the amounts can be changed only by statewide legislation. It is equally plain that any new fees must also be adopted by the Legislature rather than imposed by the clerk of court or the county board.

As for the county board, it also possesses only those powers expressly conferred upon it or necessarily implied from the nature of the grant of power. *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981); 78 Op. Att’y Gen. 38 (1989); 61 Op. Att’y Gen. 214, 217 (1972). Except where expressly provided otherwise, the county board has no authority under its general powers in section 59.07 or elsewhere to create a fee or establish a higher fee. The administrative home rule provision in section 59.025 cannot form the basis for a county to adopt fees other than those statutorily prescribed because, as I have concluded earlier, the statutory fee schedule is a matter of statewide concern which uniformly affects every county.

Where the Legislature has intended to permit some discretion in the establishment or raising of a fee, it has done so in clear and unambiguous language. For example, see section 814.705(1) which authorizes a county board to establish a higher fee for collections by the sheriff under section 814.70. No similar provision exists for the establishment or increase of any fee to be collected by the clerk of court.

JED:DPJ
Confidential Reports; Public Assistance; Information contained in a county paternity case file may be released for purposes of fraud investigation of the public assistance programs specified in section 49.53, Stats. OAG 13-92

April 23, 1992

BRYAN J. FISCHER, Corporation Counsel
Adams County

You have requested my opinion on whether a county child support office may legally disclose confidential information contained in a county paternity case file to county fraud investigators.

It is my opinion that the information contained in the county paternity case file may be released for purposes of fraud investigation of the public assistance programs specified in section 49.53, Stats.

Section 49.53(1m) provides in part that no person may use or disclose information concerning establishment of paternity services under section 46.25 for any purpose not connected with the administration of programs for general relief, aid to families with dependent children, social services, child and spousal support and supplemental payments under section 49.177. To the extent that fraud investigation is necessary for the administration of the above programs, paternity information can be released to the county fraud investigator. This conclusion is consistent with an earlier opinion issued by this office, 69 Op. Att’y Gen. 95 (1980). That opinion reviewed in detail the type of information which could be released under section 49.53. In that opinion it was noted that section 49.53 must be construed in a manner consistent with the federal regulations from which it emanated. The opinion stated that the federal regulations and legislative history allowed release of information concerning AFDC recipients in “[a]ny investigation, prosecution, or criminal or civil proceeding conducted in connection with the administration of any such plans . . . .” Id. at 99.

(a) Under State statute which imposes legal sanctions, the use or disclosure of information concerning applicants or recipients of support enforcement services is limited to purposes directly connected with:

. . . .

(2) Any investigations, prosecution or criminal or civil proceeding conducted in connection with the administration of any such plan or program;

(Emphasis added.) This regulation which safeguards information concerning applicants or recipients of support enforcement services does not prevent information in a case file from being released to other programs for purposes of an investigation, prosecution or criminal or civil proceeding. Rather, the regulation provides that the information may be released for purposes of "[a]ny investigations . . . conducted in connection with the administration of any such plan or program." 45 C.F.R. § 303.21(a)(2). Hence, based on the applicable federal regulation, I conclude that information contained in a paternity case file may be released to the county fraud investigator if he or she is conducting an investigation of one of the public assistance programs specified in section 49.53(1m).

The Wisconsin Supreme Court has interpreted section 49.53 in State ex rel. Dombrowski v. Moser, 113 Wis. 2d 296, 334 N.W.2d 878 (1983). The issue in that case was whether paternity prosecution was a "purpose . . . connected with the administration" of aid to dependent children within the meaning of section 49.53 thereby allowing the defendant in a paternity action to inspect a county department of social services record
which might have contained relevant evidence to impeach the complainant. The court concluded that disclosure of AFDC information in a paternity proceeding was proper under section 49.53 which provides that such information may be disclosed for "'purposes directly connected with . . . any investigation, prosecution or criminal or civil proceeding conducted in connection with the administration of' the AFDC program." Dombrowski, 113 Wis. 2d at 303. The court found that a paternity proceeding instituted to establish the paternity of a child who has applied for or is receiving AFDC is a civil proceeding directly connected with the administration of the AFDC program. Id. In reaching its decision the court held that use of the AFDC information must be restricted to the paternity proceeding and it noted that under section 767.53, all court proceedings relating to paternity are held in closed court and all records of the proceedings are placed in a closed file. Dombrowski, 113 Wis. 2d at 304-05.

Section 767.53 governs the confidentiality of court records in paternity hearings and sets forth the circumstances under which information from the court records can be released. For purposes of this opinion, however, I will not address the issue of access to paternity court records because your request focuses on access to county paternity case files.

The other statute which should be addressed is section 46.25 which governs child and spousal support, establishment of paternity and medical liability. Section 46.25(1) provides in relevant part that:

There is created a child and spousal support and establishment of paternity and medical liability support program in the department. The purpose of this program is to establish paternity when possible . . . . To accomplish the objectives of this program and of other assistance programs under ch. 49, county and state agencies will cooperate with one another to implement a child and spousal support and paternity establishment program in
accordance with state and federal laws, regulations and rules and to assure proper distribution of benefits of all assistance programs authorized under ch. 49.

Section 46.25(2m) provides that:

The department may request from any person any information it determines appropriate and necessary for the administration of [section 46.25 and other specified public assistance programs]. . . . The department or the county child and spousal support agency may disclose information obtained under this subsection only in the administration of [section 46.25 and other specified public assistance programs].

Hence, like section 49.53 and the applicable federal regulation, section 46.25 allows information obtained for purposes of establishment of paternity to be disclosed as necessary for the administration of other public assistance programs and to assure the proper distribution of benefits of all assistance programs under chapter 49.1 Thus, the Legislature has established a comprehensive regulatory framework which serves the joint purpose of safeguarding information about applicants and recipients of public assistance under chapter 49 and information about child and spousal support and establishment of paternity services under section 46.25. At the same time, this framework allows for the exchange of information between those programs as necessary for the

---

1The Wisconsin Supreme Court briefly discussed section 46.25 in In Matter of Grant, 83 Wis. 2d 77, 86 n.7, 264 N.W.2d 587 (1978). The court noted that section 46.25 authorized department officials to obtain information "only upon an assurance by program officials that the information will be used solely in connection with their official duties under the child support and establishment of paternity program." Id. Since that decision, section 46.25 has been amended to allow department officials to obtain and disclose information necessary for the administration of AFDC, medical assistance and food stamps as well as the child support and establishment of paternity program. See 1985 Wisconsin Act 29, secs. 862 and 863.
administration of those programs and assuring the proper
distribution of benefits.

JED:LS
Clerk Of Courts; Fees; Marriage And Divorce; If a domestic abuse petition is filed under section 813.12(2), Stats., in conjunction with an action affecting the family commenced under chapter 767, no separate filing fee is applicable because a filing fee already would have been collected by the clerk under section 814.61(1) when one of the family actions enumerated under section 767.02(1) was commenced. In the absence of a pending family action, a domestic abuse action under section 813.12 is commenced with service of the petition upon the respondent if a copy of the petition is filed before service or promptly after service, and the clerk of court is authorized to collect a fee under section 814.61(1) when a domestic abuse action is commenced in this manner. Under section 813.127, however, there is only one fee applicable where a petitioner combines in one action two or more petitions for domestic abuse, child abuse or harassment if the respondent is the same person in each petition. After a final judgment has been entered in the divorce action, any person filing a petition for a domestic abuse restraining order would be required to pay a separate filing fee except when the same person already has paid a fee under section 814.61(7) for revision of a judgment or order and that petition is still pending. OAG 14-92

May 13, 1992

J. DENIS MORAN, Director of State Courts
Supreme Court of Wisconsin

You ask two questions relating to the commencement of actions in domestic abuse cases. In addressing the commencement of an action for a domestic abuse restraining order or injunction, section 813.12(2), Stats., provides:

Commencement of action and response. No action under this section may be commenced by complaint and summons. An action under this section may be commenced only by a petition described under sub. (5)(a). The action commences with service of the petition upon the
respondent if a copy of the petition is filed before service or promptly after service. A petition may be filed in conjunction with an action affecting the family commenced under ch. 767, but commencement of an action affecting the family or any other action is not necessary for the filing of a petition or the issuance of a temporary restraining order or an injunction. Section 813.06 does not apply to an action under this section. The respondent may respond to the petition either in writing before or at the hearing on the issuance of the injunction or orally at that hearing.

Section 813.127 authorizes combined actions for domestic abuse, child abuse and harassment and provides:

Combined actions; domestic abuse, child abuse and harassment. A petitioner may combine in one action 2 or more petitions under one or more of the provisions in ss. 813.12, 813.122 and 813.125 if the respondent is the same person in each petition. In any such action, there is only one fee applicable under s. 814.61(1)(a). In any such action, the hearings for different types of temporary restraining orders or injunctions may be combined.

With this background, you initially ask:

If a petition for domestic abuse (or child abuse, or harassment) is filed "in conjunction" with a family action, are separate filing fees charged, or does "in conjunction" in s. 813.12(2) have the same meaning as "combined actions" in s. 813.127, that is, permitting those actions to be treated as one action with only one filing fee applicable? Or does "in conjunction" simply mean separate actions at the same time and therefore separate filing fees?

The American Heritage Dictionary 311 (2nd College Ed. 1991) defines "conjunction" as: "1. a. The act of joining. b. The state of being joined. 2. A simultaneous occurrence in space or time; concurrence." Under this definition section 813.12(2) permits the filing of a domestic abuse petition so that this issue
is joined with the issues already raised in the action affecting the family.

If a domestic abuse petition is filed under section 813.12(2) "in conjunction with an action affecting the family commenced under ch. 767," it is my opinion that no separate filing fee is applicable. A filing fee already would have been collected by the clerk under section 814.61(1) when one of the family actions enumerated under section 767.02(1) was commenced. There is no specific provision authorizing the clerk to collect an additional fee for the filing of such a petition in a pending family action.

In the absence of a pending family action, a domestic abuse action under section 813.12 is "commenced" with service of the petition upon the respondent if a copy of the petition is filed before service or promptly after service. The clerk of court is authorized to collect a fee under section 814.61(1) when a domestic abuse action is commenced in this manner. However, under the plain language of section 813.127, there is only one fee applicable where a petitioner combines in one action two or more petitions for domestic abuse, child abuse or harassment if the respondent is the same person in each petition.

Wisconsin long ago abandoned the highly formal concepts of common law form pleading in favor of more functional concepts defined in terms of the underlying transaction, occurrence or event that forms the basis of the claim. Korkow v. General Cas. Co. of Wisconsin, 117 Wis. 2d 187, 192-93, 344 N.W.2d 108 (1984). Permitting domestic abuse petitions in existing actions affecting the family and authorizing combined actions for domestic abuse, child abuse and harassment without requiring separate actions and fees is consistent with the modern attitudes toward liberal pleadings and judicial economy. Section 813.12(2) effectively precludes the charging of two separate filing fees where a petition is filed in conjunction with an action affecting the family while section 813.127 authorizes combined actions where a petition has not been filed in conjunction with
an action affecting the family and allows for charging only one fee.

You next ask two other fee-related questions regarding a domestic abuse petition filed in an active case. You ask (1) when a petition for domestic abuse is filed in a pending family action, is the determining factor for whether or not to charge a filing fee the active case status or the proximity of filing dates and (2) if the determining factor is the proximity of the filing dates, is there a point in time when a domestic abuse action is considered a separate action in a pending family case?

It is my opinion that the sole determining factor is the active status of the case and not the proximity of the filing date. An action affecting the family is active or pending, so that a petition may be filed "in conjunction" with that action, only until a final judgment is entered. Although the court retains jurisdiction to hear and decide requests for modification of that judgment, any subsequent proceeding to enforce or modify a previous judgment or order is itself an action affecting the family under section 767.02(1) which requires a new filing fee under section 814.61(7).

For example, if a final judgment has been entered granting a divorce and establishing maintenance, support and custody obligations or conditions, a party to the divorce several months or years later might file a petition for a domestic abuse restraining order against the ex-spouse. Even though the family court retains jurisdiction to hear post-divorce matters such as revision of maintenance, support or custody, the petition for a restraining order would be an independent action requiring a filing fee under section 814.61(1)(a) because no action is currently pending.

On the other hand, if under substantially the same circumstances a party also has filed a petition for revision or modification of an existing judgment or order, a filing fee would be required under section 814.61(7). However, if the same person also filed a petition for a domestic abuse
restraining order either at the same time or while the revision or modification petition was still pending, no additional filing fee would be required.

JED:DPJ
Licenses And Permits; Marriage And Divorce; Residence, Domicile And Legal Settlement; Words And Phrases; Wisconsin residents who have not resided in their current county of residence for 30 days prior to application for a marriage license under section 765.05, Stats., must, like nonresidents, apply for a marriage license in the county in which the marriage ceremony will be performed. Persons in military service who are stationed in Wisconsin may obtain marriage licenses in the Wisconsin county in which they reside and Wisconsin residents in the military who are stationed out of state and can show that they intend to remain Wisconsin residents can apply for marriage licenses in their county of residence in Wisconsin. OAG 15-92

June 5, 1992

FRED A. RISER, Chairperson
Senate Organization Committee

The Senate Committee on Organization asks for my interpretation of the residency requirement for obtaining a marriage license under section 765.05, Stats.

The inquiry originated with the Marriage License Committee of the Wisconsin County Clerks’ Association. A letter from the chairperson of that committee accompanied your request. In that letter, the committee poses a question concerning the residency for marriage license application purposes of Wisconsin residents who have moved from one Wisconsin county to another within 30 days prior to the application. The committee also asks a question on how the residency requirement applies to persons who are in military service.

In my opinion, Wisconsin residents who move from one county to another within the state, as well as new state residents, who cannot satisfy the 30 day residency requirement for obtaining a marriage license in their current county of residence must, like nonresidents of the state, obtain the license in the county in which the marriage ceremony will be
performed. I also conclude that persons in the military stationed in Wisconsin may obtain marriage licenses in the Wisconsin county in which they reside and that Wisconsin residents who enter military service and are stationed out of state may obtain marriage licenses in the Wisconsin county in which they claim residence if they can show that they have maintained state residency by such means as voting in Wisconsin, maintaining a state driver's license and paying state income taxes.

Section 765.05 provides that:

No person may be joined in marriage within this state until a marriage license has been obtained for that purpose from the county clerk of the county in which one of the parties has resided for at least 30 days immediately prior to making application therefor. If both parties are nonresidents of the state, the marriage license may be obtained from the county clerk of the county where the marriage ceremony is to be performed. If one of the persons is a nonresident of the county where the marriage license is to issue, the nonresident's part of the application may be completed and sworn to (or affirmed) before the person authorized to accept such applications in the county and state in which the nonresident resides.

Section 765.08 provides for a 5-day waiting period between the application for a marriage license and its issuance; however, this period may be waived by the county clerk upon payment of a fee. The fee charged for this waiver, as well as the fee for the marriage license itself under section 765.15, is the same for residents and nonresidents.

Section 765.09(3) provides in part that: "Each party shall present satisfactory, documentary proof of identification and residence and shall swear (or affirm) to the application before the clerk who is to issue the marriage license or the person authorized to accept such applications in the county and state where the party resides."
Under section 765.12(1), the county clerk issues the marriage license if statutory provisions, including the above, have been complied with. Section 765.12(2) provides in part that: “The marriage license shall authorize the marriage ceremony to be performed in any county of this state within 30 days of issuance, excepting that where both parties are nonresidents of the state, the ceremony shall be performed only in the county in which the marriage license is issued.”

The first question posed involves the situation where both parties are Wisconsin residents who moved from one Wisconsin county to another within 30 days prior to the date of application for the marriage license. The parties do not intend to have the marriage ceremony performed in the new county of residence. The question is whether the parties must apply for a license in the county where one of them had resided for 30 days prior to the move, or whether they should be treated as nonresidents and obtain the license in the county where the marriage ceremony is to be performed.

Section 765.05 on its face provides no answer to this question. The parties in question are Wisconsin residents, but neither one has satisfied the statutory 30-day requirement for obtaining a marriage license in the new county of residency. Given the 30-day requirement, the two ways of dealing with the situation are: (1) to treat the parties as residents of their county of previous residence, if qualified there; or (2) to treat the parties as nonresidents.

In my opinion, Wisconsin residents who move from one county in this state to another within 30 days of application for a marriage license must, like nonresidents, obtain the license from the clerk of the county in which the ceremony will be performed. The same holds true for new Wisconsin residents who have not satisfied the 30-day requirement in the county where they reside.

The Vital Statistics Section in the Department of Health and Social Services, in its Vital Statistics Handbook For County
Clerks (Dec. 1990), at 7, states that: "If both parties are residents of Wisconsin but neither has been a resident of a county for 30 days, the application is to be made in the county where the marriage is to be performed." The Marriage License Committee of the Wisconsin County Clerks’ Association questions this interpretation. However, in my opinion the agency’s conclusion is correct.

The language of section 765.05 does not clearly and unambiguously set forth the legislative intent, so it is necessary to examine the history, context, subject matter, scope and object of the statute. In Interest of J.A.L., 162 Wis. 2d 940, 962-63, 471 N.W.2d 493 (1991). Furthermore, interrelated statutes must be read together and harmonized. Racine Unified School Dist. v. LIRC, 164 Wis. 2d 567, 606, 476 N.W.2d 707 (Ct. App. 1991).

The 30-day residency requirement was added to section 765.05 by chapter 595, Laws of 1959. The Legislative Council Note to this section states that:

This is a restatement of Wis.Stats.1957, § 245.13 which requires that a marriage license be obtained in the county where one of the parties resides. Since residence can be established in a single day this requirement is easily circumvented. A new provision requires a county residence of 30 days.


This history shows that the 30-day requirement is comparatively recent and suggests that it relates to the purpose of the chapter expressed in section 765.001(2) “to promote the stability and best interests of marriage and the family.” A durational residency requirement may help ensure that only eligible persons, who, for example, do not intend to avoid the marriage laws in their home states, as prohibited by section 765.04(3), obtain licenses to marry in this state. Similarly, the durational requirement may help ensure that Wisconsin residents
are eligible to marry. For example, the durational residency requirement probably makes it more likely that two first cousins, who wish to marry contrary to section 765.03(1), would be discovered prior to making an illegal marriage. For persons who cannot meet the 30 day requirement, the statutory scheme, as interpreted herein, requires such persons to obtain marriage licenses within the county in which the marriage will be performed. This scheme appears "to promote the stability and best interests of marriage and the family" by forcing such persons to have multiple contacts with the same county, which probably provides some check on illegal marriages.

The legislative history of a related statute, section 765.08, shows that the question of residency for persons moving within the state was formerly addressed. Section 765.08(2) currently provides that the county clerk may waive the 5-day waiting period between the application for a marriage license and its issuance. Formerly, section 765.08 specified a number of situations under which the 5-day period could be waived and provided in part as follows: "The person applying for such order or dispensation shall have been a resident of this state for at least 30 days immediately prior to making such application. The applicant shall retain residence in one county until he or she has established residence in another for 30 days." Sec. 765.08, Stats. (1979-80). It seems likely that this language, if it were still in the law, would be read with section 765.05 and used to apply to all Wisconsin residents who had moved within the state within 30 days prior to the application for a marriage license. Racine Unified School Dist., 164 Wis. 2d 567.

However, the language on keeping residency in one's former county to meet the 30-day requirement was removed when the specified waiver provisions were removed and replaced with the current general waiver language by chapter 20, Laws of 1981 (the budget act).

Section 765.05 creates two classes: (1) persons who have resided in a Wisconsin county for 30 days prior to application
for a marriage license; and (2) nonresidents of the state. State residents who move from one Wisconsin county to another within the 30-day period, as well as new state residents, are not covered. In light of the directive in section 765.001(3) to liberally interpret the chapter, I conclude that such persons should be treated as nonresidents for the purpose of obtaining a marriage license, with the result that, under sections 765.05 and 765.12(2), they must obtain the license in the county where the ceremony will be performed. To conclude that such persons cannot obtain a license to marry, because they do not literally fit into the specified classes of persons who may obtain a license, would be to reach an absurd result contrary to the intent "to promote the stability and best interests of marriage and the family" and the directive to construe the chapter to achieve these ends expressed in section 765.001. Statutes must be construed to avoid an unreasonable or absurd result. Schwartz v. ILHR Dept., 72 Wis. 2d 217, 222, 240 N.W.2d 173 (1976).

However, to interpret the law so as to allow Wisconsin residents to keep residency in their former county of residence for marriage application purposes, when they move within the 30-day period, would contradict the legislative intent shown by the 1981 session repeal of the provision allowing this. For these reasons, I reach the conclusion that the legislative intent is best carried out by interpreting the law to provide that Wisconsin residents who cannot meet the requirement of 30-day residence in their county of current residence must be considered nonresidents under section 765.05. This means that, pursuant to sections 765.05 and 765.12(2), such persons must obtain their marriage license in the county where the marriage will be performed.

It seems somewhat unfortunate that Wisconsin residents who move from one county to another, within the 30 days prior to applying for a marriage license, lose the advantage of getting their license in their county of current residence and the ability to hold the marriage ceremony anywhere in the state. Instead,
such persons, like nonresidents, must get their license in the county where the marriage will be performed. If the Legislature wishes to allow persons who move from one Wisconsin county to another within the statutorily required residency period to be considered residents of their former county of residence, as was formerly the case, it can enact language allowing this, as it has done in section 6.10(3) for electors who move from one ward to another within the statutory residence period. This would allow such persons the freedom of having the marriage ceremony take place anywhere in the state, but would require them to return to their county of former residence to apply for the license.

The Legislature may also wish, as an alternative or complement to the above, to minimize the burden on residents moving within the state by reducing the residency period from 30 days to a lower figure, such as 10 days, which is the residency period for voting purposes under section 6.10(3). Finally, the Legislature might eliminate the 30 day period altogether for state residents. These approaches, though, while convenient for state residents who have recently moved, would obviously diminish or lose whatever benefit is provided by having a durational residency requirement.

The second question involves the situation where a Wisconsin resident entered military service and has been stationed outside the state for an extended period of time. The person continues to vote in Wisconsin, maintains a Wisconsin driver's license and pays Wisconsin income taxes. The question is:

If this individual wished to obtain a marriage license to be married in Wisconsin, to a party who is not a resident of the state, would the parties have to apply in the county where the one has claimed residency during the period of military service or in the county where the ceremony is to be performed . . . [assuming that this is a different county]?
In my opinion, under these facts, a person in the military stationed outside of Wisconsin may apply for a marriage license in the Wisconsin county in which he or she claims residence.

According to the *Vital Statistics Handbook For County Clerks* at 8, "if a person is in the military . . . the place the person is stationed . . . is the place of residence." Residency is proved by "a driver's license, a recently dated bill listing the person and address, or similar documents." *Id.* at 7. As with the first question, the Marriage License Committee of the Wisconsin County Clerks' Association questions the agency interpretation.

For the reasons set forth below, I conclude that the concept of residency in section 765.05 is broad enough to cover a person in the military stationed in this state, as well as a person who physically resided in Wisconsin prior to leaving the state for military service, where such person demonstrates the intention to return by such means as absentee voting at the place of former Wisconsin residence, maintaining a state driver's license and paying state income taxes.

The relevant provisions in chapter 765 provide no obvious answer to the question of the residency of persons in the military for marriage application purposes. Since the terms "reside" and "nonresident" are undefined in section 765.05, it is necessary to look at the context in which they are used and the general intention of the legislation to determine their meaning. *In re Marriage of Michalik v. Michalik*, 164 Wis. 2d 544, 556, 476 N.W.2d 586 (Ct. App. 1991). As stated above, interrelated statutes must be read together to produce a harmonious whole. *Racine Unified School Dist.*, 164 Wis. 2d 567. Also, in interpreting a statute, reference may be made to "other statutes which are not specifically related, but which apply to similar persons, things, or relationships." 2B Singer, *Sutherland Statutory Construction* § 53.03 (Sands 5th ed. 1992).

The section preceding section 765.05 sheds light on the meaning of residency in section 765.05. Section 765.04 uses the
terms "domicile" and "residence," and provides in part as follows:

(1) If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage . . . void under the laws of this state, such marriage shall be void . . . .

(2) Proof that a person contracting a marriage in another jurisdiction was (a) domiciled in this state within 12 months prior to the marriage, and resumed residence in this state within 18 months after the date of departure therefrom, or (b) at all times after departure from this state . . . maintained a place of residence within this state, shall be prima facie evidence that at the time such marriage was contracted the person resided and intended to continue to reside in this state.

This statute uses the concept of residency in two senses. In the first sense, where someone was "domiciled" in the state, left the state and "resumed residence," the term "residence," because it was "resumed" upon return to the state, suggests actual physical presence in the state. But in the second sense of the term, where maintaining a "place of residence" is prima facie evidence that the person "resided and intended to continue to reside in this state," the concept of residence is broader. In this broader sense residence does not require continual physical presence, but instead covers the situation where a person, who physically resided in the state, leaves the state with the intention of returning.

The use of the phrase "residing and intending to continue to reside" in subsection (1) of section 765.04, followed by the use of the term "domiciled" in subsection (2), suggests that the broader concept of residence is equivalent to "domicile." This
interpretation is supported by *Estate of Daniels*, 53 Wis. 2d 611, 614-15, 193 N.W.2d 847 (1972), in which the court stated:

It might be stated that "domicile" includes residence but "residence" does not necessarily include domicile. Domicile is generally regarded as the place where a man has his fixed and permanent home or residence to which he intends to return whenever he is absent therefrom. It is not a residence for any special or temporary purpose but one intended to be permanent for an unlimited or indefinite period.

Statutes concerning persons in the military recognize the dual sense of residence. A military elector may, with certain exceptions, vote by absentee ballot "in the ward or election district for the address of his or her residence prior to becoming a military elector." Sec. 6.22(2)(a), Stats. However, a member of the military stationed in Wisconsin, who came from outside the state, may, under section 6.10, establish residency for voting purposes in this state. 61 Op. Att’y Gen. 269 (1972).

With regard to a motor vehicle operator’s license, a person in the military who holds a Wisconsin license and is stationed outside of the state can renew the license under section 343.20(3). However, as is the case under the election law, above, it appears that a person in the military stationed in this state may qualify as a resident for operator’s license purposes under section 343.01(2)(g), where the person is an adult whose "one home and customary and principal residence, to which the person has the intention of returning whenever he or she is absent, is in this state.” This conclusion is supported by the language in that provision allowing a 17-year-old in the military to qualify as a resident for an operator’s license, even though no parent resides in the state. The inference is that adults in the military may qualify under the definition of resident if their "home and customary and principal residence . . . is in this state.” Sec. 343.01(2)(g), Stats.
Persons in the military who are stationed in the state or who are "residents on furlough or leave" in the state may obtain certain resident fish and game licenses. Secs. 29.09(12) and 29.093(2)(i), Stats. A "resident" for fish and game purposes must have maintained his or her abode for 30 days prior to application and must show "[d]omiciliary intent," which may be evidenced by "the location where the person votes, pays personal income taxes or obtains a driver's license." Sec. 29.01(12), Stats. Under this definition, as with the definition of resident for a driver's license, above, it appears that a person in the military stationed in Wisconsin may establish residence or domicile in Wisconsin.

Finally, under the federal Soldiers and Sailors Relief Act, a person in military service does not lose "residence or domicile" in a state for state income tax purposes "solely by reason of being absent therefrom in compliance with military or naval orders"; nor does the person gain residence or domicile in a state solely due to the presence in the state for military service. 50 U.S.C.A. § 574 (1990).

As the above overview shows, provisions in state and federal law allow members of the military stationed outside of Wisconsin whose home state is Wisconsin to vote in this state, maintain their state driver's licenses and pay state income taxes. These provisions allow a person in the military who resides, in the limited sense of the term, out of state to maintain Wisconsin residency in the permanent sense of domicile, where absence from the state is deemed temporary because of an intent to return to the state. On the other hand, members of the military from other states can establish Wisconsin residency and members stationed in Wisconsin, who may have maintained domicile in another state, may be accorded the privileges of residency, as in the case of fish and game licenses.

Section 765.04, discussed above, and the Vital Statistics Handbook For County Clerks recognize the physical presence aspect of residency, which is not necessarily the same as
permanent residence or domicile. In my opinion, interpreting section 765.05 to encompass both senses of residency carries out the legislative intent expressed in section 765.001(3) to liberally interpret chapter 765 and the various statutes recognizing the dual nature of residency of persons in the military. Moreover, allowing military personnel to prove state residency by such means as showing driver's licenses with Wisconsin addresses is a practical method of carrying out the clerks' duties in issuing marriage licenses.

In closing, I note that this opinion interprets the law to guide county clerks in the issuance of marriage licenses. Although clerks must follow the law, it is reassuring to observe that under section 765.23 a marriage is not void due to the issuance of a license by a clerk without jurisdiction, or due to the marriage of persons considered nonresidents in a county other than the one in which the license was issued.

JED:JHS
You have asked my opinion whether the provisions of 1991 Assembly Bill 6 would be preempted by federal law if enacted. You have also asked me to evaluate a subsequently drafted Assembly Substitute Amendment.

According to the Legislative Reference Bureau (LRB) analysis, the purpose of the bill is to allow the use of splitting devices on cable television service in one’s dwelling, and to prohibit the cable television company from charging any additional fee because a person installs or uses a splitting device. The substitute amendment requires municipalities to impose these same provisions as part of any cable franchise grant, renewal or modification under section 66.082(3m), Stats. The question is whether these provisions are preempted by the federal Cable Communications Policy Act of 1984, 47 U.S.C.A. § 521 (West 1991), et seq. (the Cable Act).

The basic principles of federal preemption of state law are well-settled. Under the Supremacy Clause of the Constitution, the law of the United States is “the supreme Law of the Land . . ., any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. Thus, where state laws come into conflict with federal law, the state enactments cannot stand.

The Supreme Court has developed a two-step inquiry for determining when a federal law preempts state law. The first inquiry is whether Congress has prohibited state regulation of the area in question entirely. Congress can accomplish a total displacement of state law either by
stating its intent to preempt an entire area expressly in the language of the statute, or by exhibiting an intent to occupy the field implicitly through the structure and purpose of a federal statute.

Even if Congress has not completely ousted state regulation in a field, federal law preempts state law that conflicts with it. Accordingly, the second inquiry is to determine whether challenged state provisions conflict with federal law. For preemption purposes, a state law is said to conflict with a federal law when, under the circumstances of the particular case, it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 97 S. Ct. 1305, 1310, 51 L.Ed.2d 604 (1977); *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L.Ed. 581 (1941).

In the Cable Act, Congress recognized the need for regulation on the federal, state, and local levels. 47 U.S.C. § 521(3); H.R.Rep. No. 98-934, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S.Code Cong. & Ad.News 4655, 4656. To accomplish the coordination of these various levels of authority, Congress included express preemption provisions in the Act. These provisions do not prohibit state and local regulation completely.

If an express provision of the Cable Act prohibits regulation of the sort being challenged in this case or if enforcement of the Regulation and Orders would frustrate the effectiveness of the Cable Act, the ... measures are invalid. Conversely, if they are not expressly prohibited and can coexist with the Cable Act, they remain in effect despite the federal statute.

The pertinent parts of 47 U.S.C.A. § 543 (West 1991), entitled Regulation of rates, and 47 U.S.C.A. § 544 (West 1991), entitled Regulation of services, facilities, and equipment, read as follows:

§ 543. Regulation of rates

(a) Limitation on regulatory power of Federal agencies, States, or franchising authorities

Any Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under this section. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.

(b) Promulgation of regulations; scope; contents; periodic review and amendment

(1) Within 180 days after October 30, 1984, the Commission shall prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition. Such regulations may apply to any franchise granted after the effective date of such regulations. Such regulations shall not apply to any rate while such rate is subject to the provisions of subsection (c) of this section.

(2) For purposes of rate regulation under this subsection, such regulations shall--

(A) define the circumstances in which a cable system is not subject to effective competition; and

(B) establish standards for such rate regulation.

§ 544. Regulation of services, facilities, and equipment

(a) Regulation by franchising authority
Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.

(b) Requests for proposals; establishment and enforcement of requirements

In the case of any franchise granted after the effective date of this subchapter, the franchising authority, to the extent related to the establishment or operation of a cable system—

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 546 of this title), may establish requirements for facilities and equipment, but may not establish requirements for video programming or other information services; and

(2) subject to section 545 of this title, may enforce any requirements contained within the franchise—

(A) for facilities and equipment; and

(B) for broad categories of video programming or other services.

The first sentence in 47 U.S.C.A. § 543(a) constitutes express federal preemption of state regulation of rates for the provision of cable service. Some specific authority is reserved to states in section 543(f) and (g), but they are not pertinent here.

Pursuant to 47 U.S.C.A. § 543 and 47 C.F.R. § 76.33 (1991) adopted thereunder, a franchising authority, which in our state would be a municipality under section 66.082, may regulate the rates of a cable system only for basic cable service and only if the cable system is not subject to effective competition. Pursuant to 47 U.S.C.A. § 544, a franchising authority may establish and enforce requirements "for facilities and equipment" as part of the franchising process, and in particular by way of its requests for proposals for a franchise.
The question becomes whether the prohibition against charging for a splitter constitutes regulation of "rates for the provision of cable service" so as to be preempted.

In the Housatonic case, the question was whether the state could prohibit a cable company from collecting special "contributions in aid of construction" from persons in sparsely populated areas into which cable service was being extended. The court noted that the Cable Act does not define the term "'rates'" or phrase "'rates for the provision of cable service'" and went on to hold that special contributions in aid of construction were not covered and thus not preempted. Housatonic, 622 F. Supp. at 808.

In the very recent case of Cable Television Ass'n v. Finneran, 954 F.2d 91 (2nd Cir. 1992), the question before the United States Court of Appeals for the Second Circuit was whether the State of New York could regulate rates charged by cable television companies to customers who downgrade to a less expensive level of cable service. The plaintiff claimed such regulation is preempted by section 543 of the Cable Act. The district court and the court of appeals both focused on the phrase "provision of" in the language preempting regulation of "rates for the provision of cable services." The court held that this terminology in the statute must be given effect and in so doing the court held that rates relating to downgrades in service do not relate to the "provision of" cable services. 954 F.2d at 98-99. Also, see Comcast Cablevision v. Sterling Heights, 178 Mich. App. 117, 443 N.W.2d 440 (Mich. App. 1989), where the court held that a prohibition against "disconnect fees" did not constitute regulation of rates for the provision of cable service.

Addressing the plaintiff's argument that the phrase "provision of" should be construed more broadly, the court stated: "This argument misses the fact that Congress' purpose in section 543 was not to curtail regulation in the abstract but rather to do so in order to allow market forces to control the rates charged by
The question posed by your request is whether the prohibition against a splitter fee involves the "provision of cable service" within the meaning of the act. It is my opinion it does not. As used here the term "provision" is synonymous with "supply." Cable service is supplied by bringing a functioning cable into the user's dwelling and connecting it to the user's equipment. See Cable Television Ass'n, 954 F.2d at 92-93. Thereafter, there is no question that a user could disconnect the cable from one piece of equipment and reconnect it to another. The user could use the cable supply in various ways, including the use of a splitter to multiply the number of connected pieces of equipment within the dwelling. The "provision of cable service" remains the same; it is merely the use of the service that is affected. Thus, to paraphrase the court in Comcast, a splitter fee has nothing to do with the provision of cable service, but instead is a fee imposed upon use of a particular service. Such regulation is not preempted. Comcast, 443 N.W.2d at 442-43.

With reference to the underlying commitment to reliance on market forces, it seems clear that the prohibition against splitter fees is promotive of competition and the artificial splitter fee is not. With the prohibition in place, the cable service user is free to benefit from a free market for splitter devices. Presumably a user may choose to purchase the splitter from the cable company or some other source based on the user's assessment of all the factors that would go into such a consumer decision. In the absence of the prohibition, the user is charged a splitter fee by the company even where he would choose to purchase the splitter from another source. This discourages resort to the market for other choices, just as the "downgrade charge" in Cable Television Ass'n discouraged a user from downgrading. 954 F.2d at 99-100.
In fact, the anticompetitive characteristics of cable companies’ policies on this subject are such that some may constitute illegal tying arrangements under the antitrust laws.

[T]he essential characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.


On a broader level, the *Cable Television Ass’n* case contains a recent recognition of the fact that the Cable Act constitutes more an allocation of power than a preemption of power.

In short, in the Cable Act Congress attempted to create a comprehensive and reticulated scheme for regulating cable television and to define the relative spheres of authority of the states and the federal government. The Act cut back on federal authority in some places—particularly control of franchising. The Act removed state authority in others—like regulation of rates for the provision of basic service. The question for this appeal is where downgrade charges fit in this tightly defined structure.

*Cable Television Ass’n*, 954 F.2d at 98.

Statutory sections and items of legislative history support the proposition that the state retains its right to protect the public welfare and the premise that the Cable Act was intended to promote increased use of cable services through competition.
In 47 U.S.C.A. § 556(a) (West 1991) it is stated: "Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter."

It is a stated purpose in 47 U.S.C.A. § 521(4) (West 1991) to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."


In 47 U.S.C.A. § 532 (West 1991), the Cable Act requires the cable operator to provide cable channels for commercial use by persons unaffiliated, and in competition, with the operator. If the operator can regulate the number of outlets available to a subscriber, it can affect the availability of a competitor's commercial channels to the subscriber if there is only one TV outlet in the household. In H.R. Rep. No. 934 at 31, reprinted in 1984 U.S. Code Cong. & Admin. News 4668, the legislative history on the section states: "Such a requirement is fundamental to the goal of providing subscribers with the diversity of information sources intended by the First Amendment."

In commenting on 47 U.S.C.A. § 553 (West 1991), which deals with pirating cable service, H.R. Rep. No. 934 at 84, reprinted in 1984 U.S. Code Cong. & Admin. News 4721, states: "[T]he Committee does not intend that this section be used as a bar to the development of competition for equipment used in the reception of services by subscribers of a cable system, to the extent use of customer premises cable equipment
other than that supplied by the cable operator is otherwise permissible under applicable law."

In other words, the legislative history and statutory provisions surrounding the rate regulation aspects of 47 U.S.C.A. § 543 evince a congressional policy which (a) validates state public welfare concerns, (b) supports maximum public access to all forms of cable programming and (c) recognizes competition as an important means of meeting the stated goals associated with cable operations.

Aside from issues involving cable piracy (47 U.S.C.A. § 553), the Cable Act expresses no interest in regulating what happens after the signal is delivered to the customer. Given the extensive provisions of 47 U.S.C.A. § 553, and the lengthy legislative history of the Cable Act, if congress had a regulatory concern about signal splitting it would have said so.

In *Shenango Cable TV, Inc. v. Tandy Corp.*, 631 F. Supp. 835 (W.D. Pa. 1986), the court granted summary judgment to Tandy on the issue that a converter it sold did not violate 47 U.S.C.A. § 553, which prohibits pirating cable signals. While admitting that its converter did permit the unauthorized reception of some non-basic channels, Tandy stated that the purpose of the converter was to permit the cable owner to use his original remote control and permit the taping of a program on a VCR while watching another channel on the TV. The court examined the legislative history of 47 U.S.C.A. § 553 and found that the converter violated the law only if it was sold with the "intention" of pirating signals. H.R. Rep. No. 934 at 83-84, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4720-21.

The *Shenango* ruling is significant for two reasons. First, it held that legal concern for the cable operator's signal ends when it is delivered to the cable customer, unless the converter was intended to pirate the cable signal, *Shenango*, 631 F. Supp. at 838. Second, as discussed by the court, 631 F. Supp. at 837, the converter, when attached to a VCR, *acted as a signal splitter*
and provided two different signals, one to the tape deck and one to the TV screen. The authorities referred to above indicate that congress' concern about the cable operator's signal ends at the point of entry, unless intention to pirate is proven.

For all these reasons, it is my opinion that state prohibition of a mandatory splitter fee is consistent with and not preempted by the federal Cable Communications Policy Act.

JED:RWL
County Board; Public Officials; Salaries And Wages; Discretionary authority to grant increases to elected county officials based upon the performance or length of service of the incumbent may not be delegated to a committee of the county board because the board itself lacks the authority to establish such a compensation scheme. The compensation of elected county officials who do not participate in establishing their own salaries may be increased but not decreased during their terms of office. OAG 17-92

June 26, 1992

FRED A. RISSER, Chairperson
Senate Organization Committee

FRANK VAZQUEZ, Corporation Counsel
Clark County

You each indicate that Clark County has established a wage and salary schedule for non-represented employes, and has included elected officials within that schedule. Mr. Vazquez states that, "[p]ursuant to this schedule, elected officials can receive interim raises during their terms based on longevity and upon a satisfactory evaluation of their performance by the County Board committee that supervises the activities of their office." You therefore both ask the following three extended questions concerning this compensation procedure:

1. Can the Personnel Committee of the County Board grant the interim raise, or must it be done by the County Board as a whole? Statute 59.15(1)(a) requires the County Board to set the base salary for elected officials prior to their earliest date for filing nomination papers. Section 66.197 says, "The governing body of any county may during the term of office of any elected official . . . increase the salary . . ." While it seems certain that the base s.59.15 salary is set by the entire board, if the board agreed to set a fixed compensation package including set step raises, must the entire board then approve the granting
of these raises once again everytime an elected official is eligible for one? Or, does the passage of an established program, setting the step raises ahead of time qualify as the governing body's approval?

2. If the prior question is answered yes, and the present rates qualify as the governing body's approval of the interim raises, is a committee of the County Board empowered to evaluate an elected officials [sic] performance in office for the purposes of granting an interim step raise. The wage and salary plan requires nonelected officials to be granted raises upon satisfactory evaluation by their supervisory committees. Can elected officials be treated the same, or are they solely to be evaluated by the electorate? It could be argued, that if interim raises are legal, than [sic] the elected body granting those raises must be able to base them on some criteria. Section 66.197 does not specify the reasons for interim raises, therefore are county's [sic] empowered to grant raises for reasons other than longevity, and if so, who has the duty to assure compliance with the salary and wage guidelines?

3. Finally, if, according to 69 Opp [sic] A.G.1, an interim raise can be granted because s.69.197 repeals that part of s.59.15(1)(a) prohibiting interim raises, does 66.197 also repeal the portion of 59.15(1)(a) prohibiting decrease in the elected officials [sic] salary during his or her term? Is a raise granted pursuant to s.66.197 also not subject to reduction for the balance of their term, or can it be considered a discretionary increase above the guaranteed s.59.15(1)(a) base salary and since it is discretionary, it can also be reduced to a point lower than the guaranteed base?

In my opinion, discretionary authority to grant increases to elected county officials based upon the performance or length of service of the incumbent may not be delegated to a committee of the county board because the board itself lacks
authority to establish such a compensation scheme. The compensation of elected county officials who do not participate in establishing their own salaries may be increased but not decreased during their terms of office.

Section 59.06(1), Stats., provides:

The board may, by resolution designating the purposes and prescribing the duties thereof and manner of reporting, authorize their chairperson to appoint before June 1 in any year committees from the members of the board, and the committees so appointed shall perform the duties and report as prescribed in such resolution.

Section 59.15(1) provides in part:

ELECTIVE OFFICIALS. (a)1. The board shall, prior to the earliest time for filing nomination papers for any elective office to be voted on in the county . . . which officer is paid in whole or part from the county treasury, establish the total annual compensation for services to be paid to the officer . . . . The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board.

Section 66.197 provides:

County salary adjustments. The governing body of any county may, during the term of office of any elected official whose salary is paid in whole or in part by such county, increase the salary of such elected official in such amount as the governing body determines. The power granted by this section shall take effect notwithstanding any other provision of law to the contrary, except that the exercise of such power shall be governed by s. 65.90(5). The power granted by this section shall not extend to elected officials who by virtue of their office are entitled to participate in the establishment of the compensation attending their office.
In order to be permissible under section 59.15(1)(a)1., periodic increases established prior to the earliest date for filing nomination papers for a particular term would have to be fixed and ascertainable, leaving no room for discretion. Cf. 72 Op. Att’y Gen. 45, 49 (1983), which construed language in article IV, section 26 of the Wisconsin Constitution prohibiting increases to appointed state officers during their terms as requiring that:

[A]ny pay adjustments during a term must be clearly provided for in specific amount or be ascertainable by reference to a salary range schedule which was in effect on the date of appointment of such official and which is not subject to discretionary change thereafter. Neither the schedule or plan, or the implementation of the schedule or plan, can be dependent upon the exercise of legislative or administrative discretion during the term.

Section 66.197 does permit “[t]he governing body of any county . . .” to avoid that portion of section 59.15(1)(a)1., which prohibits increases during an elected county official’s term. No reason need be given for granting such an increase when the circumstances outlined in section 66.197 are satisfied. Section 59.06(1) also permits a county board to delegate powers of a ministerial, administrative or executive nature to a committee of the board, such as the personnel committee. See 74 Op. Att’y Gen. 228 (1985). But any such delegation is subject to the same legal restrictions that would have existed had the board chosen to exercise that power itself. See 72 Op. Att’y Gen. at 46-47.

With respect to elected county officials, at least one such restriction is that compensation must be attendant to the office, not the personal characteristics of the individual that holds that office at any particular time. See, e.g., 65 Op. Att’y Gen. 62, 64 (1976), which concluded that a county board could not establish sick leave and vacation benefits for elected county officials. This principle was succinctly explained in 66 Op. Att’y Gen.
329, 330 (1977), which determined that longevity pay could not be based on years of service of the incumbent:

The compensation established under sec. 59.15(1)(a), Stats., is for the office, and the incumbent is entitled to it as an incident of office. See 61 Op. Att’y Gen. 165 and 61 Op. Att’y Gen. 403 (1972). Under sec. 59.15(1)(a), Stats., the board could establish the annual compensation for the office at a given figure for the first year of the term and at a higher figure for the second year of the term, but any occupant of the office would be entitled to the fixed amounts in the given years regardless of personal longevity.

61 Op. Att’y Gen. 165 (1972) and 61 Op. Att’y Gen. 403 (1972), the two opinions cited in the above quotation, appear to be directly responsive to your request. Both concluded that a county board may not establish a step-salary program for the district attorney, who at that time was paid with county funds.

Your third question is addressed in two prior attorney general opinions. In 69 Op. Att’y Gen. 1, 3 (1980), the provisions of sections 59.15(1)(a)1. and 66.197 were harmonized in the following fashion:

Under this interpretation an increase occurring between the earliest date for filing nomination papers and the taking of the oath by the newly elected county official applies to the incumbent only. Further action of the county board to increase the salary of the newly elected official is required even if he/she is reelected.

As the quoted language indicates, the fact situation presented in that opinion involved an increase granted to two elected county officials after the date for filing nomination papers for the ensuing term had passed, but prior to the date their successors assumed office. The result was that the newly-elected officials received less compensation than had been granted to their predecessors during the preceding term. If the increases discussed in that opinion had been granted prior to the
earliest date for filing nomination papers for the ensuing term, they would have been effective for all future terms, unless the county board had specified otherwise: "The compensation established . . . shall remain for ensuing terms unless changed by the board." Sec. 59.15(1)(a)1., Stats. See 45 Op. Att’y Gen. 166, 167 (1956).

The mode of statutory construction employed in 69 Op. Att’y Gen. 1 requires that the provisions of sections 59.15(1)(a)1. and 66.197 be harmonized. Under the express terms of section 66.197, however, harmonization with that statute is required only if there is "[an]other provision of law to the contrary . . . ." Section 59.15(1)(a)1. provides that the "compensation established shall not be increased nor diminished during the officer’s term." Section 66.197 modifies this language by permitting increases during the term for those county officials that do not participate in determining their own salaries, if those increases are consistent with the budgetary provisions of section 65.90(5). No language in section 66.197 permits the county board to decrease an elected county official’s compensation during his or her term of office under any circumstances. That portion of section 59.15(1)(a) that prohibits diminution of compensation during the officer’s term therefore must be given effect: "Moreover, the increase having once been granted under sec. 66.195, it cannot thereafter be decreased again during the same term, by reason of the provisions of sec. 59.15(1)(a). In other words, there can be increases but no decreases." 45 Op. Att’y Gen. at 167.

I therefore conclude that discretionary authority to grant increases to elected county officials based upon the performance or length of service of the incumbent may not be delegated to a committee of the county board, and that the compensation of elected county officials who do not participate in establishing their own salaries may be increased but not decreased during their terms of office.

JED:FTC
Civil Rights: The federal Civil Rights Act of 1991 does not prohibit expanded certification under section 230.25(1n), Stats.

OAG 18-92

June 26, 1992

JON LITSCHER, Secretary
Department of Employment Relations

You ask whether the federal Civil Rights Act of 1991, Pub. L. No. 102-166, 1991 U.S.C.C.A.N. (105 Stat.) 1071 (the CRA), which was enacted November 21, 1991, invalidated Wisconsin's expanded certification program as authorized by section 230.25, Stats. The only provisions of the CRA which appear to have that potential are sections 106 and 107 of the CRA. Though judicial and administrative interpretations of the CRA should be monitored as they are made, the answer presently appears to be no.

1. Status Before the CRA.

Voluntary affirmative action which is race, sex, color or national origin "conscious" has long been recognized by the EEOC and others as an essential means of achieving the mandate of 42 U.S.C.A. § 2000e et seq. (West 1981) (Title VII) that employment decisions are to be made without discriminating based on those factors. See e.g., 41 C.F.R. § 60-3.17 (1991). Though sometimes misperceived as favoring one group over another, voluntary affirmative action is intended to be a corrective for past and present discrimination and to level the playing field for all. Id.

Since 1978 the EEOC rules as to Title VII have considered affirmative "race, color, sex or ethnic 'conscious'" steps designed to remedy exclusionary selection procedures to be

---

appropriate voluntary affirmative actions under Title VII including:

The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

29 C.F.R. § 1608.4(c)(1) (1991). The same language is contained in “Uniform Guidelines on Employee Selection Procedures” which were adopted in 1978 by various federal agencies including the EEOC. 41 C.F.R. § 60-3.17(3)(e). Apparently the “EEOC is not planning action over the next six months with respect to its Uniform Guidelines on Employee Selection Procedures” even though the “Guidelines have come under fire from various groups in the past year.” OFCCP and EEOC Agendas, Fair Empl. Pract. Summary of Latest Developments (BNA) at 51 (May 11, 1992).

In filling positions within the Wisconsin classified service, examinations are scored and those scores result in a “register of eligibles”—namely those who have received passing scores on the examination. Secs. 230.16 and 230.25, Stats. Discrimination based on, among other things, race, sex, color and national origin, in the examination and scoring processes and in the preparation of this “register of eligibles” is explicitly prohibited and the Wisconsin statutes contain no exception to these prohibitions. Sec. 230.18, Stats. When appointing authorities notify the Department of Employment Relations (DER) of a vacant position in the classified service, DER certifies, from the “register of eligibles” appropriate to that position, the names of those then on the register with the top 5 to 10 scores. Sec.
230.25(1), Stats. Additional names may be certified based on veteran’s preference points. Sec. 230.25(2), Stats.

If, and only if, the appointing agency requests expanded certification “in order to comply with an approved affirmative action plan or program,” DER may respond to that request by doing one or more of the following: “[c]ertifying up to 3 names of persons belonging to at least one of one or more specified racial or ethnic groups” or “[c]ertifying up to 3 names of persons of a specified gender.” Sec. 230.25(1n), Stats.

Expanded certification can be viewed as a voluntary affirmative action measure designed to assure that women and minorities who are qualified to perform a job—having received an initial “qualified” ranking—are “included within the pool of persons from which the selecting official makes the selection.” 29 C.F.R. § 1608.4(c)(1). There is no requirement that women or members of any minority group actually be hired or even given any special consideration but simply that qualified female and minority candidates be given an interview. Sec. 230.25(1n), Stats. The Wisconsin statutes and rules appear to assume appointing authorities have adopted affirmative action measures—including expanded certification (sec. 230.25(1n)—pursuant to the EEOC guidelines. Compare, e.g., secs. 230.01(2), 230.03(2), 230.14(1), 230.18, 230.19 and 230.24(2), 230.25(1n), Stats., and Wis. Admin. Code §§ ER 43.01,

---

2 Frequently, particularly with older registers, appointing authorities are informed by persons so certified that they are no longer interested in or available for employment. In the event this would leave the appointing authority with less than five candidates, the appointing authority may request DER to provide an additional name as to each person reported to no longer be interested or available. Wisconsin Personnel Manual—Staffing, Vol. 2, pp. 232-12 and 232-13, ch. 232, “Certification,” § 232.053 (Rev. 11/84). In response to each such request, to the extent names remain on the register of eligibles, DER certifies the name of the person with the next highest score on the register of eligibles. Id. If the register of eligibles from which the original names were certified is exhausted, further certifications can be made from related registers of eligibles. Id.
43.02(2m) & (5) (1988), and 43.03 (1988) with 29 C.F.R. §§ 1608.1 through 1608.12 (1991) and 41 C.F.R. Part 60-3 (1991). It is assumed for purposes of this opinion that Wisconsin's overall voluntary affirmative action programs, and the specific plans adopted by each agency, are based on proper documentation, methodologies and validations under the EEOC Guidelines.³

The Supreme Court observed, in *Firefighters v. Cleveland*, 478 U.S. 501, 515-16 (1986), that:

We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII. [Citations omitted.] . . .

It is equally clear that the voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination. This was the holding of *Steelworkers v. City of Cleveland*.

³As the Seventh Circuit recently reiterated, state or local affirmative action plans and programs challenged under the equal protection clause of the Fourteenth Amendment are subjected to strict scrutiny. *Billish v. City of Chicago* and *Chicago Fire Fighters Union, Local No. 2 v. Daley*, 962 F.2d 1269, 1276-77, 58 FEP Cases 1269, 58 EPD ¶ 41,454 (7th Cir. 1992), citing to *City of Richmond v. Croson Co.*, 488 U.S. 469, 493-94, 520 (1989) and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 279-80, 285-86 (1986). To pass muster under this strict scrutiny standard, state or local affirmative action plans and programs must be justified by a compelling governmental interest and narrowly tailored to serve that interest. See, e.g., *Billish*, 962 F.2d at 1276-77, citing to *City of Richmond*, 488 U.S. at 505-08 and *Wygant*, 476 U.S. at 274.

You have not asked that I evaluate the extent to which any of the numerous affirmative action plans or programs maintained by State of Wisconsin appointing authorities which might underlie requests for expanded certification are potentially violative of the equal protection clause. I have made no attempt to do so in this opinion and am simply assuming, for purposes of this opinion, that those plans would not be violative of the equal protection clause.
2. The plain and ordinary meaning of the terms in section 106 of the CRA does not prohibit Wisconsin's expanded certification procedures and, to the extent there may be any ambiguity, legislative history indicates expanded certification is not prohibited.

In determining whether section 106 of the CRA unambiguously prohibits Wisconsin from continuing to use its expanded certification procedures, there are several key terms, underlined below, to examine:

(1) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, . . . sex, or national origin.

Engaging in expanded certification is taken "in connection with the selection or referral of applicants" (id.) such that it falls within the general bounds of section 106 of the CRA. It is not clear, however, that the other underlined terms contemplate expanded certification.

There are three different practices prohibited by section 106. Employers may not, in their selection or referral practices: (a) adjust the scores of employment related tests, (b) use different cutoff scores for employment related tests, or (c) otherwise alter the results of employment related tests based on race, sex, color or national origin.

a. Is expanded certification an "employment-related test"?

All three of the practices prohibited by section 106 of the CRA are governed by the meaning of "employment-related test." The plain and ordinary meaning of the word "test" as
otherwise used in Title VII indicates that Congress intended it to mean a measuring device rather than to apply broadly to all selection procedures. In Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-26 (1975), McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-02 (1973) and Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971), for example, the Supreme Court construed 42 U.S.C.A. § 2000e-2(h) and its regulation of tests and consistently considered the term "test" to mean a measuring device. Albemarle, 422 U.S. at 425-26; McDonnell, 411 U.S. at 801-02; Griggs, 401 U.S. at 433.

The EEOC, through its adoption of uniform guidelines as to selection procedures, has established that the term "test" has a meaning far narrower than "selection procedure." See 41 C.F.R. § 60-3.1(B) (1991); 41 C.F.R. § 60-3.2(C) (1991). In the context of these guidelines, expanded certification appears to be a "selection procedure" but not a "test." Id. See also Williams v. City and County of San Francisco, 483 F. Supp. 335, 339-40 (N.D. Cal. 1979).

The most applicable dictionary definition appears to conform with these court and agency constructions of the meaning of "test" in Title VII. Webster's Third New International Dictionary of the English Language Unabridged 2362 (1986). ("3 a : a technique for measuring objectively an individual's personal characteristics, potentialities, or accomplishments . . . .")

In the Wisconsin civil service process, there appear to be two processes that can be considered "tests" within the meaning of Title VII: (1) the initial examinations to determine who is qualified on a threshold basis to be listed on a "register of eligibles" (section 230.16) and (2) interviews and any testing that may be conducted during interviewing to actually measure relative qualifications of certified candidates. The process of certification does not itself appear to be an "employment-related test" within the meaning of Title VII. See sec. 230.25, Stats.
If there is any ambiguity about whether the term “employment-related test” was intended to include procedures such as expanded certification, the legislative history as to section 106 of the CRA appears to preclude that potential. The bill from which much of the language of the CRA was drawn was H.R. 1, 102d Cong., 1st Sess. (1991) which the House passed in June 1991. Representative Edwards, the chair of the subcommittee which examined H.R. 1, prepared an “interpretive memorandum” noting that the language in S. 1745, 102d Cong., 1st Sess. (1991)—which became the CRA—for the most part tracked the language in H.R. 1 but that there were differences which merited explanation. 137 Cong. Rec. H9526-32 (daily ed. November 7, 1991). While section 116 of H.R. 1 had used the term “written employment test,” section 106 of the CRA, as Representative Edwards points out, uses the term “employment-related test.” 137 Cong. Rec. H9529. Representative Edwards indicates in his “interpretive memorandum” that efforts to make a test “employment-related” by assuring the test treats all applicants equally are not prohibited. 137 Cong. Rec. H9529-30.

b. Are scores adjusted through expanded certification?

Neither “adjust” nor “scores” are defined in the CRA. In the absence of a definition in the statute itself or a court-approved definition, reference to a dictionary to confirm the plain, ordinary, and commonly understood meaning of the terms is appropriate. See, e.g., Torti v. United States, 249 F.2d 623, 625-26 (7th Cir. 1957).

Of the various meanings ascribed to “adjust,” the ones that seem to fit closest with the use of this term in section 106 of the CRA are: “3a. . . (2) : to rearrange the relationship of components of (a watch movement) after complete assembly

---

4Congress may have been using these words in the sense in which the Seventh Circuit analyzed the alteration of test scores as an affirmative action method in an equal protection case, namely by actually raising scores. United States v. City of Chicago, 870 F.2d 1256, 1261 (7th Cir. 1989).
b: to change the position of (as for better fit or appearance).” Webster’s at 27. Of the meanings ascribed to “score[s],” the ones that seem to fit closest with Congress’ use of this term in section 106 of the CRA are:

9: a number expressing the degree of success in a psychological or educational test in terms of the amount performed or of the time required or of the difficulty surmounted or of the accuracy and excellence of the performance 10: a numerical rating of quality... that usu[ally] is made on the basis of 100 as a perfect rating and is arrived at by adding numerical values assigned according to some definite scheme to specific significant characteristics.

Webster’s at 2036.

Assuming “adjust” and “scores” were used by Congress in these senses, must the act of certifying, for interview, additional names of candidates previously determined to be qualified necessarily be characterized as adjusting the scores of any candidate? At a minimum, the statutory language does not unambiguously require an affirmative answer as a result of which legislative history may be consulted. In the Wisconsin civil service system, “scores” may be obtained at two points in the selection process: (1) as a result of the initial qualifying examination and (2) as a result of the interviews and any accompanying testing during the interviews. No separate “score” is granted during the certification process. See sec. 230.25, Stats. It may be argued that the actual scores received by the qualified candidates as a result of the initial qualifying examination are “rearranged” or that their positions are changed through the act of expanded certification. One could, however, legitimately argue that, since the arrangement and positions of the qualifying names remain the same on the register of eligibles--and that the scores themselves remain the same--expanded certification simply involves picking additional names off of the register without adjusting the scores in any way.
At a minimum, the plain and ordinary meanings of "adjust" and "scores" do not so unequivocally encompass expanded certification (see, e.g., Mills v. United States, 713 F.2d 1249, 1255, n.4 (7th Cir. 1983); Torti, 249 F.2d at 625-26) that legislative history should not be examined.\(^5\)

The legislative history appears to confirm that section 106 of the CRA was not intended to prohibit expanded certification. The evil section 106 of the CRA was designed to prevent, according to that legislative history, was the practice of "race-norming." The predecessor to section 106 of the CRA--section 116 of H.R. 1--was known as "the Hyde Amendment." In the Judiciary Committee report issued on H.R. 1, Rep. Hyde and other dissenting members analyzed the "Hyde Amendment," which had been rejected by the committee. Civil Rights Act of 1991, H.R. Rep. No. 40 II, 102d Cong., 1st Sess. at 60-65 (1991) reprinted in 1991 U.S.C.C.A.N. 694. It is clear that the focus of the "Hyde Amendment" was to prohibit "race-norming"--a practice of actually changing scores through grouping of races before those scores are reported to hiring authorities. Id. at 63-65. The minority report defined this practice as follows:

Under the race norming practice, all candidates take the same test. But, for scoring purposes, these candidates are

\(^5\)Even if the language unambiguously prohibited expanded certification, it might still be appropriate to consult legislative history to determine whether this was Congress' intent. Several courts have held that persuasive contrary legislative history can and should be consulted even where the meaning of a federal legislative provision is plain on its face. See, e.g., Belland v. Pension Benefit Guaranty Corp., 726 F.2d 839, 844 (D.C.Cir. 1984), cert. denied, 469 U.S. 880; Monterey Coal Co. v. Federal Mine Safety and Health Review Comm'n, 743 F.2d 589, 595 (7th Cir. 1984); Peare v. McFarland, 577 F. Supp. 791, 794-95 (N.D. Ind. 1984), aff'd 778 F.2d 354 (7th Cir. 1985). The plainer the language of the statute, the more convincing the contrary legislative history must be (see, e.g., Monterey Coal, 743 F.2d at 595; Peare, 577 F. Supp. at 794-95) but a court is not precluded from examining legislative history simply because a federal statute is plain on its face.
divided into three separate categories, based upon the person’s racial or ethnic heritage. Their actual scores are then computed as a percentile score within his or her own racial or ethnic group (black, Hispanic, and other). So, the resulting final score, which goes to a prospective employer, is the adjusted or converted score. A person’s score under this system really reflects how that person’s score compares with others of his/her own racial or ethnic group. Because a person is confined to his/her percentile with a particular racial or ethnic group, the percentage-based scores distort an individual’s performance. Frequently, the adjusted scores of black or Hispanic candidates are higher than whites who actually scored better on the underlying GATB test.

Id. at 64. Though there were no published committee reports on the CRA itself, this committee report on H.R. 1 provides considerable guidance into legislative intent in the enactment of section 106 of the CRA since the language is largely the same as that found in the Hyde Amendment, section 116 of H.R. 1. When courts go beyond the face of a federal statute to determine its meaning, committee reports are, the Seventh Circuit has held, “generally the most reliable indicators of congressional intent.” Monterey Coal, 743 F.2d at 598. The Seventh Circuit has frequently reiterated this holding. See, e.g., Mills v. United States, 713 F.2d 1249, 1252 (7th Cir. 1983); N.L.R.B. v. Res-Care, Inc., 705 F.2d 1461, 1470 (7th Cir. 1983); Miller v. Federal Mine Safety & Health Review Com’n, 687 F.2d 194, 195 (7th Cir. 1982).

The Seventh Circuit has cautioned that committee reports are useful only in explaining “new or altered statutory language” (American Hospital Ass’n v. N.L.R.B., 899 F.2d 651, 657 (7th Cir. 1990)), that a report by only one committee of the house merely “express[ing] an ‘expectation’” that rules will be issued by an agency does not establish congressional intent (Scalise v. Thornburgh, 891 F.2d 640, 644-45 (7th Cir. 1989)), and that a committee report may not be used to overrule the clear direction
contained in the statute itself (*Squillacote v. United States*, 739 F.2d 1208, 1218 (7th Cir. 1984)). Nonetheless, committee reports can be “the most persuasive indicia” (*Mills*, 713 F.2d at 1252) and “powerful evidence of legislative intent” (*Miller*, 687 F.2d at 194).

That the Hyde Amendment was directed at “race-norming” was reiterated during the House floor debate on that Amendment. *E.g.*, 137 Cong. Rec. H3876 (daily ed. June 4, 1991); 137 Cong. Rec. H3930 (daily ed. June 5, 1991) (Representative Hyde stating that race-norming was “a method of adjusting or altering the results of employment aptitude tests”). *See also* the discussion of “race-norming” in *Bridgeport Guardians, Inc. v. City of Bridgeport*, 735 F. Supp. 1126, 1137 (D. Conn. 1990).

The conclusion that section 106 of the CRA was intended to be restricted to prohibiting “race-norming” and variants on “race-norming” is confirmed by other indicia of congressional intent as well. An important interpretive memorandum was placed in the record by Senator Danforth and was explicitly “intended to reflect the intent of all of the original cosponsors to S. 1745 [which was enacted as the CRA] with respect to those issues” addressed. 137 Cong. Rec. S15483-84, (daily ed. October 31, 1991). Among the issues expressly addressed were those raised by section 106 of the CRA. This interpretive memorandum confirms that the focus of section 106 of the CRA was to prohibit “race-norming” and that it only applied where tests were determined to be “employment-related.” *Id.* Of importance to the impact on expanded certification, the sponsors’ interpretive memorandum also stated section 106 of the CRA “does not purport to affect how an employer accurately reported test scores.” *Id.*

An interpretive memorandum by Representative Hyde--the original sponsor of section 116 of H.R. 1 (the Hyde Amendment) which was the predecessor to section 106 of the CRA--confirms that the focus of section 106 of the CRA was
intended to prohibit actually changing test scores and not necessarily how accurately reported test scores were used. 137 Cong. Rec. H9542-49 (daily ed. November 7, 1991). This was reiterated in Rep. Edwards' interpretive memorandum, referred to previously. 137 Cong. Rec. H9526-32.6

Unlike "race-norming," with expanded certification the person making the selection decision is not misled into thinking that those candidates who are granted an opportunity to interview through expanded certification received a higher score than persons on the register who were not certified. Since section 230.25(1n) is a published state statute, decisionmakers are likely to assume that a female or minority candidate did not, in situations involving expanded certification, receive a score higher than candidates not certified. If anything, this would lead

---

6The few courts which have referred to section 106 of the CRA have noted that its purpose was to ban "race-norming." See, e.g., Luddington v. Indiana Bell Telephone Co., 966 F.2d 225, 229 (7th Cir. 1992), Judge Posner, in analyzing retroactivity issues and noting that the CRA made more than mere technical changes, observed: "True, it does not prohibit any conduct not already prohibited by Title VII, except the practice of 'race norming' (raising mean test scores of minority applicants to the mean of the majority). 42 U.S.C. § 2000e-2(j)." (emphasis added); Billish, 962 F.2d at 1303 (Posner, J, dissenting) (noting that the pre-CRA affirmative action as to which an equal protection challenge was being rejected involved "race-norming," Judge Posner stated "[r]ace norming has since been outlawed by the Civil Rights Act of 1991" and defined race norming in Billish as "meaning that the scores of the blacks and Hispanics were raised in order to reduce the disparity in the pass rate between them and the whites"); Dixon v. Margolis, No. 89 C 5019, 1992 U.S. Dist. LEXIS 5477, at *6 (N.D.III. April 14, 1992) (noting that "race norming is prohibited by the Civil Rights Act of 1991"); Officers for Justice v. Civil Service Comm' n of the City and County of San Francisco, No. C-73-0657 RFP, No. C-77-2884 RFP, 1992 U.S. Dist. LEXIS 3098, at *4-5 (N.D.Cal. March 3, 1992), appeal pending (rejecting a challenge, based on section 106 of the CRA, to "race banding" as part of an affirmative action plan by holding that "on its face Section 106 addresses 'race-norming' which is a practice distinct from 'banding.' The former involves recomputation of test scores by reference to race; the latter provides a means of interpreting test scores to determine what constitutes an 'equivalent performance on a particular test').
to assumptions disadvantageous to female and minority candidates who happened to actually have the next highest score were it not for the fact that decisionmakers are instructed by DER to “give equal appointment consideration” to all candidates who are certified. *Wisconsin Personnel Manual—Staffing*, Vol. 2, p. 232-13, ch. 232, “Certification,” § 232.054(I)(A) (Rev. 11/84).

The legislative history of section 106 appears to confirm that prohibiting the adjustment of scores of “employment-related tests” was not intended to prohibit expanded certification.

c. What does it mean to use different “cutoff” scores?

Congress’ intended meaning of the term “scores” in section 106 of the CRA has just been examined. What did Congress mean in using the term “cutoff?” Once again, “cutoff” was not defined in the CRA and does not appear to have obtained a definitive legislative or judicial meaning. Though used as an adjective in section 106, Webster’s definitions for “cutoff” used as a verb appear more applicable: “3 : INTERCEPT, STOP : stop the passage of . . . 4 : to shut off : BAR <the fence cut off his view> . . . 6 : SEPARATE, ISOLATE” Webster’s at 561. One federal case which defined a term using “cutoff” prior to the enactment of the CRA appeared to use it in this sense. *United States v. Warmsprings Irr. Dist.*, 38 F. Supp. 239, 241, n.4 (D. Ore. 1940) (“In cutoff drainage, for draining seepy hillsides, tiles are placed along the hillside to intercept the seep water and prevent its reaching the bottom land.” Merriam Webster Dictionary, ‘Drainage’ ”).

In this sense, is it unambiguously clear that Congress intended to prohibit expanded certification by making the use of different “cutoff” scores an unlawful employment practice? Since the act of expanded certification does not appear to involve establishing any different “cutoff” scores, it does not appear so. A “cutoff” score is established, for example, as a result of the initial qualifying examination (normally a score of 70 out of 100) and the register of eligibles includes only those
who receive a score of 70 or more. Those who do not are separated or isolated from the process at that point and cannot be brought back onto that register thereafter.

This is the sense in which the Seventh Circuit recently used the term "cutoff" in analyzing an equal protection challenge to an affirmative action program in *Billish*:

The eighteen promotions were made in rank order from the 1979 eligibility list, and each of the promotees was white. Soon thereafter, Commissioner Galante inquired of the City Personnel Department whether there were any black or Hispanic lieutenants remaining on the 1979 list. He was told there were two minority lieutenants on the list but, because both had scored below the cut-off score of 70, that cut-off score would have to be lowered before they could be eligible for promotion to captain. Commissioner Galante asked the Personnel Department to lower the passing score.

*Billish*, 962 F.2d at 1275 (emphasis added).

The certification process, by contrast, is subject to variations in the number and types of names certified and--potentially--to using up the entire list of qualified candidates. *Wisconsin Personnel Manual--Staffing*, Vol. 2, pp. 232-12 and 232-13, ch. 232, "Certification," § 232.053 (Rev. 11/84). Expanded certification does not, therefore, establish a different "cutoff" score than was established through the initial examination. Certification is normally a process of determining who will be initially interviewed and frequently results in several names being added as candidates from the pool of qualified candidates on one or more occasions because some candidates initially certified either cannot be contacted or decline invitations to interview. *Id.*

It cannot be said that Congress unambiguously intended to prohibit expanded certification by prohibiting the use of different cutoff scores in section 106 of the CRA. Legislative history may, therefore, be consulted. The legislative history
analyzed in the prior section suggests that expanded certification was not among the evils section 106 of the CRA sought to prohibit by proscribing the use of different cutoff scores. Indeed, Sen. Kennedy observed that "the substitute also provides that a test cutoff score, the minimum passing score necessary to be eligible to be considered for selection or referral should not vary with the race, color, religion, sex or national origin." 137 Cong. Rec. S15235 (daily ed. October 25, 1991) (emphasis added).

d. What does it mean to otherwise "alter" the "results" of a test?

The most applicable dictionary definition of "alter" is "1: to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else . . . <preserve it as it is or . . . [alter] it out of all recognition--Aldous Huxley>." Webster's at 63. To "alter" has been defined by the federal courts in different contexts to essentially mean taking action which actually makes a substantive change. See, e.g., United States v. Sacks, 257 U.S. 37, 41-42 (1921); Porter v. Commissioner of Int. Rev., 288 U.S. 436, 443 (1933); Hutt v. Gibson Fiber Glass Products, Inc., 914 F.2d 790, 794 (6th Cir. 1990); West Texas Utilities Co. v. N.L.R.B., 206 F.2d 442, 446 (D.C. Cir. 1953), cert. denied, 346 U.S. 855 (1953).

The most applicable dictionary definitions of "result" or "results" used as a noun appear to be: "3: something obtained, achieved, or brought about by calculation, investigation, or similar activity . . . 4 results pl: a synoptic publication of the outcome of related competitive events <the race [results] are on the back page> <have you seen the football [results]>." Webster's at 1937. It is likely that, what Congress meant by altering test results is something similar to what the Seventh Circuit meant in U.S. v. City of Chicago, 870 F.2d 1256 (7th Cir. 1989) by "altering the test scores" (id. at 1261), i.e., "assigning the same mean score to each group of exams graded
by a different reader” to “standardiz[e] for ‘rater bias’” and “by raising the mean score of the black and Hispanic sergeants who had taken the test to that of the white sergeants” (id. at 1258).

Three state court decisions defining “results” in the context of “tests” are also of assistance. Reynolds v. State, 424 A.2d 6, 7 (Del. 1980) (a pretrial agreement that “results” of a truth serum test would be admissible did not include a tape recording of the entire interview and related procedure but simply some confirmation or negation of defendant’s version of the facts); People v. Rhodes, 102 Misc. 2d 377, 423 N.Y.S.2d 437, 438 (1980) (conclusion as to whether a defendant was truthful is a “result” of a polygraph test while statements made during pretest interview and during examination itself are not); State v. Blosser, 558 P.2d 105, 107 (Kan. 1976) (the “results” of a polygraph test are “the examiner’s opinion based upon his interpretation of the data shown by the machine”).

In the context of these definitions, it does not appear that expanded certification alters or changes the results of the initial examination process. The “scores” received remain the same. Indeed, the list which reports the “results” of the initial qualifying test remains the same. All that happens is that candidates with scores further down the list are interviewed rather than candidates with scores higher on the list. Once again, section 106 of the CRA does not so unambiguously prohibit expanded certification that legislative history cannot be examined. To the extent there is any ambiguity, that legislative history, analyzed previously, suggests that Congress did not intend, by barring employers from altering the results of employment-related tests, to prohibit expanded certification.

3. The plain and ordinary meaning of the terms in section 107 of the CRA does not prohibit Wisconsin’s expanded certification procedures and, to the extent there may be any ambiguity, legislative history indicates expanded certification is not prohibited.
The plain and ordinary meaning of the terms of section 107 do not so unambiguously prohibit expanded certification that legislative history cannot be examined. 42 U.S.C.A. § 2000e-2(m)—section 107 of the CRA—states:

(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, ... sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(Emphasis added). Only if it is unambiguously clear that the phrase “any employment practice” was intended both to include expanded certification and to prohibit expanded certification would consultation with legislative history be unavailing. In determining the plain meaning of this provision, however, the terms used cannot be interpreted in a vacuum and must instead be interpreted in the context of the statute as a whole. See, e.g., Crandon v. United States, 494 U.S. 152 (1990).

Section 116 of the CRA states, in relevant part, that: “Nothing in the amendments made by this title shall be construed to affect . . . affirmative action . . . that [is] in accordance with the law.” The EEOC guidelines explicitly allow race, color, sex or national origin to be a “motivating factor” in “employment practices” which are within the scope of affirmative action. It is not unambiguously clear, therefore, both that expanded certification is an “employment practice” within the meaning of section 107 of the CRA and that Congress intended, by section 107 of the CRA, to prohibit that practice. Legislative history may be consulted.

The interpretive memorandum of Rep. Edwards, the chair of the subcommittee which examined H.R. 1, interprets section 107 of the CRA in a way which excludes expanded certification from its coverage. That memorandum explicitly stated that the purpose of section 107 of the CRA was to overrule “one aspect of the Supreme Court’s decision in Price-Waterhouse v.
Hopkins, 109 S. Ct. 1775 (1989)” namely, to eliminate the “mixed motive” defense and to make it a violation of Title VII if a discriminatory reason was a factor in the employment action even if other reasons justified the employment action. 137 Cong. Rec. H9529. That memorandum went on to note that:

It is our clear understanding that this section is not intended to provide an additional method to challenge affirmative action. As Section 116 of the legislation makes plain, nothing in this legislation is to be construed to affect . . . affirmative action . . . that [is] otherwise in accordance with the law. This understanding has been clear from the time this legislation was first proposed in 1990, and any suggestion to the contrary is flatly wrong. Id. (emphasis added).

Representative Hyde, in an interpretive memorandum, agreed that section 107 of the CRA addressed the Price-Waterhouse case and, although he took the view that section 107 of the CRA could be applied in cases challenging “affirmative action plans,” he limited that potential application to “challenges to unlawful affirmative action plans.” 137 Cong. Rec. H9542-49 (emphasis added).

This legislative history confirms that section 107 of the CRA was not intended to prohibit voluntary affirmative action otherwise allowable under Title VII. Indeed, it appears that the purpose of section 107 of the CRA was not to create any new prohibitions at all but simply to clarify, in light of the Price-Waterhouse decision that, if illegal discrimination was a motivating factor, it is no defense that the action would have been taken anyway. See Officers for Justice, 1992 U.S. Dist. LEXIS 3098, at *3, n.2 (N.D. Cal. March 3, 1992) appeal pending (construing “‘in accordance with the law’” in section 116 of the CRA as referring to the prohibitions of section 107 of the CRA “would render section 116 meaningless and empty.”)
In deciding whether to interpret sections 106 or 107 of the CRA as prohibiting what has been, until now, a valid and accepted method of combatting discrimination through voluntary affirmative action, Justice Blackmun's remarks in his concurring opinion in *Weber* are instructive:

Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of "locking in" the effects of discrimination for which Title VII provides no remedy.


It is recognized that the question you pose implicates an area of federal law which remains unclear and which is still developing. It is also recognized that, regardless of which way your question is answered, litigation may well result. Although, as noted earlier, judicial and administrative interpretations should be monitored as these new provisions are implemented, it does not appear that section 106 or 107 of the CRA were intended to prohibit expanded certification authorized by section 230.25.

JED:RBM
Collection Agencies; Licenses And Permits; Section 218.04, Stats., requires licensure of nonresident collection agencies and solicitors that conduct business with Wisconsin residents solely by mail or telephone. Applying the licensing requirements to such agencies and solicitors would not impermissibly burden interstate commerce. OAG 19-92

July 23, 1992

TOBY E. SHERRY, Commissioner
Office of Commissioner of Banking

You have requested my opinion concerning the regulation of nonresident collection agencies under the Wisconsin Collection Agency Law. The law was enacted in chapter 358, Laws of 1937, and provides in relevant part:

(1) . . . .

(a) "Collection agency" means any person engaging in the business of collecting or receiving for payment for others of any account, bill or other indebtedness. . . .

(b) "Collector" or "solicitor" means any person employed by a collection agency to collect or receive payment or to solicit the receiving or collecting of payment for others of any account, bill or other indebtedness outside of the office.

. . . .

(2) Licenses Required. No person shall operate as a collection agency or as a collector or solicitor in this state without first having obtained a license as required by this section.

Sec. 218.04, Stats.

You ask whether section 218.04(2), Stats., requires licensure of nonresident collection agencies that conduct business with Wisconsin residents by mail or telephone but have no physical presence in the state.
Your inquiry raises two distinct questions. The first question is whether the terms of section 218.04(2) require licensure of nonresident collection agencies that conduct business with Wisconsin residents solely by mail or telephone. The second question is whether requiring licensure of such agencies impermissibly burdens interstate commerce. I will address each question separately.

I. Whether Section 218.04(2) Requires Licensure

The primary source in construing a statute is the language of the statute itself. *Wis. Environmental Decade v. Public Service Comm.*, 81 Wis. 2d 344, 350, 260 N.W.2d 712 (1978). Non-technical words must be given their ordinary and accepted meanings, unless the statute specifies otherwise. Sec. 990.01, Stats. If the language of the statute is ambiguous, it is permissible to discern the legislative intent by looking to the language of the statute in relation to its scope, history, context, subject matter and object intended to be accomplished. *Wis. Environmental Decade*, 81 Wis. 2d at 350.

You report that the Office of Commissioner of Banking has interpreted section 218.04(2) to require licensure of nonresident collection agencies that maintain a minimal physical presence in the state—e.g., by entering the state simply to sign a contract with a creditor previously solicited through the mail or by telephone. I discern no basis for treating nonresident collection agencies that conduct business with Wisconsin residents solely by mail and telephone any differently under section 218.04(2).

The language and purpose of section 218.04 indicates that the Legislature intended to require licensure of nonresident collection agencies that conduct business with Wisconsin residents solely by mail and telephone. Section 218.04(2) provides that no person shall "operate" as a collection agency, collector or solicitor in the state without first obtaining a license. *Webster's Third New International Dictionary* 1580 (1986) defines "operate" to include: "1: to perform a work or labor: exert power or influence: produce an effect." Nonresident
collection agencies that do not have a physical presence in Wisconsin can exert influence and produce an effect in Wisconsin by using the mail and telephone to solicit accounts from creditors and payments from debtors in Wisconsin. The language of the statute does, therefore, appear to encompass collection agencies that conduct business with Wisconsin residents solely by mail and telephone.

The purpose of the licensure requirement is to protect the public from oppressive or deceptive collection practices. *Meyers v. Matthews*, 270 Wis. 453, 460, 71 N.W.2d 368 (1955), *cert. dismissed*, 350 U.S. 927 (1956). As my predecessor observed:

> Absent the ability to license nonresident collection agencies and to examine their records, it is impossible to protect Wisconsin creditors who assign debts to them. For example, the nonresident agency may be undercapitalized, or may be bonded inadequately, or may remit collected funds slowly or not at all. In addition, regulation is necessary to protect business and consumer debtors from harsh and deceptive collection practices.


Failing to require licensure of nonresident collection agencies that conduct business with Wisconsin residents solely by mail and telephone would leave a portion of the public unprotected from these evils. Thus, based on the language and the purpose of the law, I conclude that the Legislature intended to require that such collection agencies be licensed under section 218.04.

II. Burden On Interstate Commerce

The Wisconsin Supreme Court has considered two commerce clause challenges to the licensing requirement in section 218.04. In *Metropolitan Finance Corp. v. Matthews*, 265 Wis. 275, 61 N.W.2d 502 (1953), a Missouri corporation sought a declaratory judgment that it was not subject to the requirement because it was engaged in interstate commerce. The corporation alleged that it used Wisconsin residents who were independent
contractors to solicit accounts from creditors in the state and that, thereafter, the corporation's contact with the state was limited to soliciting Wisconsin debtors, by mail, to pay their accounts and remitting the payments, by mail, to the creditors. *Id.* at 276-77. The court accepted the corporation's allegations as true and held that "[s]o long as the solicitors are independent contractors and not subject to the direction of the plaintiff, its proposed activities within Wisconsin would be so minor that they would not be subject to regulation by the state." *Id.* at 279.

In a subsequent case involving the same corporation, the court found that the corporation's solicitors in Wisconsin were in fact agents, rather than independent contractors, of the corporation. *Meyers*, 270 Wis. 453. The *Meyers* court held that, as a result, the state could require the corporation to obtain a license under section 218.04(2) without running afoul of the commerce clause. *Id.* at 468.

The court's analysis in both *Metropolitan Finance* and *Meyers* implied that a state regulation affecting interstate commerce is per se invalid when applied to interstate entities that are not physically present within the state. Actual physical presence within a state is, however, no longer a prerequisite for valid state regulation. Under modern commerce clause analysis, courts determine the validity of a state regulation by applying the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest
involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

(Citation omitted.)

At least three courts have applied this balancing test to determine whether a state may apply a licensing requirement to nonresident collection agencies that conduct business with state residents solely by mail or telephone. *Silver v. Woolf*, 538 F. Supp. 881 (D. Conn.), aff'd, 694 F.2d 8 (1982), cert. denied, 460 U.S. 1070 (1983); *Com. v. Allied Bond and Collection Agency*, 394 Mass. 608, 476 N.E.2d 955, cert. dismissed, 474 U.S. 991 (1985); *Dun & Bradstreet, Inc. v. McEldowney*, 564 F. Supp. 257 (D. Idaho 1983). All three courts held that the state may impose some form of licensing requirement on such agencies without running afoul of the commerce clause. These cases establish that, under the *Pike* test, it is not a per se violation of the commerce clause to apply state regulations to nonresident collection agencies that have no physical presence in the state. See also *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir.), cert. denied, 434 U.S. 880 (1977) (holding that applying the Wisconsin Consumer Act to an out-of-state mail order company that conducted business with Wisconsin residents solely by mail did not impermissibly burden interstate commerce). The benefits of applying the state licensing requirement to those collection agencies must be weighed against the burden the requirements will place on interstate commerce.

In 69 Op. Atty Gen. 113, my predecessor applied the balancing test to the requirement, in section 218.04(4), that licensed nonresident collection agencies maintain an “active” office in Wisconsin. As that opinion indicates, there is no doubt that the state has a legitimate interest in regulating collection agencies:

provides for concurrent jurisdiction and specifically gives precedence to state laws which provide greater protection. 15 U.S.C. sec. 1692(n)-(o). Although the Act applies only to consumer debt collections, the concept of congressional deference to state regulation would apply equally to commercial debt collection.

Id. at 116.

The purpose of the licensing requirement is to protect debtors from harsh and deceptive collection practices and ensure that creditors receive funds collected on their behalf. See id. The statute requires collection agencies operating in the state to obtain a license, maintain an "active" office in the state, file an annual report with the commissioner, retain books at the office sufficient for the commissioner to determine whether the agency is complying with the statute and post bond, if required by the commissioner. Sec. 218.04(2), (4)(b), (10) and (3)(d), Stats. The administrative rules require that the "active" office be open Monday through Friday for at least three regularly scheduled hours per day. Wis. Admin. Code § Bkg 74.01(2).

You indicated that these requirements are currently applied to nonresident collection agencies that have a minimal physical presence within the state. There is no reason to believe that these requirements are more burdensome for nonresident agencies that deal with Wisconsin residents solely by mail or telephone. Moreover, the requirements appear to be well-tailored to enabling the commissioner to determine whether collection agencies are complying with the provisions of the statute.

At least two courts have upheld remarkably similar requirements against an interstate commerce clause challenge. In Dun & Bradstreet, Inc., 564 F. Supp. at 262-63, the court held that applying the requirements of the Idaho Collection Agency Law to a nonresident collection agency that conducted business with Idaho residents solely by mail and telephone did not violate the interstate commerce clause. The Idaho law
required a collection agency to maintain an office in the state, designate a person to operate the office and keep the office open during at least a portion of each business day. Id. at 260. Similarly, in Allied Bond and Collection Ag., 476 N.E.2d 955, the court held that applying the Massachusetts collection agency licensure requirements to a nonresident consumer collection agency that conducted business in the state solely by interstate mail or telephone did not impermissibly burden interstate commerce. The Massachusetts regulations required a collection agency to maintain an office in the state, file a schedule of days and hours the office would be open and maintain specified records at the office. Id. at 956 n.1. The licensure requirements under Wisconsin law are virtually identical. Sec. 218.04, Stats., and Wis. Admin. Code § Bkg 74.01(2).

I cannot determine conclusively whether the state’s interests could be promoted as well with alternative requirements that have a lesser impact on interstate commerce. However, in my opinion, the burden that the existing licensure requirements impose on interstate commerce is not “clearly excessive” in relation to their local benefits. In my opinion, it is, therefore, probable that a court would conclude that applying the requirements to nonresident collection agencies that conduct business with Wisconsin residents solely by mail or telephone would not impermissibly burden interstate commerce.

JED:MWS
Insurance; Insurance, Commissioner Of; Words And Phrases;
The Commissioner of Insurance lacks the authority to regulate
administrators of self-funded or self-insured employe benefit
plans under section 3516r of 1991 Wisconsin Act 39 (the
budget bill) since such regulation is preempted by ERISA and
therefore precluded by section 633.16, Stats., as created by the
bill. OAG 20-92

July 28, 1992

ROBERT D. HAASE, Commissioner
Office of the Commissioner of Insurance

You request my opinion regarding your authority to regulate
administrators of self-funded or self-insured employe benefit
plans. Specifically you ask whether you have the authority to
regulate such administrators under chapter 633, Stats., created
by section 3516r of 1991 Wisconsin Act 39 (budget bill) or
whether this regulation is precluded by provisions of the
Employee Retirement Income Security Act of 1974 (ERISA)
and section 633.16.

Sections 633.01 through 633.17, as created by the budget bill,
provide for regulation of employe benefit plan administrators by
the Commissioner of Insurance. The specified elements
regulated include administrator agreements (633.04), notification
of insured (633.12), record retention (633.04(4)), payment of
claims (633.10), fiduciary responsibilities (633.09), bonding
(633.14(1)(b)) and licensure (633.13(1)). Certain of these
elements of state regulation are among the core elements
description), 29 U.S.C.A. § 1021 (1985) (disclosure to insured),
29 U.S.C.A. §§ 1027, 1059 (1985) (retention of records), and
29 U.S.C.A. § 1104 (1985) (fiduciary duties). Thus the
Legislature in section 633.16 provides that "[n]othing in this
chapter gives the commissioner the authority to impose
requirements on a plan that is exempt from state law under 29
USC 1144(b) [ERISA]."
It is my opinion that you lack the authority to regulate administrators of self-funded or self-insured employe benefit plans, as set forth in chapter 633, because such authority is preempted by ERISA and therefore excluded by section 633.16. While “plan” is defined as “an insured or wholly or partially self-insured employe benefit plan” under section 633.01(4), your question and therefore my answer relate only to self-funded or self-insured plans and do not consider insured or partially insured plans. The term self-funded plan as used hereafter should be deemed to also include self-insured plans.

In *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), the United States Supreme Court determined that the ERISA “deemer clause” preempts state statutes that regulate self-funded employe benefit plans. As that Court stated, 498 U.S. at 56-58:

In determining whether federal law pre-empts a state statute, we look to congressional intent. “Pre-emption may be either express or implied, and “is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” ’ ’ [Case cites omitted.] . . . We “begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” [Case cite omitted.] Three provisions of ERISA speak expressly to the question of pre-emption:

“Except as provided in subsection (b) of this section [the saving clause], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” § 514(a), as set forth in 29 U.S.C. § 1144(a) (pre-emption clause).

“Except as provided in subparagraph (B) [the deemer clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.”

"Neither an employee benefit plan ... nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (deemer clause).

... The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that "relate[s] to" an employee benefit plan governed by ERISA. The saving clause returns to the States the power to enforce those state laws that "regulat[e] insurance," except as provided in the deemer clause. Under the deemer clause, an employee benefit plan governed by ERISA shall not be "deemed" an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws "purporting to regulate" insurance companies or insurance contracts.

It appears that chapter 633 is intended to cover administrators of the same employe benefit plans covered by ERISA. "Employee benefit plan" as defined under ERISA includes "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C.A. § 1002(3) (West Supp. 1992). "Employee welfare benefit plan" means for ERISA purposes:

any plan, fund, or program ... maintained by an employer or by an employee organization, or by both ... for the purpose of providing ... through the purchase of insurance or otherwise, ... medical, surgical, or hospital
care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . . .


any plan, fund, or program . . . maintained by an employer or by an employee organization, or by both, to the extent that . . . such plan, fund, or program--

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond.


"Plan" is similarly defined at section 633.01(4) as:

an insured or wholly or partially self-insured employe benefit plan which . . . provides to one or more employees . . . benefits or services that include, but are not limited to, benefits for medical, surgical or hospital care, benefits in the event of sickness, accident, disability or death, or benefits in the event of unemployment or retirement.

It is thus apparent that the plan administrators to be regulated under chapter 633 are regulated by ERISA. It also appears that the United States Supreme Court has interpreted the ERISA preemption to broadly preclude the operation of state laws which deal not only with ERISA core subject matters or are designed to affect employe benefit plans but those which merely "relate to" employe benefit plans:

[A] law relates to an employee welfare plan if it has "a connection with or reference to such a plan." . . . It [the Congress] did not mean to pre-empt only state laws specifically designed to affect employee benefit plans . . . . We also emphasized that to interpret the pre-emption clause to apply only to state laws dealing with the subject matters covered by ERISA, such as reporting, disclosure,
and fiduciary duties, would be incompatible with the provision’s legislative history . . . .

. . . .

Nor, in our view, is the deemer clause directed solely at laws governing the business of insurance. It is plainly directed at “any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.” § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B). Moreover, it is difficult to understand why Congress would have included *insurance contracts* in the pre-emption clause if it meant only to pre-empt state laws relating to the operation of insurance as a business. . . . We view the language of the deemer clause, however, to be either coextensive with or broader, not narrower, than that of the saving clause.

*FMC Corp.*, 498 U.S. at 58-64.

The only question remaining is whether the “saving clause,” 29 U.S.C.A. § 1144(b)(2)(A) (1985), allows the chapter 633 state regulation under its exemption of state laws regulating insurance or whether the “deemer clause,” 29 U.S.C.A. § 1144(b)(2)(B) (1985), controls. The United States Supreme Court tells us that the “deemer clause” controls in the case of self-funded plans:

Our interpretation of the deemer clause makes clear that if a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer’s insurance contracts; if the plan in uninsured, the State may not regulate it. . . . [Case cite omitted] . . . A construction of the deemer clause that exempts employee benefit plans from only those state regulations that encroach upon core ERISA concerns or that apply to insurance as a business would be fraught with administrative difficulties, necessitating definition of core ERISA concerns and of what constitutes business activity.
FMC Corp., 498 U.S at 64-65.

The United States Supreme Court has therefore held that the "deemer clause" exempts self-funded ERISA plans from state laws that regulate insurance regardless of whether those laws do or do not impact on ERISA core concerns. Chapter 633 dealing with core concerns is therefore clearly preempted. ERISA and section 633.16 preclude you from regulating administrators of self-funded or self-insured employe benefit plans.

JED:WMS
Schools And School Districts; School district members of cooperative educational service agencies who unsuccessfully oppose purchase of real estate are obliged to pay their share of the costs of the acquisition of that real estate, and the CESA may sue those districts if they do not fulfill their financial obligation. The board of control may set the appropriate share for the school districts if the money used for acquisition is not state or local aids under section 116.08(1), Stats. OAG 21-92

July 28, 1992

HERBERT J. GROVER, State Superintendent
Department of Public Instruction

You have asked for my formal opinion on an interpretation of section 116.055, Stats., which provides for the purchase of real estate by the board of control of a community cooperative educational service agency (CESA). Your questions are:

1. If a CESA complies with section 116.055, are dissenting boards required to contribute to the purchase of the real estate?

2. If they are, what legal remedies are available to the CESA against dissenting districts who refuse to pay?

3. May the CESA board determine the method of allocating costs between the member boards?

Section 116.055 provides:

The board of control may purchase, hold, encumber and dispose of real property, in the name of the agency, for use as its office or for any educational service provided by the agency if a resolution to do so is adopted by a two-thirds vote of the members of the board of control and then approved by three-fourths of the school boards in the agency by majority vote of each school board. Aid received under s. 116.08 may be used for the acquisition and maintenance of real property under this section.

The CESA is governed by a board of control composed of members of school boards of districts within the agency. Sec.
1992 OPINIONS OF THE ATTORNEY GENERAL

116.02(1)(a), Stats. The duties of the board are set forth in section 116.03 and include, among other things, determining the policies of the CESA, section 116.03(1); receiving money on behalf of the CESA, section 116.03(2), (4) and (13m); and authorizing expenditures of money for the expenses of the board and for the purposes set forth in chapter 116, section 116.03(10).

Section 116.055 specifically provides for the board of control to purchase and hold real property in the name of the CESA. The school board members have no ownership interest in the property. The statute further provides the required vote for the members of the board of control and for approval by the member school boards of the school districts within the CESA.

Based on these statutes, it is my opinion that dissenting school districts are bound by a decision complying with section 116.055 to purchase property. The CESA incurs the obligation to pay for the purchase of the property. The statute allows CESAs to encumber the property and to use funds acquired under section 116.08. This language authorizes the board to borrow through mortgages. If school districts do not pay the money required of them under section 116.08 or any other statute, a CESA has the statutory authority to sue the school district to collect the amount owed. Section 116.015 provides that a CESA may enter contracts in its own name and sue or be sued.

Your third question concerns whether CESA boards may determine that the costs of acquiring real property shall be equally shared among the districts or employ some other formula such as that set out in section 116.03(4).

Section 116.03(4) requires the board to determine a prorated share for each school district "of the cost of cooperative programs and assess the costs of each program against each unit participating in the program." In Elroy-Kendall-Wilton Schs. v. Coop. Educ. Serv., 102 Wis. 2d 274, 306 N.W.2d 89 (Ct. App. 1981), the court of appeals held that section 116.03 did not
authorize the expenditure of money for the purchase of real estate because that section was limited to "the expenditure of money for ... the acquisition of equipment, space and personnel" under section 116.03(10)." *Id.* at 280.

I therefore conclude that, based on that case, neither section 116.03 nor its formula directly applies to real property.

There is no formula in section 116.055, the section authorizing the board of control to purchase and hold real property. The section does refer to aid received under "s. 116.08." Section 116.08 has a formula in section 116.08(5). That formula requires each school board to pay to the board of control an amount equal to the amount of state aid paid to the CESA in that year under section 116.08(1) multiplied by a fraction consisting of the school district average daily membership as the numerator and agency average daily membership as the denominator.

I conclude that if the cost of the real property is paid from state and local aid under section 116.08(1), the formula of section 116.08(5) applies. If the real property is paid for from money received from other sources than state or local aid under section 116.08(1), which the board of control has authority to do pursuant to section 116.055, the amount of the payments are determined as they are currently. If separate assessment is required for mortgage payments or purchase, the board of control may either reach agreement on the amounts or assess payments to the school district as it sees fit. Section 116.03(14) gives the board the power to "[d]o all other things necessary to carry out [chapter 116]."

JED:WDW
Law Enforcement; Prisons And Prisoners; Sheriffs; Pursuant to section 51.20(14), Stats., the director of the county department under section 51.42 or 51.437 may request the sheriff of the county in which an individual was placed under emergency detention to transport that individual to another designated inpatient facility prior to the initial court hearing under chapter 51, and the sheriff must do so within a reasonable time. OAG 22-92

August 12, 1992

WILLIAM A. J. DRENGLER, Corporation Counsel
Marathon County

You indicate that problems have arisen in your area because certain inpatient facilities have either refused to accept individuals under emergency detention under section 51.15, Stats., or have taken the position that they have the statutory authority to require the law enforcement officer who has detained the individual to transport that individual to another inpatient facility which they designate. You, therefore, ask two questions related to the transportation of individuals by law enforcement officers under chapter 51.

Your first question is as follows:

Does the sheriff’s responsibility to transport patients, under § 51.20(14), Stats., also include the responsibility to transport patients back and forth between different inpatient facilities prior to any hearing at the mere request of the treatment director?

In my opinion, only a private treatment facility may refuse to accept an individual under emergency detention. Upon arrival at any facility listed in section 51.15(2)(a), (b) or (c) and upon acceptance under section 51.15(2)(d), it is the responsibility of the inpatient facility to which the individual is initially transported under section 51.15(2) to secure transportation to another inpatient treatment facility, if such transportation is required prior to the initial hearing.
Section 51.15 provides in part:

Emergency detention. (1) BASIS FOR DETENTION. (a) A law enforcement officer or other person authorized to take a child into custody under ch. 48 may take an individual into custody if the officer or person has cause to believe that such individual is mentally ill, drug dependent or developmentally disabled, and that the individual evidences any of the following [specified circumstances]:

(2) FACILITIES FOR DETENTION. The law enforcement officer shall transport the individual, or cause him or her to be transported for detention and for treatment if permitted under sub. (8) to any of the following facilities:

(a) A hospital which is approved by the department as a detention facility or under contract with a county department under s. 51.42 or 51.437, or an approved public treatment facility;

(b) A center for the developmentally disabled;

(c) A state treatment facility; or

(d) An approved private treatment facility, if the facility agrees to detain the individual.

(3) CUSTODY. Upon arrival at the facility, the individual is deemed to be in the custody of the facility.

(5) DETENTION PROCEDURE; OTHER COUNTIES. In counties having a population of less than 500,000, the law enforcement officer shall sign a statement of emergency detention which shall provide detailed specific information concerning the recent overt act, attempt or threat to act or omission on which the belief under sub. (1) is based and the names of persons observing or reporting the recent overt act, attempt or threat to act or omission. The law enforcement officer is not required to designate in the statement whether the subject individual is mentally ill,
developmentally disabled or drug dependent, but shall allege that he or she has cause to believe that the individual evidences one or more of these conditions. The statement of emergency detention shall be filed by the officer with the detention facility at the time of admission, and with the court immediately thereafter. The filing of the statement has the same effect as a petition for commitment under s. 51.20. When upon the advice of the treatment staff, the director of a facility specified in sub. (2), determines that the grounds for detention no longer exist, he or she shall discharge the individual detained under this section.

Section 51.20 provides in part:

Involuntary commitment for treatment.

. . . .

(2) Notice of hearing and detention. Upon filing of a petition for examination, the court shall review the petition to determine whether an order of detention should be issued. . . . Placement shall be made in a hospital which is approved by the department as a detention facility or under contract with a county department under s. 51.42 or 51.437, approved public treatment facility, mental health institute, center for the developmentally disabled under the requirements of s. 51.06(3), state treatment facility, or in an approved private treatment facility if the facility agrees to detain the subject individual. Upon arrival at the facility, the individual is deemed to be in the custody of the facility.

(7) Probable-cause hearing. (a) After the filing of the petition under sub. (1), if the subject individual is detained under s. 51.15 or this section the court shall hold a hearing to determine whether there is probable cause to believe the allegations made under sub. (1)(a) within 72 hours after the individual arrives at the facility, excluding Saturdays, Sundays and legal holidays.
(b) If the subject individual is not detained or is an inmate of a state prison, county jail or house of correction, the court shall hold a hearing within a reasonable time of the filing of the petition, to determine whether there is probable cause to believe the allegations made under sub. (1).

(8) Disposition pending hearing. (a) If it is shown that there is probable cause to believe the allegations under sub. (1), the court may release the subject individual pending the full hearing and the individual has the right to receive treatment services, on a voluntary basis, from the county department under s. 51.42 or 51.437, or from the department.

(b) If the court finds the services provided under par. (a) are not available, suitable, or desirable based on the condition of the individual, it may issue a detention order and the subject individual may be detained pending the hearing as provided in sub. (7)(c). Detention may be in a hospital which is approved by the department as a detention facility or under contract with a county department under s. 51.42 or 51.437, approved public treatment facility, mental health institute, center for the developmentally disabled under the requirements of s. 51.06(3), state treatment facility, or in an approved private treatment facility if the facility agrees to detain the subject individual.

(14) Transportation; expenses. The sheriff or any law enforcement officer shall transport an individual who is the subject of a petition and execute the commitment, or any competent relative, friend or member of the staff of a treatment facility may assume responsibility for the
individual and transport him or her to the inpatient facility. The director of the county department under s. 51.42 or 51.437 may request the sheriff to provide transportation for a subject individual or may arrange any other method of transportation which is feasible. The county department may provide reimbursement for the transportation costs from its budgeted operating funds.

In 66 Op. Att’y Gen. 249, 253 (1977), it was stated, in connection with court-ordered placements, that “a public agency [cannot be required] to accept custody of a person unless there is a statute authorizing the court to do so or a statute requiring the agency to accept such a placement.” Although emergency detention does not involve the issuance of a court order, I have no doubt that the Legislature may require public facilities to accept custody of individuals subject to such detention under specified circumstances. It has done so for those facilities listed in section 51.15(2)(a), (b) and (c), since only section 51.15(2)(d), which is applicable to approved private treatment facilities, contains the qualifying language “if the facility agrees to detain the individual.” The express mention of such a consent provision only in connection with private facilities implies that consent is not required in connection with emergency detention to all other facilities listed in section 51.15(2). See, e.g., 70 Op. Att’y Gen. 17, 18 (1981). Such public facilities therefore may not refuse to accept individuals brought to them under emergency detention, but the treatment director may discharge the individual if “the grounds for detention no longer exist.” Sec. 51.15(5), Stats. It is therefore important that the law enforcement officer who detains an individual make a good faith effort to transport him or her to a facility that provides the type of treatment that the individual apparently needs.

Upon arrival at any of the facilities listed in section 51.15(2)(a), (b) and (c), and upon acceptance by an approved private treatment facility under section 51.15(2)(d), custody of the individual is transferred from the sheriff or other law
enforcement officer that detained the individual to the facility itself. Sec. 51.15(3), Stats. Apparently, those facilities listed in section 51.15(2)(a) that have contractual relationships with county departments in your area maintain that, for space or other reasons, they may request the sheriff "to provide transportation for a subject individual" under emergency detention pursuant to section 51.20(14) at any time after an individual "arrive[s] at the facility" under sections 51.15(3), 51.20(2) or 51.20(8)(b).

That position is supported by the wording of the questions posed in 68 Op. Att'y Gen. 223 (1979). The answers provided to those questions in that opinion did not explicitly distinguish between the terms "commitment" and "detention." "Commitment" occurs under section 51.20(13)(a) and may be either to the county department under section 51.42 in the case of the county residents or jail inmates or to the Department of Health and Social Services in the case of nonresidents or prison inmates. In contrast to commitment, detention is to a specific facility, rather than to the county department or to the Department of Health and Social Services. Detention, which can occur without knowledge of the county department, in all cases therefore simply places the individual in the custody of the facility where he or she is initially detained. Secs. 51.15(3) and 51.20(2).\(^1\) When detention occurs, no one "execute[s] the commitment" within the meaning of the first sentence of section 51.20(14).\(^2\)

\(^1\)Although similar language does not appear in section 51.20(8)(b), I am of the opinion that this omission is simply a "'legislatively dropped stitch.'" 65 Op. Att'y Gen. 49, 52 (1976), quoting Scharping v. Johnson, 32 Wis. 2d 383, 394, 145 N.W.2d 719 (1966).

\(^2\)See section 51.06, Stats. (1969), which formerly provided in part:

Execution of commitment; expenses. (1) The sheriff and such assistants as the court deems necessary shall execute the commitment; but if any competent relative or friend of any patient so requests, the commitment may (continued...)
68 Op. Att’y Gen. 223 appears to have concluded that the second sentence of section 51.20(14) is independent of the first. That opinion assumes that commitment need not have occurred in order for the treatment director of the county department to “request the sheriff to provide transportation to the subject individual” under the second sentence of that statute. Applying the doctrine of *cum onere*, the opinion also concluded that the sheriff must comply with any transportation request under section 51.20(14) which is made by the director of the county department concerning any individual that is the subject of a petition for examination under section 51.20(1). The Legislature has amended section 51.20 a number of times since the issuance of that opinion, although it has never amended section 51.20(14). The opinion therefore should be accorded some persuasive value. *See Town of Vernon v. Waukesha County*, 99 Wis. 2d 472, 479, 299 N.W.2d 593 (Ct. App. 1980), *aff’d*, 102 Wis. 2d 686, 693, 307 N.W.2d 227 (1981).

To the extent that the second sentence of section 51.20(14) refers to the execution of the commitment, 68 Op. Att’y Gen. 223 correctly applies the doctrine of *cum onere* because the first sentence of that statute requires the sheriff (or any other law enforcement officer) to execute all such commitments. The application of the doctrine of *cum onere* in that opinion so as to absolve the county department from any reimbursement obligation in connection with all other court-ordered transportation directed to the sheriff under chapter 51 also

---

2(...continued)
be delivered to and executed by him. For such execution he shall be entitled to his necessary expenses, not exceeding the fees and expenses allowed to sheriffs. The officer, unless otherwise ordered by the court, shall on the day that a patient is adjudged mentally ill or infirm or deficient, deliver him to the proper institution. Every female patient transported to a hospital shall be accompanied by a competent woman. The court shall prescribe the kind of transportation to be used. Whenever ordered by the court, the person executing the commitment shall wear civilian clothes.
makes sense because the sheriff must “[p]ersonally, or by the undersheriff or deputies, serve or execute according to law all processes, writs, precepts and orders issued or made by lawful authority and delivered to the sheriff.” Sec. 59.23(4), Stats. See 79 Op. Att’y Gen. 8, 11-12 (1990).

In other pre-commitment situations, which were not separately analyzed in 68 Op. Att’y Gen. 223, the application of the cum onere doctrine makes sense if the Legislature intended that the sheriff must honor any “request” made under section 51.20(14). The sheriff is required to “[p]erform all other duties required of the sheriff by law.” Sec. 59.23(7), Stats. Commitment is not a prerequisite to making a request for transportation of any “subject individual” under section 51.20(14). That phrase encompasses any individual who is the subject of a petition under section 51.20(1) as well as any individual under emergency detention, since “[t]he filing of the statement [of emergency detention] has the same effect as a petition for commitment under s. 51.20.” Sec. 51.15(5), Stats. There would be little reason for the second sentence of section 51.20(14) if its terms were applicable only to individuals already under commitment pursuant to section 51.20(13). The statute would then apply only to reexamination proceedings under section 51.20(16) and post-commitment transfers to other facilities. It is far more likely that the Legislature intended the statute to be applicable to any individual under detention, since almost all such individuals must be transported to further court proceedings if the commitment process is to continue. 68 Op. Att’y Gen. 223 implicitly adopts that position.

Section 51.20(14) requires the director of the county department, rather than an employee of the facility where the individual is initially detained, to make a request for transportation and to direct that request to the sheriff. The statute therefore appears to contemplate that some kind of a review of the individual’s treatment setting take place before transfer is requested. Once an appropriate request is made, the
sheriff may transport the individual to another facility within a reasonable time under the facts and circumstances, rather than at a particular time, as is usually required in connection with a court proceeding. Since I find no language in the second sentence of section 51.20(14) that would limit its application to situations where court proceedings have been initiated, I therefore conclude that the director of the county department, after independent review of a subject’s treatment situation, may request the sheriff to transport an individual under emergency detention prior to the initial court hearing under chapter 51. I further conclude that the Legislature intended that the sheriff would honor such requests.

You also ask that I address the question of which law enforcement agency must transport an individual prior to the time an initial court hearing is held. Under section 51.20(14), a request must be directed to the sheriff, as opposed to the head of any other law enforcement agency. Where only a single county is involved, the request can only be made to the sheriff of the county in which the individual is initially detained. In situations involving multi-county departments, the same process should occur, absent a formal agreement between counties to employ some other procedure. However, once court proceedings are initiated, it may be desirable to obtain an order for transportation from the court in which the commitment proceedings will be held.

JED:FTC
Radioactive Waste Review Board; Waste Management; Only the Radioactive Waste Review Board is authorized to negotiate agreements with the federal government regarding the disposal of high-level nuclear waste and transuranic waste either in a high-level radioactive waste repository or a monitored retrievable storage facility. Local units of government may apply for grants to provide funds to support information and education efforts related to potential negotiation for those sites. Those applications must be reviewed and commented upon by the Radioactive Waste Review Board. OAG 23-92

August 12, 1992

JOSEPH STROHL, Chairman
Wisconsin Radioactive Waste Review Board

You ask two questions; both concern the authority of the Radioactive Waste Review Board (Board).

You first ask whether any unit of government or officer of the state, other than the Board, may represent the state in negotiating agreements with federal agencies regarding the disposal of high-level radioactive waste and transuranic waste (HLRW) or siting for a monitored retrievable storage facility. Second, you ask whether a local unit of government in Wisconsin may deal directly with federal agencies independent of the Board and discuss, negotiate, apply for or receive funds in support of negotiations regarding the siting of an HLRW repository or storage facility.

In my opinion local governments cannot negotiate HLRW agreements directly with the federal government. Local units of government may, however, apply for grants to provide funds to support information and education efforts related to potential negotiations for those sites.

The Board serves as an advocate on behalf of the citizens of Wisconsin before the federal Department of Energy and other federal agencies on matters related to the long-term disposal of HLRW. Sec. 36.50(3), Stats. Section 36.50(2)(a) of the
Wisconsin statutes designates the Board as the initial agency to be contacted by the federal Department of Energy or any other federal agency on any matter related to the long-term disposal of HLRW. The Legislature has specifically designated the Board as the agency to negotiate agreements with the Department of Energy on any matter related to the long-term disposal of HLRW. Sec. 36.50(8)(a), Stats.

With regard to your first question, section 36.50(8) provides that the Board shall serve as the agency in Wisconsin to negotiate written agreements and modifications to those agreements with the federal Department of Energy and any other federal agency on any matter related to the long-term disposal of HLRW. The federal law requires the negotiator to negotiate with the governing body of any Indian tribe or the governor of any state in which a potential site is located but specifically provides that if state law authorizes any person or entity other than the governor to negotiate a proposed agreement, the negotiator must negotiate with that other entity. 42 U.S.C.A. § 10243(a) (West 1992). As noted above, Wisconsin law provides that the Board shall negotiate any agreement on behalf of Wisconsin. The federal law requires therefore, that the negotiator, if he or she is to negotiate with anyone in Wisconsin, must negotiate with the Board. Neither federal nor state law authorizes negotiating agreements with any unit of government other than the Board.

42 U.S.C.A. § 10243(b) (West 1992) specifically provides:

In addition to entering into negotiations under subsection (a) of this section, the Negotiator shall consult with any State, affected unit of local government, or any Indian tribe that the Negotiator determines may be affected by the siting of a repository . . . and may include in any proposed agreement such terms and conditions relating to the interest of . . . affected units of local government . . . as the Negotiator determines to be reasonable and appropriate.
42 U.S.C.A. § 10101(31) (West Supp. 1992) defines an affected unit of local government as "the unit of local government with jurisdiction over the site of a repository or a monitored retrievable storage facility." The federal law, therefore, does not permit, much less mandate, the negotiator to reach agreements with local units of government. It merely provides that the negotiator may consult with those affected local units of government and incorporate their concerns into any state agreement to the extent the negotiator determines those concerns to be reasonable.

In sum, under Wisconsin law only the Board may negotiate agreements with the federal government. Under federal law the negotiator must negotiate any HLRW agreement involving Wisconsin with the Board. Wisconsin law does not authorize any other entity to negotiate with the federal government. The federal law does not authorize the negotiator to negotiate with any other entity.

With regard to your second question, section 36.50(5) gives the Board the authority to "review any application to the federal department of energy or other federal agency by a state agency, local unit of government or regional planning commission for funds for any program related to the long-term disposal of high-level radioactive waste or transuranic waste." Wisconsin law, therefore, specifically contemplates local units of government applying for funds for programs relating to long-term disposal of radioactive waste. The law provides that if the Board finds that the application is not consistent with the Board's policy relating to the long-term disposal of HLRW or if the Board finds that the application is not in the best interest of the state, the Board must forward its findings to the Governor, the Joint Committee on Finance and the federal agency to which the application of funds is being made. If the applicant for funds is a state agency, the Board must include a recommendation that the Governor include conditions for the acceptance of the funds which are necessary to safeguard the interests of the state.
The state law obviously contemplates local units of government applying for funds. State law gives the Board the authority to review requests; it does not give the Board the authority to veto the requests. A local unit of government may apply for grants to support information and education efforts related to potential negotiation for siting a facility or a repository. The Board must be given the opportunity to review and comment upon the application.

JED:AL
Counties; Waste Management; Section 59.07(135)(L), Stats., authorizes counties that are responsible units of government under section 159.09(1)(b) to levy taxes for capital and operating expenses incurred in connection with the operation of the county's recycling program only upon those local units of government which have not become responsible units of government pursuant to section 159.09(1)(c). Section 59.07(135)(L) now authorizes counties to levy taxes for both capital and operating expenses incurred in connection with any other form of solid waste management function only upon local units of government which participate with the county in that form of solid waste management activity. Where both recycling and other kinds of solid waste management functions are performed in a single county facility, the county must use accounting principles to apportion the costs of those activities before levying taxes upon local units of government within the county. OAG 24-92

September 2, 1992

JOHN MUENCH, Corporation Counsel
Barron County

You ask how a county that has adopted a resolution designating itself a responsible unit of government for recycling solid waste pursuant to section 159.09(1)(b), Stats., levies taxes for capital and operating costs against local units of government within the county where those costs are incurred in connection with the operation of a combined solid waste incineration and recycling facility. You are particularly concerned about the scope of language contained in section 59.07(135)(L) which prohibits taxation of those local units of government that have also elected to become responsible units of government for recycling solid waste pursuant to section 159.09(1)(c).

In my opinion, section 59.07(135)(L) authorizes counties that are responsible units of government under section 159.09(1)(b) to levy taxes for capital and operating expenses incurred in
connection with the operation of the county's recycling program only upon those local units of government which have not become responsible units of government pursuant to section 159.09(1)(c). Section 59.07(135)(L) now authorizes counties to levy taxes for capital and operating expenses incurred in connection with other solid waste management activities only upon local units of government which participate in that particular activity. Where both recycling and other kinds of solid waste management functions are performed in a single county facility, the county must use accounting principles to apportion the costs of those activities before levying taxes upon local units of government.

Section 59.07(135)(L), as amended by 1989 Wisconsin Act 335, effective May 11, 1990, authorizes counties to:

Appropriate funds and levy taxes to provide funds for acquisition or lease of sites, easements, necessary facilities and equipment and for all other costs required for the solid waste management system except that no town, city or village which operates its own solid waste management program under s. 159.09(2)(a) or waste collection and disposal facility, or property therein, shall be subject to any tax levied hereunder to cover the cost of operation capital and operating costs of these functions. Such appropriations may be treated as a revolving capital fund to be reimbursed from proceeds of the system.

Section 159.09, which was created by 1989 Wisconsin Act 335, provides in part:

(1) DESIGNATION OF RESPONSIBLE UNITS. (a) Except as provided in pars. (b) to (d), each municipality is a responsible unit.

(b) A county board of supervisors may adopt a resolution designating the county a responsible unit. Except as provided in pars. (c) and (d), a county that has adopted such a resolution is the responsible unit for the entire county.
(c) Within 90 days after the county board of supervisors adopts a resolution under par. (b), the governing body of a municipality that is located in part or in whole in the county may adopt a resolution retaining the municipality’s status as a responsible unit.

(d) The governing body of a responsible unit designated under par. (a), (b) or (c) may by contract under s. 66.30 designate another unit of government or a solid waste management system created under s. 59.07(135) to be the responsible unit in lieu of the responsible unit designated under par. (a), (b) or (c). The contract shall cover all functions required under sub. (2), including provisions for financing and enforcing the recycling or other solid waste management program.

(2) DUTIES. Each responsible unit shall do all of the following:

(a) Develop and implement a recycling or other program to manage the solid waste generated within its region in compliance with s. 159.07 (1m) to (4) and the priorities under s. 159.05(12).

(3) POWERS. A responsible unit may do any of the following:

(a) Designate one or more other persons to implement specific components of the program under sub. (2)(a), if the designated person consents to the designation.

Before section 59.07(135)(L) was amended by 1989 Wisconsin Act 335 any county with a population of under 500,000 could establish a solid waste management system pursuant to section 59.07(135). Once such a system was established, local units of government within the county could ordinarily be taxed for both the capital and operating costs associated with running such a system. However, if a local unit
of government within the county was already operating or subsequently elected to operate its own waste collection and disposal site or facility and therefore chose not to dispose of solid waste in the county facility, it could be taxed only for capital costs incurred in connection with the operation of the county’s solid waste management system. 67 Op. Att’y Gen. 77 (1977).

1989 Wisconsin Act 335 altered the result reached in 67 Op. Att’y Gen. 77 by amending section 59.07(135) so as to make the prohibition on taxation of local units of government that operate their own solid waste management or recycling facilities in lieu of county facilities applicable to both capital and operating costs. Those counties that were operating solid waste management systems under section 59.07(135) therefore became subject to new limitations on their ability to finance such systems by virtue of the passage of that act. Similarly, those counties that chose to become responsible units of government for recycling solid waste pursuant to section 159.09(1)(b) could not finance any capital or operating costs associated with the operation of such a recycling program through taxation of those local units of government that chose to become responsible for recycling their own solid waste pursuant to section 159.09(1)(c).

Once a county board adopts a resolution to become a responsible unit of government under section 159.09(1)(b), each local unit of government within the county is given ninety days under section 159.09(1)(c) to enact a resolution retaining responsibility for recycling. By waiting for the mandatory ninety-day period to expire, a county may, prior to making substantial investments in the county’s recycling program, ascertain the number of local units of government that the county may tax. Apparently because of the existence of this ninety-day window, section 59.07(135)(L), as amended by 1989 Wisconsin Act 335, clearly and unambiguously states that a county which operates a solid waste management system (which includes a county that has chosen to become a responsible unit
of government for the recycling of solid waste under the provisions of section 159.09(1)(b)) may not impose a tax on either the capital or operating costs associated with the performance of such functions against any municipality that "operates its own solid waste management program under s. 159.09(2)(a)."

You express concern about this result, which you acknowledge appears to be required by the unambiguous language of section 59.07(135)(L). You suggest that a local unit of government within the county might pass a resolution accepting responsibility for recycling under section 159.09(1)(c), make unsatisfactory progress in establishing its own recycling program and then either attempt to make interim use of the county's recycling program or ask to return to the county's recycling program at some future date.

In my opinion, neither of these circumstances is contemplated by the statutory scheme embodied in 1989 Wisconsin Act 335. Among the obligations of a "responsible unit" under the recycling law is the duty to "[d]evelop and implement a recycling or other program to manage the solid waste generated within its region." Sec. 159.09(2)(a), Stats. If the term "operates" in section 59.07(135)(L) excluded local units of government within the county whose recycling programs were in the planning stage but not yet functioning, such municipalities would be required to contribute toward the cost of the county's recycling program even though they would not benefit from its operation.

The legislative history surrounding the enactment of 1989 Wisconsin Act 335 supports this conclusion. While subsequent legislative "history" should not be accorded the same weight as legislative history accompanying the passage of a particular bill, cf. Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980), consideration of legislative materials created or compiled at approximately the same time and dealing with the same subject matter as the legislation which was ultimately
enacted may be examined in order to determine legislative intent. *Cf. County of Dane v. Racine County*, 118 Wis. 2d 494, 500, 347 N.W.2d 622 (Ct. App. 1984). A trailer bill containing technical and clarifying amendments to 1989 Wisconsin Act 335, 1991 Senate Bill 135, was prepared by the Legislative Council and introduced in the Senate. Although that bill did not pass, its contents are relevant because it deals with the same subject matter as 1989 Wisconsin Act 335 and was introduced at a point close in time to the passage of that act.

The Legislative Council’s explanatory note to 1991 S.B. 135, section 36, states that the trailer bill would have amended section 159.09(1)(b) and (c) so as to permit either the county or any local unit of government within its boundaries to rescind a resolution accepting responsibility for recycling no later than ninety days after the resolution had been enacted:

NOTE: Specifies that, for 90 days following adoption by a county of a resolution designating the county as a responsible unit, the county may rescind its resolution and cease to be a responsible unit and any municipality that adopts a resolution to remain outside the county program may rescind its resolution and remain in the county program. After the 90 days have elapsed, all resolutions in effect will remain in effect.

It is noteworthy that these proposed amendments were not characterized by the Legislative Council as embodying a mere clarification of existing law. Under the existing statutory language, a local unit of government that has accepted responsibility for recycling may only choose to transfer the entirety of that responsibility by contract to another unit of government or to a solid waste management system pursuant to the provisions of section 159.09(1)(d). A responsible unit may also elect to transfer certain specific recycling functions to a private entity or to another unit of government, including a county. *See* secs. 159.09(3)(a) and 159.01(5m), Stats. There are currently no other provisions for transferring or relinquishing
responsibility for recycling once such responsibility has been accepted under section 159.09(1)(b) or (c). The quoted legislative material provides additional support for the premise that the Legislature views the obligations resulting from actions taken by municipalities under section 159.09 as irrevocable. Thus, after the expiration of the period covered by the scheme of taxation which is in effect at the time a local unit of government within the county accepts responsibility for recycling under section 159.09(1)(c), a county may refuse to grant a local unit of government which has accepted recycling responsibility under section 159.09(1)(c), access to the county’s recycling program if the county’s program has been established pursuant to section 159.09(1)(b). In those circumstances, under the current statutory scheme, a local unit of government may regain access to a county’s recycling program only through a contractual arrangement under section 159.09(1)(d).

Although you express no concern about the interpretation of the term “or” in that portion of section 59.07(135)(L) which prohibits the imposition of any tax on any local unit of government within the county that “operates its own solid waste management program under s. 159.09(2)(a) or waste collection and disposal facility, or property therein,” it could be argued that the insertion of that word in the statute extended the statutory prohibition in such a fashion that a county would be unable to impose any tax on a local unit of government that either has elected to become a responsible recycling unit under section 159.09(1)(c) or is operating its own waste collection and disposal facility in lieu of the county’s solid waste management system. Statutes, however, should be construed so as to avoid unreasonable and absurd results. State v. Clausen, 105 Wis. 2d 231, 313 N.W.2d 819 (1982). It would be unreasonable and absurd to permit a local unit of government to avail itself of the county’s solid waste management or recycling program while evading any share of the cost of carrying out that particular program.
The distinction between a county solid waste management system operated under section 59.07(135) and a responsible unit of government under section 159.09(1)(b) is apparent in the language of section 159.09(1)(d), which authorizes any "responsible unit" to contract with another unit of government or "a solid waste management system created under s. 59.07(135)" to act in its stead as a responsible unit by performing all recycling activities required under section 159.09(2). That distinction is also reflected in the trailer bill, which would have created a new statute dividing the prohibition on taxation into two separate sentences, one dealing with recycling under section 159.09(2)(a), and another dealing with other forms of solid waste management. The Legislative Council's explanatory note to 1991 S.B. 135, section 10, notes that the proposed statute would have clarified existing law:

NOTE: Clarifies, in the preceding 2 SECTIONS, current law which prohibits counties from levying a property tax to cover the capital and operating cost of a solid waste management system on property in municipalities that operate their own solid waste management systems by separating solid waste collection and disposal functions from recycling functions for purposes of this prohibition.

Using this legislative "history" in the same fashion that similar legislative "history" was used by the court of appeals in County of Dane, it may readily be concluded that a county is free to levy tax on a local unit of government that chooses to avail itself of either the county's solid waste management system or the county's recycling program, but that the local unit of government may only be taxed in connection with the service which it selects.

You also seek some further definition of the term "operating costs" and inquire how costs should be allocated if a county operates a combined solid waste incineration and recycling facility. Although the precise terminology was inserted in section 59.07(135)(L) by 1989 Wisconsin Act 335, "costs of
operation” was initially defined in 67 Op. Att’y Gen. at 78, which suggested that accounting principles should be used to distinguish between capital and operating costs. Despite its insertion in the statute, the definition of “operating costs” is now of little relevance in light of the passage of 1989 Wisconsin Act 335. Since a local unit of government must now be taxed for both capital and operating costs, or not taxed at all, there is no longer any need to distinguish capital costs from operating costs. 67 Op. Att’y Gen. 77 does, however, indicate that accounting principles should be used to apportion the costs associated with the operation of a combined physical plant if a local unit of government within the county may be taxed for only some of those costs.

I therefore conclude that section 59.07(135)(L) authorizes counties that are responsible units of government under section 159.09(1)(b) to levy taxes for capital and operating expenses incurred in connection with the operation of the county’s recycling program only upon those local units of government which have not become responsible units of government pursuant to section 159.09(1)(c). Section 59.07(135)(L) now authorizes counties to levy taxes for capital and operating expenses incurred in connection with other solid waste management activities only upon local units of government which participate in that particular activity. Where both recycling and other kinds of solid waste management functions are performed in a single county facility, the county must use accounting principles to apportion the costs of those activities before levying taxes upon local units of government within the county.

JED:FTC
Administrative Code; Discrimination; Indians; Schools And School Districts; Words And Phrases; Discrimination such as the use by public schools of American Indian logos, mascots or nicknames does come within the purview of section 118.13 of the Wisconsin statutes. OAG 25-92

September 17, 1992

HERBERT J. GROVER, State Superintendent
Department of Public Instruction

You request my opinion on the following related questions:

1. Does the use by public schools of American Indian logos, mascots or nicknames, singly or in combination, come within the purview of section 118.13 of the Wisconsin statutes?

2. Is Wisconsin Administrative Code chapter PI 9 consistent with legislative intent?

The answer to both questions is yes.

Section 118.13 provides:

Pupil discrimination prohibited. (1) No person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.

The primary source for construction of a statute is the language of the statute itself. State v. Burkman, 96 Wis. 2d 630, 638, 292 N.W.2d 641 (1980). If the statutory language is unambiguous, one arrives at the intention of the Legislature by giving language its ordinary and accepted meaning. Vigil v. State, 76 Wis. 2d 133, 142, 250 N.W.2d 378 (1977). Only where a statute is not clear on its face as to its meaning or application does one look to the legislative intent in construing

A statute is ambiguous if two or more reasonably well-informed persons could understand the language in different senses. *Allen v. Juneau County*, 98 Wis. 2d 103, 108, 295 N.W.2d 218 (Ct. App. 1980). I believe that reasonably well-informed persons can differ over the definition of discrimination as applied to "any curricular, extracurricular, pupil services, recreational or other program or activity." The ultimate purpose of statutory construction is to give effect to the legislative intent. *Madison v. Southern Wis. R. Co.*, 156 Wis. 352, 360, 146 N.W. 492 (1914). Since there is no single document evidencing the legislative intent of the language of the statute, legislative intent must be construed from other actions of the Legislature. *Pittman v. Lieffring*, 59 Wis. 2d 52, 62, 207 N.W.2d 610 (1973).

Under section 227.19, the Legislature may delegate rulemaking authority to an agency. Through section 118.13(3)(a)2. the Legislature gave the superintendent of public instruction the power to create rules to administer this anti-discrimination statute. Pursuant to its statutory authority, the Department of Public Instruction (Department) established Wisconsin Administrative Code chapter PI 9.

Wisconsin Administrative Code chapter PI 9 provides:

"Discrimination" means any action, policy or practice, including bias, stereotyping and pupil harassment, which is detrimental to a person or group of persons and differentiates or distinguishes among persons, or which limits or denies a person or group of persons opportunities, privileges, roles or rewards based, in whole or in part, on sex, race, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability, or which perpetuates the effects of past discrimination.

“Pupil harassment” means behavior towards pupils based, in whole or in part, on sex, race, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability which substantially interferes with a pupil’s school performance or creates an intimidating, hostile or offensive school environment.


“Stereotyping” means attributing behaviors, abilities, interests, values and roles to a person or group of persons on the basis, in whole or in part, of their sex, race, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.


To become effective, this rule had to go through an extensive legislative review process. The Department first sent its proposed rule to the Legislative Council. The Legislative Council subsequently issued a report which the Department forwarded to the Senate. The Senate Committee on Education and Governmental Operations reviewed the report and held a public hearing. No objections were made, and the Senate approved Wisconsin Administrative Code chapter PI 9. The Department also sent the report to the Assembly where it was reviewed by the Committee on Education. The committee held a public hearing and made modifications. The changes that resulted did not have the effect of excluding school mascots from the purview of this anti-discrimination rule (Wisconsin Legislative Council Memo, dated January 16, 1992). The Assembly took no further action and approved the rule. Therefore, the Legislature must have intended the statute to be at least as broad as the rule provides.
“‘[W]hen the legislature charges an administrative agency to apply and enforce a particular statute . . . the agency’s construction and interpretation of the statute are entitled to great weight and any rational basis will sustain its practical interpretations.’” William Wrigley, Jr. Co. v. DOR, 160 Wis. 2d 53, 69-70, 465 N.W.2d 800 (1991). Wisconsin Administrative Code chapter PI 9 should be given great weight, both because the Department has the express power to implement and administer section 118.13 and because the Department’s definitions are unquestionably rational. In addition, this rule has been in effect for almost six years, and longstanding administrative construction of a statute is accorded great weight in determining legislative intent because the Legislature is presumed to have acquiesced in that construction if it has not amended the statute. Dairyland Harvestore v. DOR, 151 Wis. 2d 799, 804, 447 N.W.2d 56 (Ct. App. 1989).

Wisconsin Administrative Code chapter PI 9 is not ambiguous. The language is clear and direct; therefore, to interpret the rule we need only look at its ordinary meaning. Vigil v. State, 76 Wis. 2d at 142. Section 118.13 prohibits discrimination against a member of a protected class in a program or activity approved or sponsored by the school board. The rule defines discrimination as any action, policy or practice of a school that affects a person or a group of persons. This includes stereotyping and pupil harassment. The rule further defines stereotyping as attributing behavior, abilities, interests, values or roles to a protected class, and it defines pupil harassment as behavior toward a protected class which creates an intimidating, hostile or offensive school environment. In addition, such actions must be detrimental and perpetuate effects of past discrimination. Webster’s New Collegiate Dictionary 310 (1977) defines detrimental as something “harmful” or “damaging.”

In the application of this language to the question at hand, American Indians are a protected class that has been subjected
to discrimination in the past. It is entirely possible that an
American Indian logo, mascot or nickname could cause an
American Indian harm by reinforcing a stereotype and/or
creating an intimidating or offensive environment, thus
perpetuating past discrimination. Therefore, the language of the
statute and the rule is comprehensive enough that an American
Indian logo, mascot or nickname used by a public school could
be a violation of section 118.13.

American Indian logos, mascots and nicknames, however, are
not per se violations of section 118.13. Certainly not all images
or nicknames depicting a protected class are intrinsically
negative or offensive. In fact, the groups themselves often use
self-images to project a positive impression. The mere name of
a tribe such as "Seminole" could, under the facts of a given
case, be wholly neutral.

Section 118.13(3)(a)1. provides that appeals of the
superintendent's decisions under this subsection are subject to
chapter 227 review. This implies that there must be a contested
case before the superintendent with findings of fact, conclusions
of law and a record containing evidence. Therefore, whether or
not a violation exists must be determined on a case-by-case
basis after such a hearing.

You have also asked if intent is a necessary element of a
finding of discrimination under section 118.13. In my opinion
there is no requirement of intent except for the provision in
section 118.13(4). Neither the statute nor the rule expressly or
impliedly require intent for a general finding of discrimination.
Had the Legislature wanted findings of discrimination to apply
only to intentional acts, it would have so provided. Therefore,
if discrimination is found to exist, it exists regardless of intent.
Section 118.13(4) provides, however, that if intent can be
demonstrated, financial sanctions may be imposed. For example,
noncompliance with a superintendent's administrative order may
be strong evidence of "intent," thus enhancing the possibility of
a civil forfeiture action under section 118.13(4).
In conclusion, I am of the opinion that Wisconsin Administrative Code chapter PI 9 is consistent with legislative intent, and American Indian logos, mascots and nicknames used by public schools may violate section 118.13, whether or not they are intended to be discriminatory.

JED:WDW
Governor; Legislation; The Governor’s partial veto of section 1117g of 1991 Wisconsin Act 269 did not result in a complete and workable law. The partial veto, therefore, was invalid. Because the Governor’s approval was not necessary for the bill to become law, the invalidity of the partial veto results in the law being enforced as passed by the Legislature. OAG 26-92

October 6, 1992

FRED A. RISSER, Chairperson
Senate Organization Committee

The Senate Organization Committee has requested my opinion on the validity of Governor Thompson’s partial veto of section 1117g of the Budget Adjustment Act, 1991 Wisconsin Act 269. Section 1117g, as passed by the Legislature and as vetoed in part by the Governor, provides:

SECTION 1117g. 605.35 of the statutes is created to read:

605.35 Loan to general fund. On or before June 30, 1992, the property fund shall make a loan of $10,000,000 to the general fund. Interest shall accrue on the principal balance at the average rate earned by the state on its deposits in public depositories during the period of the loan. The general fund shall repay the loan in 5 annual installments of $2,000,000 principal plus accrued interest, beginning on or before June 30, 1994.

Before the partial veto, section 1117g directed the Local Government Property Insurance Fund to loan $10 million to the state’s general fund and required the general fund to repay the loan in five annual installments of $2 million plus accrued interest beginning on or before June 30, 1994.

After the Governor’s partial veto, section 1117g reads: “On or before June 30, 1992, the property fund shall make $10,000,000 to the general fund.” The Governor’s veto message on section 1117g states: “I am partially vetoing this section to remove language designating the fund transfer as a loan and
setting up a repayment schedule. The effect of my veto is to transfer $10 million to the general fund in fiscal year 1992-93.”

You ask my opinion on two issues. First, you ask whether the Governor's partial veto of section 1117g is valid under article V, section 10 of the Wisconsin Constitution. If the answer to that question is yes, you ask whether the law is valid in light of section 604.03(2), Stats., which provides that various funds, including the Local Government Property Insurance Fund, are held in trust for the benefit of insureds and proper claimants and prohibits those funds from being spent for any other purpose. The law specifically provides that the funds “may be borrowed by the state only pursuant to normal and usual investment practices under s. 604.05.” Because I have concluded that the partial veto of section 1117g was invalid, I do not reach your second question.

Wisconsin's Constitution grants the Governor "a uniquely broad and expansive power to veto parts of an appropriation bill." Wis. Senate v. Thompson, 144 Wis. 2d 429, 450, 424 N.W.2d 385 (1988). The limitation on the exercise of that partial veto authority "is that what remains after the veto must be a complete and workable law." Id. at 451. In Wis. Senate the court refrained from deciding that some of the vetoes challenged in that case were invalid "because the resulting provisions are inartful, clumsy, ungrammatical or incomprehensible." Id. at 462. The court reiterated:

[T]he test applied to determine the validity of the governor's partial vetoes is not one of grammar. The only requirement is that the result remaining after the partial veto is a "complete and workable law." Awkward phrasing, twisted syntax, alleged incomprehensibility and vagueness are matters to be resolved only on a case-by-case basis in which specific challenges to discrete applications of the new provisions are raised in a complete factual setting.

Id. at 462-63 (citation omitted).
"On or before June 30, 1992, the property fund shall make $10,000,000 to the general fund" is unworkable because it doesn't make sense. The law does not tell the Commissioner of Insurance, the manager of the fund under section 604.04, what the Commissioner is to do on June 30, 1992.

The law can be made comprehensible by giving an uncommon meaning to the verb "make." For example, "make" can mean "to cause to be available; provide (to make change, to make room)" or "to deliver (a speech) or utter (remarks, etc.)." Webster's New World Dictionary of the American Language 855 (2d coll. ed. 1974). Nontechnical words in a statute, however, are to be construed according to their common and ordinary usage. Ervin v. City of Kenosha, 159 Wis. 2d 464, 484, 464 N.W.2d 654 (1991). If "make" is given its common and ordinary meaning, the phrase "make $10,000,000 to the general fund" is incomprehensible.

Alternatively, the law could be given meaning by adding "a loan of," "a transfer of" or "a gift of," after the word "make." Although a court may "read words in place which seem to be there by necessary or reasonable inference," this judicial license "should never be used to make a law." Pfingsten v. Pfingsten, 164 Wis. 308, 313-14, 159 N.W. 921 (1916). Adding a phrase after the word "make" would not be the effectuating of legislative intent; it would be creating a law. The courts will uphold legislative enactments if the meaning of the statute is merely elusive and "if any reasonably intelligible analysis can result." Marshfield v. Cameron, 24 Wis. 2d 56, 62, 127 N.W.2d 809 (1964). An instruction to "make $10,000,000 to the general fund," however, is not an obscure expression of an idea; it is not an expression of an idea at all.

I must conclude that section 1117g after the partial veto is not a complete and workable law. The law can be given meaning only by giving the word "make" an uncommon definition or by creating a law by inserting a phrase after the word "make." I must also conclude that an otherwise
incomplete and unworkable law cannot be made complete and workable through the Governor's veto message.

In April 1990 the voters of Wisconsin amended article V, section 10 of the Wisconsin Constitution to provide: "In approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters in the words of the enrolled bill." Wis. Const. art. V, § 10(1)(c). The Governor, therefore, did not have the authority to use his partial veto to change "make a loan" to "make a transfer" by striking individual letters in the rest of section 1117g. If the Governor is allowed to create ambiguity, or worse, through the use of the partial veto and then, through his veto message, allowed to accomplish a result which he could not accomplish through the exercise of partial veto, the April 1990 amendment to the constitution becomes a nullity.

Under Wisconsin's Constitution, a governor's partial veto is valid if it results in a complete, entire and workable law without reference to the Governor's veto message. Although reference to an executive message may be permissible when construing ambiguous executive action, Medlock v. Schmidt, 29 Wis. 2d 114, 121, 138 N.W.2d 248 (1965), it is not proper to use the Governor's veto message to give meaning to a law which otherwise would have no meaning. I conclude, therefore, that the Governor's partial veto of section 1117g of 1991 Wisconsin Act 269 did not result in a complete and workable law.

If a governor's affirmative approval is not necessary for a bill to become law, the parts of the bill vetoed become law as though there had not been an invalid partial veto. State ex rel. Finnegan v. Dammann, 220 Wis. 143, 149, 264 N.W. 622 (1936). The Wisconsin Constitution requires the Governor's affirmative approval for a bill to become a law only if the Legislature's adjournment prevents the Governor from returning the bill to the Legislature: "Any bill not returned by the governor within 6 days . . . after it shall have been presented to the governor shall be law unless the legislature, by final
adjournment, prevents the bill’s return, in which case it shall not be law.” Wis. Const. art. V, § 10(3).

The bill in question in Finnegan required the Governor’s affirmative approval because the Legislature had adjourned, preventing him from returning the bill to the Legislature. The 1991 Budget Adjustment Act did not require the Governor’s approval to become law because the Legislature had not adjourned. In fact, the Governor did return his partial vetoes to the Legislature. Therefore, because the partial veto is invalid “the secretary of state has a mandatory duty to publish those sections of the enactment as if they had not been vetoed.” State ex. rel Sundby v. Adamany, 71 Wis. 2d 118, 125, 237 N.W.2d 910 (1976). In this case, the partial veto was ineffective as a veto and, since no approval was required, the law is in force. Finnegan, 220 Wis. at 149.

JED:AL
Bingo; Gambling; Indians; Oneida Indians; Television; If any element of the Oneida tribe television bingo game occurs off the reservation, it is subject to prosecution under Wisconsin criminal law. OAG 27-92

November 5, 1992

FRED A. RISSER, Chairperson
Senate Organization Committee

The Senate Organization Committee has requested a formal attorney general’s opinion regarding “the constitutionality of the Oneida Indian Tribe running a bingo game on television.” Since this does not raise any questions of constitutional law, save under the Supremacy Clause of the United States Constitution, I assume that the Senate Organization Committee wishes my opinion on the legality of Oneida TV bingo.

Because of the pervasive aspect of the Indian gambling question, I begin with a general statement of the law concerning the state’s ability to regulate Indian activities. Although generalizations on the subject of state regulation of Indians and Indian activity both on and off the reservation are treacherous, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980), the following is a guide for application of state regulation of Indians and their activities.

The tribes retain “attributes of sovereignty over both their members and their territory.” United States v. Mazurie, 419 U.S. 544, 557 (1975). There is no rigid rule by which to resolve the question of whether state law may be applied to an Indian reservation or to tribal members. The tribes have retained a “semi-independent” position, not as states or nations, but as a separate people with the power of regulating their internal and social relations and not brought under the laws of the union or of the state within whose limits they reside. McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973).

Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, article I, section 8, clause 3 of the
United States Constitution. "This congressional authority" and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop" against which vague or ambiguous federal enactments must always be measured. *White Mountain Apache Tribe*, 448 U.S. at 142-43 (citations omitted).

Congress has chosen to regulate gambling on the reservation through the Indian Gaming Regulatory Act. 25 U.S.C.A. § 2701 et seq. (West Supp. 1992). Under that act, bingo is a Class II activity which, when conducted on Indian lands, is not subject to regulation by the state but only by the National Indian Gaming Commission. 25 U.S.C.A. § 2710(b) (West Supp. 1992).

Off-reservation activities, while not completely without doubt, are more likely subject to state regulation. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the United States Supreme Court upheld a gross receipts tax on the Apache ski resort which was located off the reservation even though it was the
primary source of tribal income. The Court stated after much of the same statement of general law as above,

tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake [v. Egan, 369 U.S. 60, 75 (1962)]. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.

*Id.* at 148-49.

The Wisconsin courts, relying on *Mescalero Apache Tribe*, have held that the state courts have jurisdiction to prosecute crimes committed by Indians off the reservation. *Sturdevant v. State*, 76 Wis. 2d 247, 251 N.W.2d 50 (1977). The supreme court in that case specifically referred to section 939.03(1)(a), Stats., which provides that a person is subject to prosecution and punishment under the law of Wisconsin if 

"[h]e commits a crime, any of the constituent elements of which takes place in this state." The statute further provides a person is subject to prosecution and punishment under Wisconsin law if 

"[w]hile out of this state, he does an act with intent that it cause in this state a consequence set forth in a section defining a crime." Sec. 939.03(1)(c), Stats.

In my opinion this interpretation comports with the United States Supreme Court pronouncements in *Mescalero Apache Tribe* and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). In *Confederated Tribes*, the Court invalidated an excise tax on the privilege of using state highways because the tax applied fully to Indian owned vehicles both on and off the reservation. In making the point pertinent here, the Court said that the tax might be valid if tied only "to the amount of actual off-reservation use." *Id.* at 163-64.

Our supreme court has stated the test for determining whether state law applies off the reservation as follows: "[T]he off-
reservation activities of Indians are generally subject to the prescriptions of a nondiscriminatory state law, in the absence of an express federal law to the contrary." *State v. Big John*, 146 Wis. 2d 741, 749, 432 N.W.2d 576 (1988).

It is my opinion that if at least one element of a Wisconsin crime occurs off the reservation, state law can be applied to prosecute a violation of that crime. For example, section 945.02(3) requires the elements of prize, chance and consideration. If any one of these three elements occurs off of Indian lands, Wisconsin has jurisdiction to criminally prosecute. Exceptions to section 945.01(5)(am) exist only for bingo conducted under chapter 163 (soon to be chapter 563). I do not believe any federal law expressly prohibits Wisconsin from exercising its criminal jurisdiction over gaming that occurs, even in part, off Indian lands. The Indian Gaming Regulatory Act, by its legislative history, covers only gaming on Indian lands. 25 U.S.C.A. §§ 2702(3), 2703(4) and 2710(a), (b) and (d) (West Supp. 1992). It does not establish the right of the Oneida or any other tribe to conduct gaming in part off Indian lands through activity which extends beyond the boundaries of these lands.

Nor does the regulation of broadcast media insulate the participants, players and tribal members or management companies from prosecution when one element of the crime occurs wholly separate from the broadcast itself. The attachments to your request indicate that the Oneida are using a 900 telephone number to facilitate play of TV bingo. Such use of the telephone may implicate sections 945.03(7) and 945.06. The purchase of bingo cards off Indian lands may also violate section 945.05(1)(a).

It appears that violations of Wisconsin's criminal statutes may be occurring through use of 900 and 800 number telephone lines and perhaps through use of the mails. However, it is also apparent that some of the sales of Oneida TV bingo may be entirely legal. Sales on the Oneida reservation or any other
Indian lands (even lands of other tribes) are not subject to Wisconsin’s criminal jurisdiction if the sale, selection of the winner, award and claiming of the prize all occur on Indian land. The fact that an alternative legal means of participation may exist, however, does not insulate Oneida TV bingo from prosecution when an element of the crime actually occurs off Indian lands. See 60 Op. Att’y Gen. 382 (1971).

Whether a violation of Wisconsin’s criminal gambling law has occurred can only be determined on the facts of each individual transaction. This determination is best left to the appropriate prosecuting officials. If the facts establish that any element of a Wisconsin crime is occurring off Indian lands, it is my opinion that Wisconsin has criminal jurisdiction to prosecute.

JED:WDW
Banks And Banking; Indians; The Wisconsin Commissioner of Banking does have a compelling interest in regulating banking activities on Indian reservations under chapters 217 and 218 and section 138.09, Stats., even though Public Law 280 does not specifically grant such regulatory authority. OAG 28-92

November 13, 1992

TOBY E. SHERRY, Commissioner
Office of Commissioner of Banking

You requested my opinion on several related issues: (1) whether your office’s authority to regulate consumer bank communications terminals (“ATMs”) pursuant to section 221.04(1)(k) of the Wisconsin statutes extends to ATMs located on Indian land; and (2) whether your office would have the authority to regulate various banking enterprises, owned either by tribal or nontribal members, if they were to operate on Indian land. Specifically, you inquire as to whether your office would be able to approve and deny license applications pursuant to section 218.01, issue licenses to sellers of checks pursuant to chapter 217, issue licenses dealing with precomputed loans pursuant to section 138.09 and issue licenses for currency exchanges pursuant to section 218.05.

Although there is no absolute barrier to the exercise of state jurisdiction within reservation boundaries, jurisdiction may be exercised only when the state can establish a significant interest which outweighs any federal or tribal interest. The United States Supreme Court recently summarized the analytical framework utilized to determine under what circumstances a state’s regulatory authority may lawfully be extended within reservation boundaries.

In White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), the Court noted that it long ago departed from the early view that state laws can have no force within reservation boundaries. Rather, the question whether a particular state law
may be applied within an Indian reservation boundary or to
tribe members requires a particularized inquiry into the nature
of the state, federal and tribal interests at stake, an inquiry
designed to determine whether, in the specific context, the
exercise of state authority would violate federal law.

The Court concluded:

Congress has broad power to regulate tribal affairs
under the Indian Commerce Clause, Art. 1, § 8, cl. 3. This
congressional authority and the "semi-independent
position" of Indian tribes have given rise to two
independent but related barriers to the assertion of state
regulatory authority over tribal reservations and members.
First, the exercise of such authority may be pre-empted by
federal law. Second, it may unlawfully infringe "on the
right of reservation Indians to make their own laws and be
ruled by them." The two barriers are independent because
either, standing alone, can be a sufficient basis for holding
state law inapplicable to activity undertaken on the
reservation or by tribal members. They are related,
however, in two important ways. The right of tribal self-
government is ultimately dependent on and subject to the
broad power of Congress. Even so, traditional notions of
Indian self-government are so deeply engrained in our
jurisprudence that they have provided an important
"backdrop" against which vague or ambiguous federal
enactments must always be measured.

Bracker, 448 U.S. at 142-43 (citations omitted).

Unquestionably, the application of these principles in
resolving jurisdictional questions is materially affected by the
status of the land tenure where enforcement is sought and the
identity of the persons or entity being regulated.

If, therefore, an institution which has its principal place of
business off reservation seeks to place ATMs on a reservation,
the state has authority to regulate such activity. Mescalero
When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable because the state’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self government is at its strongest. See Bracker; Moe v. Confederated Salish & Kootenai Tribes, etc., 425 U.S. 463 (1976); McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973); Montana v. United States, 450 U.S. 544 (1981). In such situations, state laws generally are not applicable to tribe members or Indian activities on a reservation except where Congress has expressly provided that they shall apply. McClanahan, 411 U.S. at 170-71; U.S. v. John, 437 U.S. 634 (1978); and Fisher v. Dist. Court of Sixteenth Jud. Dist., 424 U.S. 382 (1976).

I am not aware of any federal law which specifically authorizes Wisconsin to enforce civil/regulatory statutes on the reservations. The United States Supreme Court has adopted lower court reasoning that limits Public Law 280 (67 Stat. 588, codified at 18 U.S.C.A. § 1162 (West 1984)), the only grant of jurisdiction to Wisconsin, to state criminal/prohibitory statutes. Under the Supreme Court’s reasoning, only statutes which violate the states’ public policy and are prohibitory in nature apply on the reservations. Statutes which permit the activity with regulation do not apply. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

It is clear that chapters 217 and 218 and sections 138.09 and 895.055 are all purely regulatory in nature. Therefore, these regulatory statutes fall outside the scope of Public Law 280’s grant of jurisdiction to Wisconsin.

However, in my view, Wisconsin has a significant interest in applying regulatory statutes concerning ATMs and banking which outweigh any federal or tribal interest. Since the advent of gaming on Indian reservations, the increase in non-Indian traffic and the likelihood of non-Indians using ATMs and other banking facilities on the reservations for the purpose of obtaining funds while on the reservations is significant. The
state has a compelling interest in regulating ATMs and various other banking activities as to non-Indians on the reservations. As state citizens and consumers, they are entitled to the same type of protection and oversight from the state on the reservations as the state provides to citizens and consumers off the reservations.

Additionally there is a substantial state and federal interest in uniformity and public trust in the regulation of banking activities. State regulation of such activity would therefore advance both federal and state interests in fostering such uniformity and public trust. It seems it would also be in the tribes' interest to establish uniformity and public trust with respect to any banking activities undertaken by the tribes.

Lastly, there is considerable interplay between banking systems throughout the world. Individuals who maintain accounts in Wisconsin may use ATMs in foreign countries, other states and on the reservations which affect their accounts in local banking institutions. Of necessity, any banking activity, including ATMs on the reservations, will interact with both federal and state banking systems, all of which are subject to federal and/or state regulation.

In view of the likely use of banking activities on the reservations by non-Indians, the highly regulated nature of banking, and the interplay between any banking activity on the reservations and both state and federally regulated systems off the reservations, I believe Wisconsin has a compelling interest in applying its statutory regulations to banking activities on the reservations.

JED:WDW
Counties; County Board; Land; A county board may not give land to a private corporation. The adequacy as consideration for the conveyance of land of a promise by a private corporation to build and operate a factory on the land involves the application of the public purpose doctrine to the specific facts of the conveyance. OAG 29-92

December 18, 1992

WALTER KUNICKI, Chairperson
Assembly Organization Committee

The Assembly Committee on Organization (Committee) has requested my formal opinion on the question of whether a county may "make a gift of county-owned property to . . . [a] private corporation in return for the company's agreement to construct a plant and commence operations on the property."

The Committee's question asks whether the county may make a "gift" of land to a private corporation, but then qualifies this by stating that the conveyance is in exchange for a promise to construct a plant and begin operations on the property. In addition, the materials transmitted with the request ("transmittal") suggest that there may be other consideration for the conveyance, but do not specify what that consideration is. The Committee's question is thus twofold, involving the authority of a county to make a gift and the question of the adequacy of consideration for a specific conveyance of land.

In my opinion, the county may not make a gift of land to a private corporation. The answer to the question of the adequacy of consideration for the county's conveyance of land is legally difficult and depends, obviously, upon the specific facts.

I will first consider the county's authority to make a gift of real property to a private corporation.

The powers of the county as a body corporate are exercised by the county board. Sec. 59.02(1), Stats. The powers of a county board are limited. A "county board has only such
powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power.' . . . Stated otherwise: ‘counties are creatures of the Legislature and their powers must be exercised within the scope of authority ceded to them by the state . . . .’" St. ex rel. *Teunis v. Kenosha County*, 142 Wis. 2d 498, 504, 418 N.W.2d 833 (1988) (citations omitted).

Under section 59.01(1), Stats., counties may "acquire . . . real and personal estate for public uses or purposes . . . [and] sell, lease and convey the same." Under section 59.07(1)(a) counties can acquire land "for public uses or purposes of any nature, including without limitation acquisitions for county buildings, airports, parks, recreation, highways, dam sites in parks, parkways and playgrounds." Section 59.07(1)(a) provides that the county board may acquire property for public purposes and section 59.07(1)(c) provides in part that the county board may:

Direct the clerk to lease, sell or convey or contract to sell or convey any county property, not donated and required to be held for a special purpose, on such terms as the board approves. In addition any county property may, by gift or otherwise, be leased, rented or transferred to the United States, the state, any other county within the state or any municipality or school district within the county.

The statutes provide for county industrial development in sections 59.07(75) and 59.071. Under section 59.07(75)(a), the county board may

appropriate money for and create a county industrial development agency or to any nonprofit agency organized to engage or engaging in activities described in this paragraph, appoint an executive officer and provide a staff and facilities to promote and develop the resources of the county and of its component towns and municipalities. To this end the agency may, without restriction because of enumeration, develop data regarding the industrial needs, advantages and sites in the county, acquaint the purchaser
with the products of the county by promotional activities, coordinate its work with that of the county planning commission, the department of development and private credit development corporations and to do all things necessary to provide for the continued improvement of the industrial climate of the county.

Under section 59.071, a county board may form a county industrial development agency. Such an agency is a separate public instrumentality and body corporate and politic which exercises the powers under that section. Sec. 59.071(4)(d), Stats. Since the Committee’s transmittal makes no mention of the involvement of a county industrial development agency, I limit my discussion to the powers of the county as exercised by the county board.

The above statutes provide no authority for a county board to give land to a private industry. On the contrary, county gifts of land are limited to certain governmental units. Sec. 59.07(1)(c), Stats. A review of the statutes shows no other authority, express or implied, for a county board to give land to a private industry. Accordingly, in light of counties’ limited powers, St. ex rel. Teunas, it is my opinion that a county board may not give land to a private industry. See also 67 Op. Att’y Gen. 236 (1978) (county has no authority to give land to private persons).

The next question involves the adequacy of the consideration given to the county for the conveyance of land. Although a county may not make a gift of property to a private corporation, it may, under section 59.07(1)(c), convey property upon such terms as the county board approves. Consideration for a conveyance need not be monetary. Hermann v. Lake Mills, 275 Wis. 537, 82 N.W.2d 167 (1957); Rath v. Two Rivers Community Hosp., 160 Wis. 2d 853, 467 N.W.2d 150 (Ct. App. 1991).

The materials that the Committee sent indicate that the value of the property conveyed is approximately $390,000. The Committee’s transmittal indicates that the company has agreed
to locate on the land owned by the county in the industrial park and construct a factory. There is also reference to possible other, unspecified, consideration.

A decision as to the adequacy of the consideration would require a full inquiry into the facts surrounding the transfer. The published criteria for the issuance of attorney general opinions indicate that opinions should not be issued when there are factual disputes to be resolved, because the attorney general does not have the authority to determine questions of fact. 77 Op. Att'y Gen. Preface (1988). Such factual issues are best resolved in litigation in which there is an orderly presentation of evidence and cross-examination of witnesses.

The Committee's request asks for my opinion on the validity of an agreement, which, the materials show, has already been executed. Indeed, I have received information indicating that construction of the plant is under way. The factual background concerning the consideration for the county's conveyance of land to the private industry is incomplete and subject to dispute.

In light of the above, I find that I cannot answer the question of the adequacy of the consideration. However, I will offer some general comments in recognition of the fact that the scope of allowable economic development activity under the case law is a controversial area which the Legislature may wish to address.

The case law does not provide clear guidelines to governmental subdivisions concerning the bounds of proper economic development activity. In general, under the constitutional tenet known as the public purpose doctrine, state and local units of government can spend public moneys only for public, rather than private, purposes. *Hopper v. Madison*, 79 Wis. 2d 120, 128, 256 N.W.2d 139 (1977). The courts in the older case law prohibit subsidization of private enterprise for economic development by local governmental units. *See Kiel v. Frank Shoe Mfg. Co.*, 240 Wis. 594, 4 N.W.2d 117 (1942) (city cannot give industry cash, free rent and forgiveness of taxes as
inducement to locate in city); and Hermann, 275 Wis. 537 (city cannot make gift of municipal property to a private industry, by selling below market value, to promote industrial expansion).

More recent authority has stressed the evolving nature of the public purpose doctrine. In State ex rel. Hammermill Paper Co. v. La Plante, 58 Wis. 2d 32, 55-56, 205 N.W.2d 784 (1973), the court noted that: “Public purpose is not a static concept. The trend of both legislative enactments and judicial decisions is to extend the concept of public purposes in considering the demands upon municipal governments to provide for the needs of the citizens.” See also 76 Op. Att’y Gen. 169, 172 (1987). It is not clear, though, whether the law has changed since the Hermann decision (which has not been explicitly overruled) to the extent that a county board may convey property to a private corporation in exchange for an agreement to build and operate a plant within the county.

In Rath, 160 Wis. 2d 853, the most recent public purpose doctrine case, a city-owned hospital valued at over $5 million was conveyed at no cost to a nonprofit corporation. The sole consideration was a deed restriction providing that the hospital would revert to the city if it ceased to be used as a medical facility. The court in Rath observed that two applicable statutes allow the city to convey property to a nonprofit corporation for public purposes. Section 62.22(2) provides that a city may donate property to a nonprofit corporation for public purposes. Similarly, section 66.501(1)(a) allows a city to sell a hospital to a nonprofit corporation “for such consideration and upon such terms and conditions as in the judgment of the governing body of the city or village are in the public interest.” The court noted that consideration need not be monetary, citing Hermann, 275 Wis. at 542, and concluded that, under both statutes, the restrictive language in the deed provided adequate consideration. Rath, 160 Wis. 2d at 865.

It is not clear how far a court would go in applying Rath to the facts presented by the Committee. Although there are
similarities, in that both situations involve the conveyance of land in exchange for a promise that a desired activity will be carried out, there are significant differences. Rath involved the interpretation of specific statutes relating to conveyances to nonprofit corporations and the provision of health care to the community. These facts distinguish the consideration in Rath from the general economic benefits to the community envisioned by an economic development plan such as that under consideration here. On the other hand, there is a strong presumption in the law regarding the public purpose doctrine that the acts of the legislative body, in this case the county board, are constitutional, Hopper, 79 Wis. 2d at 128, and the judicial trend, as noted above, is to extend the scope of activities considered to be valid public purposes, La Plante, 58 Wis. 2d at 55-56.

I hope these comments prove useful.

JED:JHS
# STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION LAWS, LEGISLATIVE BILLS, OPINIONS OF THE ATTORNEY GENERAL, AND RESOLUTIONS REFERRED TO AND CONSTRUED

## U.S. CODE

<table>
<thead>
<tr>
<th>Statute</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 U.S.C. 1503 (West 1977)</td>
<td>70</td>
</tr>
<tr>
<td>25 U.S.C. 2710(a) (Supp. 1992)</td>
<td>335</td>
</tr>
<tr>
<td>25 U.S.C. 2710(b) (Supp. 1992)</td>
<td>333</td>
</tr>
<tr>
<td>25 U.S.C. 2710(d) (Supp. 1992)</td>
<td>335</td>
</tr>
<tr>
<td>26 U.S.C. 3301-3311</td>
<td>155</td>
</tr>
<tr>
<td>29 U.S.C. 1021 (West 1985)</td>
<td>290</td>
</tr>
<tr>
<td>29 U.S.C. 1022 (West 1985)</td>
<td>290</td>
</tr>
<tr>
<td>29 U.S.C. 1027 (West 1985)</td>
<td>290</td>
</tr>
<tr>
<td>29 U.S.C. 1059 (West 1985)</td>
<td>290</td>
</tr>
<tr>
<td>29 U.S.C. 1104 (West 1985)</td>
<td>290</td>
</tr>
<tr>
<td>42 U.S.C. 10243(a) (West 1992)</td>
<td>309</td>
</tr>
<tr>
<td>42 U.S.C. 10243(b) (West 1992)</td>
<td>309</td>
</tr>
<tr>
<td>47 U.S.C. 521 (West 1991)</td>
<td>248</td>
</tr>
<tr>
<td>47 U.S.C. 521(4) (West 1991)</td>
<td>255</td>
</tr>
<tr>
<td>47 U.S.C. 532 (West 1991)</td>
<td>255</td>
</tr>
<tr>
<td>47 U.S.C. 543 (West 1991)</td>
<td>250</td>
</tr>
<tr>
<td>47 U.S.C. 543(a) (West 1991)</td>
<td>251</td>
</tr>
<tr>
<td>47 U.S.C. 543(f)&amp;(g) (West 1991)</td>
<td>251</td>
</tr>
<tr>
<td>47 U.S.C. 544 (West 1991)</td>
<td>250</td>
</tr>
<tr>
<td>47 U.S.C. 553 (West 1991)</td>
<td>255</td>
</tr>
<tr>
<td>47 U.S.C. 556(a) (West 1991)</td>
<td>255</td>
</tr>
<tr>
<td>50 U.S.C. 574 (West 1990)</td>
<td>246</td>
</tr>
</tbody>
</table>

## UNITED STATES CONSTITUTION

<table>
<thead>
<tr>
<th>Article</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. I, sec. 8, cl. 3</td>
<td>332</td>
</tr>
<tr>
<td>Art. I, sec. 10, cl. 1</td>
<td>109</td>
</tr>
</tbody>
</table>

## WISCONSIN CONSTITUTION

<table>
<thead>
<tr>
<th>Article</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. I, sec. 12</td>
<td>109</td>
</tr>
<tr>
<td>IV, sec. 18</td>
<td>167</td>
</tr>
<tr>
<td>IV, sec. 22</td>
<td>216</td>
</tr>
<tr>
<td>IV, sec. 23</td>
<td>216</td>
</tr>
<tr>
<td>IV, sec. 23a</td>
<td>217</td>
</tr>
<tr>
<td>IV, sec. 24</td>
<td>53, 82</td>
</tr>
<tr>
<td>IV, sec. 24(1)</td>
<td>54</td>
</tr>
<tr>
<td>IV, sec. 24(2)</td>
<td>56</td>
</tr>
<tr>
<td>IV, sec. 24(3) &amp; (4)</td>
<td>56</td>
</tr>
<tr>
<td>IV, sec. 24(5)</td>
<td>82</td>
</tr>
<tr>
<td>IV, sec. 24(6)</td>
<td>56</td>
</tr>
<tr>
<td>IV, sec. 26</td>
<td>187, 261</td>
</tr>
<tr>
<td>IV, sec. 31</td>
<td>167</td>
</tr>
<tr>
<td>IV, sec. 32</td>
<td>172</td>
</tr>
<tr>
<td>V, sec. 10</td>
<td>328</td>
</tr>
<tr>
<td>V, sec. 10(1)(c)</td>
<td>330</td>
</tr>
<tr>
<td>V, sec. 10(3)</td>
<td>331</td>
</tr>
</tbody>
</table>

## SENATE BILLS

<table>
<thead>
<tr>
<th>Year</th>
<th>Bill</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987</td>
<td>No. 444</td>
<td>126</td>
</tr>
<tr>
<td>1989</td>
<td>No. 23</td>
<td>127</td>
</tr>
<tr>
<td>1989</td>
<td>No. 148</td>
<td>108</td>
</tr>
<tr>
<td>1989</td>
<td>No. 542</td>
<td>20</td>
</tr>
<tr>
<td>1991</td>
<td>No. 135</td>
<td>317</td>
</tr>
<tr>
<td>1991</td>
<td>No. 135, sec. 10</td>
<td>319</td>
</tr>
<tr>
<td>1991</td>
<td>No. 135, sec. 36</td>
<td>317</td>
</tr>
</tbody>
</table>

## ASSEMBLY BILLS

<table>
<thead>
<tr>
<th>Year</th>
<th>Bill</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>No. 425</td>
<td>214</td>
</tr>
<tr>
<td>1989</td>
<td>No. 611, sec. 17</td>
<td>211</td>
</tr>
<tr>
<td>1991</td>
<td>No. 6</td>
<td>248</td>
</tr>
<tr>
<td>1991</td>
<td>No. 91</td>
<td>173, 191</td>
</tr>
</tbody>
</table>
### SESSION LAWS

<table>
<thead>
<tr>
<th>Year</th>
<th>Section/Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1919</td>
<td>Ch. 344</td>
<td>15</td>
</tr>
<tr>
<td>1929</td>
<td>Ch. 369</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>Ch. 508</td>
<td>15</td>
</tr>
<tr>
<td>1937</td>
<td>Ch. 358</td>
<td>283</td>
</tr>
<tr>
<td>1955</td>
<td>Ch. 536</td>
<td>15</td>
</tr>
<tr>
<td>1959</td>
<td>Ch. 595</td>
<td>239</td>
</tr>
<tr>
<td>1961</td>
<td>Ch. 77, sec. 4</td>
<td>15</td>
</tr>
<tr>
<td>1963</td>
<td>Ch. 459, sec. 10</td>
<td>15</td>
</tr>
<tr>
<td>1969</td>
<td>Ch. 154, sec. 122(m)</td>
<td>147</td>
</tr>
<tr>
<td></td>
<td>Ch. 154, sec. 375(m)</td>
<td>147</td>
</tr>
<tr>
<td>1971</td>
<td>Ch. 125, sec. 518</td>
<td>147</td>
</tr>
<tr>
<td>1973</td>
<td>Ch. 297</td>
<td>178</td>
</tr>
<tr>
<td>1975</td>
<td>Ch. 39</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>Ch. 92</td>
<td>214</td>
</tr>
<tr>
<td></td>
<td>Ch. 322, sec. 10</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>Ch. 426</td>
<td>132, 178</td>
</tr>
<tr>
<td>1979</td>
<td>Ch. 34, sec. 2006m(1)</td>
<td>147</td>
</tr>
<tr>
<td></td>
<td>Ch. 34, sec. 2006m(1)c</td>
<td>148</td>
</tr>
<tr>
<td></td>
<td>Ch. 190</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>Ch. 221, sec. 903g</td>
<td>147</td>
</tr>
<tr>
<td>1981</td>
<td>Ch. 20</td>
<td>240</td>
</tr>
<tr>
<td></td>
<td>Ch. 317</td>
<td>152</td>
</tr>
<tr>
<td>1983</td>
<td>Act 84</td>
<td>178</td>
</tr>
<tr>
<td></td>
<td>Act 532</td>
<td>62</td>
</tr>
<tr>
<td>1985</td>
<td>Act 26, sec. 6</td>
<td>178</td>
</tr>
<tr>
<td></td>
<td>Act 29</td>
<td>138</td>
</tr>
<tr>
<td></td>
<td>Act 29, sec. 153m</td>
<td>178</td>
</tr>
<tr>
<td></td>
<td>Act 29, secs. 862 &amp; 863</td>
<td>229</td>
</tr>
<tr>
<td></td>
<td>Act 29, secs. 1150-61</td>
<td>215</td>
</tr>
<tr>
<td></td>
<td>Act 29, sec. 3053</td>
<td>143</td>
</tr>
<tr>
<td></td>
<td>Act 315</td>
<td>40</td>
</tr>
<tr>
<td>1987</td>
<td>Act 255, sec. 5, 34, 44</td>
<td>160</td>
</tr>
<tr>
<td></td>
<td>Act 305, secs. 2-5</td>
<td>178</td>
</tr>
<tr>
<td></td>
<td>Act 326, sec. 6</td>
<td>95</td>
</tr>
<tr>
<td></td>
<td>Act 354</td>
<td>124</td>
</tr>
<tr>
<td></td>
<td>Act 377, sec. 15</td>
<td>28</td>
</tr>
<tr>
<td></td>
<td>Act 399</td>
<td>153</td>
</tr>
<tr>
<td></td>
<td>Act 417, sec. 1</td>
<td>207</td>
</tr>
<tr>
<td>1989</td>
<td>Act 13</td>
<td>106</td>
</tr>
<tr>
<td></td>
<td>Act 13, sec. 18</td>
<td>111</td>
</tr>
<tr>
<td></td>
<td>Act 13, sec. 26</td>
<td>111</td>
</tr>
<tr>
<td></td>
<td>Act 13, sec. 47(1)</td>
<td>111</td>
</tr>
<tr>
<td></td>
<td>Act 13, sec. 47(2)</td>
<td>115</td>
</tr>
<tr>
<td></td>
<td>Act 31</td>
<td>19, 95</td>
</tr>
<tr>
<td></td>
<td>Act 31, sec. 2900</td>
<td>21</td>
</tr>
<tr>
<td></td>
<td>Act 117</td>
<td>19</td>
</tr>
<tr>
<td></td>
<td>Act 122</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>Act 171</td>
<td>46</td>
</tr>
<tr>
<td></td>
<td>Act 206</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Act 241</td>
<td>119</td>
</tr>
<tr>
<td></td>
<td>Act 335</td>
<td>313</td>
</tr>
<tr>
<td></td>
<td>Act 336</td>
<td>19</td>
</tr>
<tr>
<td></td>
<td>Act 338</td>
<td>202, 206</td>
</tr>
<tr>
<td></td>
<td>Act 338, sec. 17</td>
<td>211</td>
</tr>
<tr>
<td>1991</td>
<td>Act 39</td>
<td>187</td>
</tr>
<tr>
<td></td>
<td>Act 39, sec. 1148m</td>
<td>167</td>
</tr>
<tr>
<td></td>
<td>Act 39, sec. 1154ky</td>
<td>196</td>
</tr>
<tr>
<td></td>
<td>Act 39, sec. 1154Li</td>
<td>191</td>
</tr>
<tr>
<td></td>
<td>Act 39, sec. 1154Lj</td>
<td>196</td>
</tr>
<tr>
<td></td>
<td>Act 39, sec. 3516r</td>
<td>290</td>
</tr>
<tr>
<td></td>
<td>Act 39, sec 9108</td>
<td>146</td>
</tr>
<tr>
<td></td>
<td>Act 39, sec. 9108(1)(b)</td>
<td>146</td>
</tr>
<tr>
<td></td>
<td>Act 39, sec. 9419(1g)</td>
<td>187</td>
</tr>
<tr>
<td></td>
<td>Act 107</td>
<td>188</td>
</tr>
<tr>
<td></td>
<td>Act 269, sec. 1117g</td>
<td>327</td>
</tr>
</tbody>
</table>

### OPINIONS

<table>
<thead>
<tr>
<th>Year</th>
<th>Section/Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1910</td>
<td>OAG 373</td>
<td>41</td>
</tr>
<tr>
<td>1916</td>
<td>OAG 380</td>
<td>55</td>
</tr>
<tr>
<td>1920</td>
<td>OAG 9</td>
<td>55</td>
</tr>
<tr>
<td>1922</td>
<td>OAG 396</td>
<td>55</td>
</tr>
<tr>
<td>1934</td>
<td>OAG 396</td>
<td>55</td>
</tr>
<tr>
<td>1939</td>
<td>OAG 457</td>
<td>55</td>
</tr>
<tr>
<td>1939</td>
<td>OAG 536</td>
<td>55</td>
</tr>
<tr>
<td>1943</td>
<td>OAG 181</td>
<td>55</td>
</tr>
<tr>
<td>1948</td>
<td>OAG 184</td>
<td>55</td>
</tr>
<tr>
<td>1952</td>
<td>OAG 111</td>
<td>55</td>
</tr>
<tr>
<td>1956</td>
<td>OAG 166</td>
<td>263</td>
</tr>
<tr>
<td>1956</td>
<td>OAG 267</td>
<td>121</td>
</tr>
<tr>
<td>1960</td>
<td>OAG v</td>
<td>177</td>
</tr>
<tr>
<td>1961</td>
<td>OAG 47</td>
<td>41</td>
</tr>
<tr>
<td>1971</td>
<td>OAG 98</td>
<td>33</td>
</tr>
<tr>
<td>1971</td>
<td>OAG 382</td>
<td>336</td>
</tr>
<tr>
<td>1972</td>
<td>OAG 116</td>
<td>48</td>
</tr>
<tr>
<td>1972</td>
<td>OAG 165</td>
<td>262</td>
</tr>
<tr>
<td>1972</td>
<td>OAG 214</td>
<td>225</td>
</tr>
<tr>
<td>1972</td>
<td>OAG 269</td>
<td>245</td>
</tr>
<tr>
<td>1972</td>
<td>OAG 332</td>
<td>149</td>
</tr>
<tr>
<td>1972</td>
<td>OAG 401</td>
<td>153</td>
</tr>
<tr>
<td>1972</td>
<td>OAG 403</td>
<td>262</td>
</tr>
<tr>
<td>1972</td>
<td>OAG 405</td>
<td>55</td>
</tr>
<tr>
<td>1973</td>
<td>OAG 35</td>
<td>48</td>
</tr>
<tr>
<td>1973</td>
<td>OAG 122</td>
<td>55</td>
</tr>
<tr>
<td>1973</td>
<td>OAG 250</td>
<td>121</td>
</tr>
<tr>
<td>1974</td>
<td>OAG 217</td>
<td>69</td>
</tr>
<tr>
<td>1976</td>
<td>OAG 49</td>
<td>304</td>
</tr>
</tbody>
</table>
## Statutes Cited

<table>
<thead>
<tr>
<th>Year</th>
<th>Volume</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>65</td>
<td>OAG 62</td>
<td>261</td>
</tr>
<tr>
<td>66</td>
<td>OAG 113</td>
<td>64, 132</td>
</tr>
<tr>
<td>66</td>
<td>OAG 148</td>
<td>33, 76</td>
</tr>
<tr>
<td>66</td>
<td>OAG 249</td>
<td>303</td>
</tr>
<tr>
<td>66</td>
<td>OAG 315</td>
<td>121</td>
</tr>
<tr>
<td>66</td>
<td>OAG 329</td>
<td>261</td>
</tr>
<tr>
<td>66</td>
<td>OAG 335</td>
<td>95</td>
</tr>
<tr>
<td>66</td>
<td>OAG 358</td>
<td>223</td>
</tr>
<tr>
<td>67</td>
<td>OAG 77</td>
<td>315</td>
</tr>
<tr>
<td>67</td>
<td>OAG 236</td>
<td>343</td>
</tr>
<tr>
<td>67</td>
<td>OAG 304</td>
<td>80</td>
</tr>
<tr>
<td>67</td>
<td>OAG 315</td>
<td>69</td>
</tr>
<tr>
<td>68</td>
<td>OAG 92</td>
<td>49</td>
</tr>
<tr>
<td>68</td>
<td>OAG 223</td>
<td>304</td>
</tr>
<tr>
<td>69</td>
<td>OAG 1</td>
<td>262</td>
</tr>
<tr>
<td>69</td>
<td>OAG 58</td>
<td>77</td>
</tr>
<tr>
<td>69</td>
<td>OAG 95</td>
<td>226</td>
</tr>
<tr>
<td>69</td>
<td>OAG 113</td>
<td>285</td>
</tr>
<tr>
<td>70</td>
<td>OAG 17</td>
<td>303</td>
</tr>
<tr>
<td>70</td>
<td>OAG 59</td>
<td>55</td>
</tr>
<tr>
<td>71</td>
<td>OAG 49</td>
<td>11</td>
</tr>
<tr>
<td>72</td>
<td>OAG 43</td>
<td>7</td>
</tr>
<tr>
<td>72</td>
<td>OAG 45</td>
<td>193, 261</td>
</tr>
<tr>
<td>72</td>
<td>OAG 129</td>
<td>152</td>
</tr>
<tr>
<td>72</td>
<td>OAG 132</td>
<td>95</td>
</tr>
<tr>
<td>72</td>
<td>OAG 161</td>
<td>122</td>
</tr>
<tr>
<td>73</td>
<td>OAG 54</td>
<td>133</td>
</tr>
<tr>
<td>73</td>
<td>OAG 131</td>
<td>70</td>
</tr>
<tr>
<td>74</td>
<td>OAG 38</td>
<td>134</td>
</tr>
<tr>
<td>74</td>
<td>OAG 228</td>
<td>50, 261</td>
</tr>
<tr>
<td>75</td>
<td>OAG 43</td>
<td>3</td>
</tr>
<tr>
<td>75</td>
<td>OAG 49</td>
<td>3</td>
</tr>
<tr>
<td>75</td>
<td>OAG 182</td>
<td>5</td>
</tr>
<tr>
<td>75</td>
<td>OAG 269</td>
<td>21</td>
</tr>
<tr>
<td>76</td>
<td>OAG 15</td>
<td>33</td>
</tr>
<tr>
<td>76</td>
<td>OAG 60</td>
<td>52</td>
</tr>
<tr>
<td>76</td>
<td>OAG 77</td>
<td>81</td>
</tr>
<tr>
<td>76</td>
<td>OAG 169</td>
<td>80, 345</td>
</tr>
<tr>
<td>76</td>
<td>OAG 189</td>
<td>95</td>
</tr>
<tr>
<td>77</td>
<td>OAG Preface (1988)</td>
<td>344</td>
</tr>
<tr>
<td>77</td>
<td>OAG Preface, No. 3.H. (1988)</td>
<td>52</td>
</tr>
<tr>
<td>77</td>
<td>OAG Preface, No. 3.C. (1988)</td>
<td>82</td>
</tr>
<tr>
<td>77</td>
<td>OAG 113</td>
<td>217</td>
</tr>
<tr>
<td>77</td>
<td>OAG 160</td>
<td>206</td>
</tr>
<tr>
<td>77</td>
<td>OAG 230</td>
<td>93</td>
</tr>
<tr>
<td>77</td>
<td>OAG 249</td>
<td>42</td>
</tr>
<tr>
<td>78</td>
<td>OAG 38</td>
<td>225</td>
</tr>
<tr>
<td>78</td>
<td>OAG 85</td>
<td>100</td>
</tr>
<tr>
<td>78</td>
<td>OAG 122</td>
<td>100</td>
</tr>
<tr>
<td>78</td>
<td>OAG 149</td>
<td>207</td>
</tr>
<tr>
<td>79</td>
<td>OAG 8 (1990)</td>
<td>306</td>
</tr>
<tr>
<td>79</td>
<td>OAG 14 (1990)</td>
<td>53</td>
</tr>
</tbody>
</table>

## Statutes

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 13</td>
<td>subch. III</td>
<td>202, 205</td>
</tr>
<tr>
<td>19</td>
<td>subch. III</td>
<td>202, 205</td>
</tr>
<tr>
<td>20</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>29</td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>49</td>
<td></td>
<td>229</td>
</tr>
<tr>
<td>51</td>
<td></td>
<td>299</td>
</tr>
<tr>
<td>59</td>
<td></td>
<td>82</td>
</tr>
<tr>
<td>60</td>
<td></td>
<td>62</td>
</tr>
<tr>
<td>108</td>
<td></td>
<td>159</td>
</tr>
<tr>
<td>116</td>
<td></td>
<td>297</td>
</tr>
<tr>
<td>125</td>
<td></td>
<td>221</td>
</tr>
<tr>
<td>163</td>
<td></td>
<td>56, 335</td>
</tr>
<tr>
<td>181</td>
<td></td>
<td>61, 129</td>
</tr>
<tr>
<td>213</td>
<td></td>
<td>61</td>
</tr>
<tr>
<td>217</td>
<td></td>
<td>337</td>
</tr>
<tr>
<td>218</td>
<td></td>
<td>337</td>
</tr>
<tr>
<td>227</td>
<td></td>
<td>325</td>
</tr>
<tr>
<td>565</td>
<td></td>
<td>60</td>
</tr>
<tr>
<td>633</td>
<td></td>
<td>290</td>
</tr>
<tr>
<td>765</td>
<td></td>
<td>243</td>
</tr>
<tr>
<td>767</td>
<td></td>
<td>231</td>
</tr>
<tr>
<td>784</td>
<td></td>
<td>122</td>
</tr>
<tr>
<td>Sec. 5.02(22)</td>
<td></td>
<td>69</td>
</tr>
<tr>
<td>5.58</td>
<td></td>
<td>69</td>
</tr>
<tr>
<td>6.10</td>
<td></td>
<td>245</td>
</tr>
<tr>
<td>6.10(3)</td>
<td></td>
<td>242</td>
</tr>
<tr>
<td>6.22(2)(a)</td>
<td></td>
<td>245</td>
</tr>
<tr>
<td>8.01(3)(a) &amp; (b)</td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>13.48(2)(b)1.</td>
<td></td>
<td>148</td>
</tr>
<tr>
<td>13.48(10)</td>
<td></td>
<td>148</td>
</tr>
<tr>
<td>13.62(12)</td>
<td></td>
<td>208</td>
</tr>
<tr>
<td>13.625</td>
<td></td>
<td>205</td>
</tr>
<tr>
<td>13.625(1)</td>
<td></td>
<td>207</td>
</tr>
<tr>
<td>13.625(2)</td>
<td></td>
<td>207</td>
</tr>
<tr>
<td>13.625(7)</td>
<td></td>
<td>202, 205</td>
</tr>
<tr>
<td>13.91</td>
<td></td>
<td>71</td>
</tr>
<tr>
<td>13.92</td>
<td></td>
<td>71</td>
</tr>
<tr>
<td>13.93</td>
<td></td>
<td>71</td>
</tr>
<tr>
<td>13.94</td>
<td></td>
<td>71</td>
</tr>
<tr>
<td>13.95</td>
<td></td>
<td>71</td>
</tr>
<tr>
<td>14.90(3)(b) (1959)</td>
<td></td>
<td>177</td>
</tr>
<tr>
<td>17.03</td>
<td></td>
<td>48, 120</td>
</tr>
<tr>
<td>17.03(4)</td>
<td></td>
<td>119</td>
</tr>
<tr>
<td>17.03(4)(a)</td>
<td></td>
<td>121</td>
</tr>
<tr>
<td>17.03(4)(d)</td>
<td></td>
<td>121</td>
</tr>
<tr>
<td>Section Numbers</td>
<td>Page Numbers</td>
<td></td>
</tr>
<tr>
<td>-------------------------</td>
<td>--------------</td>
<td></td>
</tr>
<tr>
<td>17.03(10)</td>
<td>48</td>
<td></td>
</tr>
<tr>
<td>17.07(4) &amp; (5)</td>
<td>47</td>
<td></td>
</tr>
<tr>
<td>17.10(2)</td>
<td>47</td>
<td></td>
</tr>
<tr>
<td>17.22</td>
<td>47</td>
<td></td>
</tr>
<tr>
<td>17.22(1)</td>
<td>47</td>
<td></td>
</tr>
<tr>
<td>19.32(1)</td>
<td>136</td>
<td></td>
</tr>
<tr>
<td>19.41</td>
<td>186</td>
<td></td>
</tr>
<tr>
<td>19.42(1)</td>
<td>203</td>
<td></td>
</tr>
<tr>
<td>19.42(13)</td>
<td>208</td>
<td></td>
</tr>
<tr>
<td>19.42(14)</td>
<td>209</td>
<td></td>
</tr>
<tr>
<td>19.44</td>
<td>33, 183</td>
<td></td>
</tr>
<tr>
<td>19.44(1)(b)</td>
<td>183</td>
<td></td>
</tr>
<tr>
<td>19.44(3)(b)</td>
<td>184</td>
<td></td>
</tr>
<tr>
<td>19.45(2)</td>
<td>201</td>
<td></td>
</tr>
<tr>
<td>19.45(3m)</td>
<td>201</td>
<td></td>
</tr>
<tr>
<td>19.46</td>
<td>33</td>
<td></td>
</tr>
<tr>
<td>19.56</td>
<td>208</td>
<td></td>
</tr>
<tr>
<td>19.56(1)</td>
<td>203</td>
<td></td>
</tr>
<tr>
<td>19.56(3)</td>
<td>201, 209</td>
<td></td>
</tr>
<tr>
<td>19.56(3)(a)</td>
<td>202, 210</td>
<td></td>
</tr>
<tr>
<td>19.56(3)(b)</td>
<td>202</td>
<td></td>
</tr>
<tr>
<td>19.81(1)</td>
<td>134, 180</td>
<td></td>
</tr>
<tr>
<td>19.81(4)</td>
<td>134</td>
<td></td>
</tr>
<tr>
<td>19.81-19.98</td>
<td>129</td>
<td></td>
</tr>
<tr>
<td>19.82(1)</td>
<td>129, 180</td>
<td></td>
</tr>
<tr>
<td>19.85(1)</td>
<td>179</td>
<td></td>
</tr>
<tr>
<td>19.85(1)(c)</td>
<td>176</td>
<td></td>
</tr>
<tr>
<td>20.923</td>
<td>194</td>
<td></td>
</tr>
<tr>
<td>20.924</td>
<td>146</td>
<td></td>
</tr>
<tr>
<td>20.924(1)(a)</td>
<td>146</td>
<td></td>
</tr>
<tr>
<td>20.924(1)(d)</td>
<td>149</td>
<td></td>
</tr>
<tr>
<td>29.01(4)</td>
<td>11</td>
<td></td>
</tr>
<tr>
<td>29.01(6)</td>
<td>11</td>
<td></td>
</tr>
<tr>
<td>29.01(12)</td>
<td>246</td>
<td></td>
</tr>
<tr>
<td>29.01(14)</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>29.09(12)</td>
<td>246</td>
<td></td>
</tr>
<tr>
<td>29.093(2)(i)</td>
<td>246</td>
<td></td>
</tr>
<tr>
<td>29.245</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>29.245(1)(b)</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>29.245(1)(d)</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>29.245(4)</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>29.245(4)(b)</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>29.245(5)</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>29.245(5)(b)</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>29.574</td>
<td>15</td>
<td></td>
</tr>
<tr>
<td>29.574(6)(a)</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>29.574(6)(c)</td>
<td>16</td>
<td></td>
</tr>
<tr>
<td>29.575(4)</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>29.578</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>29.578(4)</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>29.578(7)</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>29.578(8)</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>29.578(9)</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>29.578(14)</td>
<td>16</td>
<td></td>
</tr>
<tr>
<td>36.09(1)(j)</td>
<td>139</td>
<td></td>
</tr>
<tr>
<td>36.09(1)(k)</td>
<td>138</td>
<td></td>
</tr>
<tr>
<td>36.09(1)(k)2.a</td>
<td>140</td>
<td></td>
</tr>
<tr>
<td>36.09(1)(k)2.b</td>
<td>140</td>
<td></td>
</tr>
<tr>
<td>36.09(1)(k)2.c</td>
<td>140</td>
<td></td>
</tr>
<tr>
<td>36.09(1)(k)2.d</td>
<td>140</td>
<td></td>
</tr>
<tr>
<td>36.50(2)(a)</td>
<td>308</td>
<td></td>
</tr>
<tr>
<td>36.50(3)</td>
<td>308</td>
<td></td>
</tr>
<tr>
<td>36.50(5)</td>
<td>310</td>
<td></td>
</tr>
<tr>
<td>36.50(8)</td>
<td>309</td>
<td></td>
</tr>
<tr>
<td>36.50(8)(a)</td>
<td>309</td>
<td></td>
</tr>
<tr>
<td>40.01(1)</td>
<td>197</td>
<td></td>
</tr>
<tr>
<td>40.01(2)</td>
<td>197</td>
<td></td>
</tr>
<tr>
<td>40.02(17)(c) (1985)</td>
<td>167</td>
<td></td>
</tr>
<tr>
<td>40.02(25)(b)3</td>
<td>188</td>
<td></td>
</tr>
<tr>
<td>40.02(25)(b)6</td>
<td>188</td>
<td></td>
</tr>
<tr>
<td>40.02(35)</td>
<td>197</td>
<td></td>
</tr>
<tr>
<td>40.03(1)(e)</td>
<td>105</td>
<td></td>
</tr>
<tr>
<td>40.03(5)(b)</td>
<td>104</td>
<td></td>
</tr>
<tr>
<td>40.04</td>
<td>196</td>
<td></td>
</tr>
<tr>
<td>40.04(10)</td>
<td>197</td>
<td></td>
</tr>
<tr>
<td>40.05</td>
<td>101, 196</td>
<td></td>
</tr>
<tr>
<td>40.05(1)(a)1</td>
<td>103</td>
<td></td>
</tr>
<tr>
<td>40.05(2)</td>
<td>103</td>
<td></td>
</tr>
<tr>
<td>40.05(2)(a)</td>
<td>106</td>
<td></td>
</tr>
<tr>
<td>40.05(2)(am)</td>
<td>116</td>
<td></td>
</tr>
<tr>
<td>40.05(2)(b)</td>
<td>114</td>
<td></td>
</tr>
<tr>
<td>40.05(2m)</td>
<td>103</td>
<td></td>
</tr>
<tr>
<td>40.05(2n)</td>
<td>101</td>
<td></td>
</tr>
<tr>
<td>40.05(2n)(a)</td>
<td>109</td>
<td></td>
</tr>
<tr>
<td>40.05(2n)(a)3</td>
<td>108</td>
<td></td>
</tr>
<tr>
<td>40.05(4)(b)</td>
<td>188</td>
<td></td>
</tr>
<tr>
<td>40.05(4)(bc)</td>
<td>191</td>
<td></td>
</tr>
<tr>
<td>40.05(4)(br)</td>
<td>197</td>
<td></td>
</tr>
<tr>
<td>40.01(1)</td>
<td>110</td>
<td></td>
</tr>
<tr>
<td>40.26(3)(b)</td>
<td>171</td>
<td></td>
</tr>
<tr>
<td>46.23</td>
<td>31</td>
<td></td>
</tr>
<tr>
<td>46.23(1)</td>
<td>31</td>
<td></td>
</tr>
<tr>
<td>46.23(2)(a)</td>
<td>31</td>
<td></td>
</tr>
<tr>
<td>46.23(4)</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>46.23(4)(a)1</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>46.23(5)(c)</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>46.23(5)(d)</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>46.25</td>
<td>226</td>
<td></td>
</tr>
<tr>
<td>46.25(1)</td>
<td>228</td>
<td></td>
</tr>
<tr>
<td>Statutes Cited</td>
<td>351</td>
<td></td>
</tr>
<tr>
<td>----------------</td>
<td>-----</td>
<td></td>
</tr>
<tr>
<td>46.25(2m)</td>
<td>229</td>
<td></td>
</tr>
<tr>
<td>48.627</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>49.177</td>
<td>226</td>
<td></td>
</tr>
<tr>
<td>49.53</td>
<td>226</td>
<td></td>
</tr>
<tr>
<td>49.53(1m)</td>
<td>226</td>
<td></td>
</tr>
<tr>
<td>50.50(1)(a) &amp; (c)</td>
<td>219</td>
<td></td>
</tr>
<tr>
<td>51.06 (1969)</td>
<td>304</td>
<td></td>
</tr>
<tr>
<td>51.15</td>
<td>299</td>
<td></td>
</tr>
<tr>
<td>51.15(2)</td>
<td>299</td>
<td></td>
</tr>
<tr>
<td>51.15(2)(a)</td>
<td>299</td>
<td></td>
</tr>
<tr>
<td>51.15(2)(b)</td>
<td>299</td>
<td></td>
</tr>
<tr>
<td>51.15(2)(c)</td>
<td>299</td>
<td></td>
</tr>
<tr>
<td>51.15(2)(d)</td>
<td>299</td>
<td></td>
</tr>
<tr>
<td>51.15(3)</td>
<td>304</td>
<td></td>
</tr>
<tr>
<td>51.15(5)</td>
<td>303</td>
<td></td>
</tr>
<tr>
<td>51.20</td>
<td>301</td>
<td></td>
</tr>
<tr>
<td>51.20(1)</td>
<td>305</td>
<td></td>
</tr>
<tr>
<td>51.20(2)</td>
<td>304</td>
<td></td>
</tr>
<tr>
<td>51.20(8)(b)</td>
<td>304</td>
<td></td>
</tr>
<tr>
<td>51.20(13)</td>
<td>306</td>
<td></td>
</tr>
<tr>
<td>51.20(13)(a)</td>
<td>304</td>
<td></td>
</tr>
<tr>
<td>51.20(14)</td>
<td>299</td>
<td></td>
</tr>
<tr>
<td>51.20(16)</td>
<td>306</td>
<td></td>
</tr>
<tr>
<td>51.42</td>
<td>299</td>
<td></td>
</tr>
<tr>
<td>51.437</td>
<td>299</td>
<td></td>
</tr>
<tr>
<td>59.01(1)</td>
<td>80, 342</td>
<td></td>
</tr>
<tr>
<td>59.02(1)</td>
<td>341</td>
<td></td>
</tr>
<tr>
<td>59.025</td>
<td>225</td>
<td></td>
</tr>
<tr>
<td>59.031</td>
<td>215</td>
<td></td>
</tr>
<tr>
<td>59.031(2)(a)</td>
<td>49</td>
<td></td>
</tr>
<tr>
<td>59.031(5)</td>
<td>214</td>
<td></td>
</tr>
<tr>
<td>59.032(5)</td>
<td>214</td>
<td></td>
</tr>
<tr>
<td>59.06(1)</td>
<td>260</td>
<td></td>
</tr>
<tr>
<td>59.07</td>
<td>225</td>
<td></td>
</tr>
<tr>
<td>59.07(1)(a)</td>
<td>80, 342</td>
<td></td>
</tr>
<tr>
<td>59.07(1)(c)</td>
<td>50, 342</td>
<td></td>
</tr>
<tr>
<td>59.07(1)(d)</td>
<td>51</td>
<td></td>
</tr>
<tr>
<td>59.07(5)</td>
<td>216</td>
<td></td>
</tr>
<tr>
<td>59.07(34g)</td>
<td>46</td>
<td></td>
</tr>
<tr>
<td>59.07(75)</td>
<td>342</td>
<td></td>
</tr>
<tr>
<td>59.07(75)(a)</td>
<td>342</td>
<td></td>
</tr>
<tr>
<td>59.07(135)</td>
<td>314</td>
<td></td>
</tr>
<tr>
<td>59.07(135)(L)</td>
<td>312</td>
<td></td>
</tr>
<tr>
<td>59.07(141)</td>
<td>95</td>
<td></td>
</tr>
<tr>
<td>59.071</td>
<td>342</td>
<td></td>
</tr>
<tr>
<td>59.071(4)(d)</td>
<td>343</td>
<td></td>
</tr>
<tr>
<td>59.08</td>
<td>51</td>
<td></td>
</tr>
<tr>
<td>59.08(1)</td>
<td>51</td>
<td></td>
</tr>
<tr>
<td>59.15(1)</td>
<td>260</td>
<td></td>
</tr>
<tr>
<td>59.15(1)(a)</td>
<td>263</td>
<td></td>
</tr>
<tr>
<td>59.15(1)(a)1</td>
<td>261</td>
<td></td>
</tr>
<tr>
<td>59.21</td>
<td>119</td>
<td></td>
</tr>
<tr>
<td>59.21(1)</td>
<td>119</td>
<td></td>
</tr>
<tr>
<td>59.21(1)(c)</td>
<td>122</td>
<td></td>
</tr>
<tr>
<td>59.21(4)</td>
<td>122</td>
<td></td>
</tr>
<tr>
<td>59.21(8)(a)</td>
<td>121</td>
<td></td>
</tr>
<tr>
<td>59.23</td>
<td>41</td>
<td></td>
</tr>
<tr>
<td>59.23(4)</td>
<td>306</td>
<td></td>
</tr>
<tr>
<td>59.23(7)</td>
<td>306</td>
<td></td>
</tr>
<tr>
<td>59.24</td>
<td>41</td>
<td></td>
</tr>
<tr>
<td>59.245</td>
<td>91</td>
<td></td>
</tr>
<tr>
<td>59.25</td>
<td>41</td>
<td></td>
</tr>
<tr>
<td>59.39-59.42</td>
<td>224</td>
<td></td>
</tr>
<tr>
<td>59.395(8)</td>
<td>224</td>
<td></td>
</tr>
<tr>
<td>59.42(1)</td>
<td>224</td>
<td></td>
</tr>
<tr>
<td>59.51(1)</td>
<td>76</td>
<td></td>
</tr>
<tr>
<td>60.55</td>
<td>63</td>
<td></td>
</tr>
<tr>
<td>60.55(1)(a)</td>
<td>63</td>
<td></td>
</tr>
<tr>
<td>60.55(1)(a)1 &amp; 4</td>
<td>63</td>
<td></td>
</tr>
<tr>
<td>60.55(1)(b)</td>
<td>63</td>
<td></td>
</tr>
<tr>
<td>60.55(2)</td>
<td>63</td>
<td></td>
</tr>
<tr>
<td>61.65(2)(a)1</td>
<td>67</td>
<td></td>
</tr>
<tr>
<td>62.13(8)</td>
<td>67</td>
<td></td>
</tr>
<tr>
<td>62.22(2)</td>
<td>345</td>
<td></td>
</tr>
<tr>
<td>65.90(5)</td>
<td>263</td>
<td></td>
</tr>
<tr>
<td>66.082</td>
<td>251</td>
<td></td>
</tr>
<tr>
<td>66.082(3m)</td>
<td>248</td>
<td></td>
</tr>
<tr>
<td>66.197</td>
<td>260</td>
<td></td>
</tr>
<tr>
<td>66.20(4)</td>
<td>95</td>
<td></td>
</tr>
<tr>
<td>66.29(2)</td>
<td>51</td>
<td></td>
</tr>
<tr>
<td>66.501(1)(a)</td>
<td>345</td>
<td></td>
</tr>
<tr>
<td>66.77(3)(b)</td>
<td>179</td>
<td></td>
</tr>
<tr>
<td>66.884(6)</td>
<td>206</td>
<td></td>
</tr>
<tr>
<td>69.01(15)</td>
<td>35</td>
<td></td>
</tr>
<tr>
<td>69.01(26)</td>
<td>75</td>
<td></td>
</tr>
<tr>
<td>69.03</td>
<td>35, 75</td>
<td></td>
</tr>
<tr>
<td>69.03(1)</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>69.03(2)</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>69.03(6)</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>69.03(7)</td>
<td>35</td>
<td></td>
</tr>
<tr>
<td>69.05</td>
<td>35, 75</td>
<td></td>
</tr>
<tr>
<td>69.05(1)</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>69.05(4)</td>
<td>38</td>
<td></td>
</tr>
<tr>
<td>69.07</td>
<td>73</td>
<td></td>
</tr>
<tr>
<td>69.20(1)</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>69.21(1)</td>
<td>35</td>
<td></td>
</tr>
<tr>
<td>69.21(1)(a)</td>
<td>35</td>
<td></td>
</tr>
<tr>
<td>69.21(1)(a)2.a</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>69.21(1)(a)2.b</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>69.21(2)</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>Statute</td>
<td>Page</td>
<td></td>
</tr>
<tr>
<td>---------</td>
<td>------</td>
<td></td>
</tr>
<tr>
<td>345.05</td>
<td>24</td>
<td></td>
</tr>
<tr>
<td>345.05(1)(c)</td>
<td>99</td>
<td></td>
</tr>
<tr>
<td>345.05(2)</td>
<td>28</td>
<td></td>
</tr>
<tr>
<td>345.05(3)</td>
<td>24</td>
<td></td>
</tr>
<tr>
<td>345.26(2)</td>
<td>153</td>
<td></td>
</tr>
<tr>
<td>345.26(2)(a)</td>
<td>151</td>
<td></td>
</tr>
<tr>
<td>562.05</td>
<td>83</td>
<td></td>
</tr>
<tr>
<td>562.05(3m)</td>
<td>84</td>
<td></td>
</tr>
<tr>
<td>562.05(1)(a)</td>
<td>80</td>
<td></td>
</tr>
<tr>
<td>562.05(1)(b)</td>
<td>84</td>
<td></td>
</tr>
<tr>
<td>562.05(1)(c)</td>
<td>84</td>
<td></td>
</tr>
<tr>
<td>562.05(3w)</td>
<td>124</td>
<td></td>
</tr>
<tr>
<td>562.05(3w)(a)</td>
<td>124</td>
<td></td>
</tr>
<tr>
<td>562.05(9)(b)</td>
<td>84</td>
<td></td>
</tr>
<tr>
<td>562.05(10)</td>
<td>84</td>
<td></td>
</tr>
<tr>
<td>562.05(11)</td>
<td>85</td>
<td></td>
</tr>
<tr>
<td>565.02(3)(b)5</td>
<td>59</td>
<td></td>
</tr>
<tr>
<td>565.02(3)(d)</td>
<td>59</td>
<td></td>
</tr>
<tr>
<td>565.02(3)(g)</td>
<td>59</td>
<td></td>
</tr>
<tr>
<td>565.17</td>
<td>59</td>
<td></td>
</tr>
<tr>
<td>565.27(1)</td>
<td>59</td>
<td></td>
</tr>
<tr>
<td>565.27(1)(a)-(f)</td>
<td>60</td>
<td></td>
</tr>
<tr>
<td>565.27(1)(b)</td>
<td>59</td>
<td></td>
</tr>
<tr>
<td>565.27(3)</td>
<td>59</td>
<td></td>
</tr>
<tr>
<td>604.03(2)</td>
<td>328</td>
<td></td>
</tr>
<tr>
<td>604.04</td>
<td>329</td>
<td></td>
</tr>
<tr>
<td>633.01-633.17</td>
<td>290</td>
<td></td>
</tr>
<tr>
<td>633.01(4)</td>
<td>291</td>
<td></td>
</tr>
<tr>
<td>633.04</td>
<td>290</td>
<td></td>
</tr>
<tr>
<td>633.04(4)</td>
<td>290</td>
<td></td>
</tr>
<tr>
<td>633.09</td>
<td>290</td>
<td></td>
</tr>
<tr>
<td>633.10</td>
<td>290</td>
<td></td>
</tr>
<tr>
<td>633.12</td>
<td>290</td>
<td></td>
</tr>
<tr>
<td>633.13(1)</td>
<td>290</td>
<td></td>
</tr>
<tr>
<td>633.14(1)(b)</td>
<td>290</td>
<td></td>
</tr>
<tr>
<td>633.16</td>
<td>290</td>
<td></td>
</tr>
<tr>
<td>700.03(2)</td>
<td>185</td>
<td></td>
</tr>
<tr>
<td>700.05(3)</td>
<td>185</td>
<td></td>
</tr>
<tr>
<td>700.05(4)</td>
<td>185</td>
<td></td>
</tr>
<tr>
<td>700.07</td>
<td>185</td>
<td></td>
</tr>
<tr>
<td>700.17(2)</td>
<td>73</td>
<td></td>
</tr>
<tr>
<td>706.05</td>
<td>77</td>
<td></td>
</tr>
<tr>
<td>706.05(1)</td>
<td>76</td>
<td></td>
</tr>
<tr>
<td>706.06(3)</td>
<td>76</td>
<td></td>
</tr>
<tr>
<td>765.001</td>
<td>241</td>
<td></td>
</tr>
<tr>
<td>765.001(2)</td>
<td>239</td>
<td></td>
</tr>
<tr>
<td>765.001(3)</td>
<td>241</td>
<td></td>
</tr>
<tr>
<td>765.03(1)</td>
<td>240</td>
<td></td>
</tr>
<tr>
<td>765.04</td>
<td>243</td>
<td></td>
</tr>
<tr>
<td>765.04(1)</td>
<td>244</td>
<td></td>
</tr>
<tr>
<td>765.04(2)</td>
<td>244</td>
<td></td>
</tr>
<tr>
<td>765.04(3)</td>
<td>239</td>
<td></td>
</tr>
<tr>
<td>765.05</td>
<td>236</td>
<td></td>
</tr>
<tr>
<td>765.08</td>
<td>237</td>
<td></td>
</tr>
<tr>
<td>765.08(1979-80)</td>
<td>240</td>
<td></td>
</tr>
<tr>
<td>765.08(2)</td>
<td>240</td>
<td></td>
</tr>
<tr>
<td>765.09(3)</td>
<td>237</td>
<td></td>
</tr>
<tr>
<td>765.12(1)</td>
<td>238</td>
<td></td>
</tr>
<tr>
<td>765.12(2)</td>
<td>238</td>
<td></td>
</tr>
<tr>
<td>765.15</td>
<td>237</td>
<td></td>
</tr>
<tr>
<td>765.23</td>
<td>247</td>
<td></td>
</tr>
<tr>
<td>767.02(1)</td>
<td>231</td>
<td></td>
</tr>
<tr>
<td>767.53</td>
<td>228</td>
<td></td>
</tr>
<tr>
<td>813.12</td>
<td>231</td>
<td></td>
</tr>
<tr>
<td>813.12(2)</td>
<td>231</td>
<td></td>
</tr>
<tr>
<td>813.127</td>
<td>231</td>
<td></td>
</tr>
<tr>
<td>814.60-814.63</td>
<td>224</td>
<td></td>
</tr>
<tr>
<td>814.60(1)</td>
<td>224</td>
<td></td>
</tr>
<tr>
<td>814.61</td>
<td>224</td>
<td></td>
</tr>
<tr>
<td>814.61(1)</td>
<td>231</td>
<td></td>
</tr>
<tr>
<td>814.61(7)</td>
<td>231</td>
<td></td>
</tr>
<tr>
<td>814.63</td>
<td>153</td>
<td></td>
</tr>
<tr>
<td>814.63(2)</td>
<td>151</td>
<td></td>
</tr>
<tr>
<td>814.63(3)</td>
<td>151</td>
<td></td>
</tr>
<tr>
<td>814.63(4)</td>
<td>151</td>
<td></td>
</tr>
<tr>
<td>814.70</td>
<td>225</td>
<td></td>
</tr>
<tr>
<td>814.70(1)</td>
<td>225</td>
<td></td>
</tr>
<tr>
<td>865.20(1)</td>
<td>75</td>
<td></td>
</tr>
<tr>
<td>865.20(2)</td>
<td>75</td>
<td></td>
</tr>
<tr>
<td>867.03</td>
<td>76</td>
<td></td>
</tr>
<tr>
<td>867.04</td>
<td>74</td>
<td></td>
</tr>
<tr>
<td>867.045</td>
<td>75</td>
<td></td>
</tr>
<tr>
<td>867.045(1)</td>
<td>74</td>
<td></td>
</tr>
<tr>
<td>867.045(3)</td>
<td>75</td>
<td></td>
</tr>
<tr>
<td>867.045(4)</td>
<td>74</td>
<td></td>
</tr>
<tr>
<td>867.046</td>
<td>74</td>
<td></td>
</tr>
<tr>
<td>867.046(1)</td>
<td>74</td>
<td></td>
</tr>
<tr>
<td>867.046(2)</td>
<td>75</td>
<td></td>
</tr>
<tr>
<td>867.046(5)</td>
<td>75</td>
<td></td>
</tr>
<tr>
<td>893.80</td>
<td>24</td>
<td></td>
</tr>
<tr>
<td>893.80(3)</td>
<td>24</td>
<td></td>
</tr>
<tr>
<td>895.055</td>
<td>339</td>
<td></td>
</tr>
<tr>
<td>895.43</td>
<td>24</td>
<td></td>
</tr>
<tr>
<td>895.46</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>895.46(1)(a)</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>895.46(1)(c)</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>939.03(1)(a)</td>
<td>334</td>
<td></td>
</tr>
<tr>
<td>939.03(1)(c)</td>
<td>334</td>
<td></td>
</tr>
<tr>
<td>939.12</td>
<td>44</td>
<td></td>
</tr>
</tbody>
</table>
INDEX

N.B. The texts of Unpublished Opinions appearing in this Index without page references are available on request from the Office of the Attorney General.

ADMINISTRATIVE CODE
Discrimination
Discrimination such as the use by public schools of American Indian logos, mascots or nicknames does come within the purview of section 118.13 of the Wisconsin statutes. OAG 25-92 ............................ 321

RACE
Under 1987 Wisconsin Act 354 and section 562.05(3w)(a), Stats., residency for purposes of owning and operating a racetrack does not require fifty-one percent ownership by individuals. Wisconsin Administrative Code section RACE 1.01(9) (1990) is consistent with this legislative intent. OAG 19-91 .......................... 124

APPROPRIATIONS AND EXPENDITURES
County executive’s veto
A veto of an appropriation by the county executive under section 59.031(5), Stats., does not restore the appropriation to the level in the county executive’s proposed budget. OAG 10-92 ........................... 214

BANKS AND BANKING
ATM (Automated Teller Machine) regulation
The Wisconsin Commissioner of Banking does have a compelling interest in regulating banking activities on Indian reservations under chapters 217 and 218 and section 138.09, Stats., even though Public Law 280 does not specifically grant such regulatory authority. OAG 28-92 .......................... 337

Indian reservations
The Wisconsin Commissioner of Banking does have a compelling interest in regulating banking activities on Indian reservations under chapters 217 and 218 and section 138.09, Stats., even though Public Law 280 does not specifically grant such regulatory authority. OAG 28-92 .......................... 337

BED AND BREAKFAST
Alcohol beverage consumption
An owner of a bed and breakfast establishment who does not hold an alcohol beverages license may personally consume alcohol beverages or serve alcohol beverages at social events held on the premises without violating section 125.09(1), Stats., provided that consumption of alcohol beverages occurs in a portion of the bed and breakfast establishment that is not open to the public or to renters.
BED AND BREAKFAST (continued)

Alcohol beverage consumption (continued)

Proprietors of a bed and breakfast establishment may solicit and accept voluntary contributions from guests at a social event held on the premises to defray costs of alcohol beverages, but bed and breakfast proprietors who do not hold an alcohol beverages license may not serve alcohol beverages at a social event where alcohol beverages are served only to those who pay an admission fee, without violating section 125.04(1). OAG 11-92 ................................. 218

Liquor license laws

An owner of a bed and breakfast establishment who does not hold an alcohol beverages license may personally consume alcohol beverages or serve alcohol beverages at social events held on the premises without violating section 125.09(1), Stats., provided that consumption of alcohol beverages occurs in a portion of the bed and breakfast establishment that is not open to the public or to renters.

Proprietors of a bed and breakfast establishment may solicit and accept voluntary contributions from guests at a social event held on the premises to defray costs of alcohol beverages, but bed and breakfast proprietors who do not hold an alcohol beverages license may not serve alcohol beverages at a social event where alcohol beverages are served only to those who pay an admission fee, without violating section 125.04(1). OAG 11-92 ................................. 218

BINGO

Indian reservations

If any element of the Oneida tribe television bingo game occurs off the reservation, it is subject to prosecution under Wisconsin criminal law. OAG 27-92 ................................. 332

Television

If any element of the Oneida tribe television bingo game occurs off the reservation, it is subject to prosecution under Wisconsin criminal law. OAG 27-92 ................................. 332

BUILDING COMMISSION, STATE

Corrections, Department of, building projects

The Building Commission’s actions authorizing Department of Corrections building projects did not violate section 20.924, Stats. OAG 1-92 ................................. 146

CABLE COMMUNICATIONS POLICY ACT OF 1984

1991 Assembly Bill 6; splitter fees

The federal Cable Communications Policy Act, 47 U.S.C. § 521 (1991), does not preempt state prohibition of mandatory fees for the use of splitter devices. OAG 16-92 ................................. 248
CABLE TELEVISION
See TELEVISION

CIVIL RIGHTS
Certification program, expanded
The federal Civil Rights Act of 1991 does not prohibit expanded certification under section 230.25(1n), Stats. OAG 18-92 264

Civil Rights Act of 1991
The federal Civil Rights Act of 1991 does not prohibit expanded certification under section 230.25(1n), Stats. OAG 18-92 264

CIVIL SERVICE
Political activities
Classified employees, including classified employees of legislative service agencies can run for nonpartisan office. An agency cannot prohibit its classified employees from running for nonpartisan office except in certain circumstances. OAG 12-91 68

CLERK OF COURTS
Fees
Neither the clerk of court nor the county board has the authority to adopt a non-refundable processing fee for persons desiring to pay a fine or forfeiture imposed by the court through installment payments in the absence of a statute specifically providing for such processing fee. OAG 12-92 223

If a domestic abuse petition is filed under section 813.12(2), Stats., in conjunction with an action affecting the family commenced under chapter 767, no separate filing fee is applicable because a filing fee already would have been collected by the clerk under section 814.61(1) when one of the family actions enumerated under section 767.02(1) was commenced. In the absence of a pending family action, a domestic abuse action under section 813.12 is commenced with service of the petition upon the respondent if a copy of the petition is filed before service or promptly after service, and the clerk of court is authorized to collect a fee under section 814.61(1) when a domestic abuse action is commenced in this manner. Under section 813.127, however, there is only one fee applicable where a petitioner combines in one action two or more petitions for domestic abuse, child abuse or harassment if the respondent is the same person in each petition. After a final judgment has been entered in the divorce action, any person filing a petition for a domestic abuse restraining order would be required to pay a separate filing fee except when the same person already has paid a fee under section 814.61(7) for revision of a judgment or order and that petition is still pending. OAG 14-92 231
COLLECTION AGENCIES

Nonresident collection agencies

Section 218.04, Stats., requires licensure of nonresident collection agencies and solicitors that conduct business with Wisconsin residents solely by mail or telephone. Applying the licensing requirements to such agencies and solicitors would not impermissibly burden interstate commerce. OAG 19-92 ............................... 283

Wisconsin collection agency law

Section 218.04, Stats., requires licensure of nonresident collection agencies and solicitors that conduct business with Wisconsin residents solely by mail or telephone. Applying the licensing requirements to such agencies and solicitors would not impermissibly burden interstate commerce. OAG 19-92 ............................... 283

COMPANY

See CORPORATIONS

CONFIDENTIAL REPORTS

Fraud investigation

Information contained in a county paternity case file may be released for purposes of fraud investigation of the public assistance programs specified in section 49.53, Stats. OAG 13-92 ...................... 226

Paternity case file

Information contained in a county paternity case file may be released for purposes of fraud investigation of the public assistance programs specified in section 49.53, Stats. OAG 13-92 ...................... 226

CORPORATIONS

Company as employe service company

Strict compliance with all criteria in section 108.02(12m), Stats., and section 108.065 is required before a company will qualify as an employe service company and the employer for unemployment compensation purposes. OAG 3-92 ......................... 154

Employe service company

Strict compliance with all criteria in section 108.02(12m), Stats., and section 108.065 is required before a company will qualify as an employe service company and the employer for unemployment compensation purposes. OAG 3-92 ......................... 154

Temporary help service company

Strict compliance with all criteria in section 108.02(12m), Stats., and section 108.065 is required before a company will qualify as an employe service company and the employer for unemployment compensation purposes. OAG 3-92 ......................... 154
CORRECTIONS, DEPARTMENT OF

Building projects

The Building Commission's actions authorizing Department of Corrections building projects did not violate section 20.924, Stats. OAG 1-92 146

COUNTIES

District Attorney support staff

It is the responsibility of the county to develop position descriptions, determine salaries and compile a list of eligible applicants for investigative and support staff positions within the district attorney's office. It is the district attorney's responsibility to approve each new member of the investigative and support staff and to supervise such staff after it is hired. OAG 3-91 19

Human services department

"Volunteer Registration Form" utilized by county human services department to register volunteer drivers who transport department clients is ineffective to release county from civil liability in event client is injured or killed in accident. Moreover, an attempt by a county to obtain such a release from liability may violate public policy. OAG 4-91 23

Human services board

Under section 46.23(4)(a)1., Stats., officers, employes and directors of public or private entities that furnish "human services" to a county may not be appointed to the county's human services board. The prohibition contained in section 46.23(4)(a)1. does not extend to the appointment of members of the immediate family that do not provide human services to the board, but other legal and practical considerations may mitigate strongly against such appointments. OAG 5-91 30

Joint county/tribal telecommunications system

A county has statutory authority to enter into a joint law enforcement agreement with an Indian tribe which locates a joint telecommunications terminal in a tribal building, so long as the terminal is properly secured, supervised and under the control of a county law enforcement agency. OAG 16-91 91

Land

Although a county may not acquire land specifically for the purpose of leasing that land to a private entity licensed to operate a racetrack under section 562.05(1)(a), Stats., it may lease land initially acquired for a valid public purpose to such a private entity, unless the circumstances of the lease demonstrate that the land has become surplus land. OAG 14-91 80
COUNTIES (continued)

Menominee tribal/county telecommunications system
A county has statutory authority to enter into a joint law enforcement agreement with an Indian tribe which locates a joint telecommunications terminal in a tribal building, so long as the terminal is properly secured, supervised and under the control of a county law enforcement agency. OAG 16-91 91

Public property to private corporation
A county board may not give land to a private corporation. The adequacy as consideration for the conveyance of land of a promise by a private corporation to build and operate a factory on the land involves the application of the public purpose doctrine to the specific facts of the conveyance. OAG 29-92 341

Public purpose doctrine
A county board may not give land to a private corporation. The adequacy as consideration for the conveyance of land of a promise by a private corporation to build and operate a factory on the land involves the application of the public purpose doctrine to the specific facts of the conveyance. OAG 29-92 341

Racetrack
Although a county may not acquire land specifically for the purpose of leasing that land to a private entity licensed to operate a racetrack under section 562.05(1)(a), Stats., it may lease land initially acquired for a valid public purpose to such a private entity, unless the circumstances of the lease demonstrate that the land has become surplus land. OAG 14-91 80

Real estate
Although a county may not acquire land specifically for the purpose of leasing that land to a private entity licensed to operate a racetrack under section 562.05(1)(a), Stats., it may lease land initially acquired for a valid public purpose to such a private entity, unless the circumstances of the lease demonstrate that the land has become surplus land. OAG 14-91 80

Recycling
Section 59.07(135)(L), Stats., authorizes counties that are responsible units of government under section 159.09(1)(b) to levy taxes for capital and operating expenses incurred in connection with the operation of the county's recycling program only upon those local units of government which have not become responsible units of government pursuant to section 159.09(1)(c). Section 59.07(135)(L) now authorizes counties to levy taxes for both capital and operating expenses incurred in connection with any other form of solid waste management function only upon local units of government which participate with the county in that form of solid waste management activity. Where both recycling and other kinds of solid waste
COUNTIES (continued)
Recycling (continued)
management functions are performed in a single county facility, the county must use accounting principles to apportion the costs of those activities before levying taxes upon local units of government within the county. OAG 24-92 ............................................ 312

Solid waste disposal
Section 59.07(135)(L), Stats., authorizes counties that are responsible units of government under section 159.09(1)(b) to levy taxes for capital and operating expenses incurred in connection with the operation of the county's recycling program only upon those local units of government which have not become responsible units of government pursuant to section 159.09(1)(c). Section 59.07(135)(L) now authorizes counties to levy taxes for both capital and operating expenses incurred in connection with any other form of solid waste management function only upon local units of government which participate with the county in that form of solid waste management activity. Where both recycling and other kinds of solid waste management functions are performed in a single county facility, the county must use accounting principles to apportion the costs of those activities before levying taxes upon local units of government within the county. OAG 24-92 ............................................ 312

Taxes for recycling and waste management
Section 59.07(135)(L), Stats., authorizes counties that are responsible units of government under section 159.09(1)(b) to levy taxes for capital and operating expenses incurred in connection with the operation of the county's recycling program only upon those local units of government which have not become responsible units of government pursuant to section 159.09(1)(c). Section 59.07(135)(L) now authorizes counties to levy taxes for both capital and operating expenses incurred in connection with any other form of solid waste management function only upon local units of government which participate with the county in that form of solid waste management activity. Where both recycling and other kinds of solid waste management functions are performed in a single county facility, the county must use accounting principles to apportion the costs of those activities before levying taxes upon local units of government within the county. OAG 24-92 ............................................ 312

Volunteer drivers, liability
"Volunteer Registration Form" utilized by county human services department to register volunteer drivers who transport department clients is ineffective to release county from civil liability in event client is injured or killed in accident. Moreover, an attempt by a county to obtain such a release from liability may violate public policy. OAG 4-91 ............................................ 23
COUNTY BOARD

Elected officials; salaries

Discretionary authority to grant increases to elected county officials based upon the performance or length of service of the incumbent may not be delegated to a committee of the county board because the board itself lacks the authority to establish such a compensation scheme. The compensation of elected county officials who do not participate in establishing their own salaries may be increased but not decreased during their terms of office. OAG 17-92 258

Fees

Neither the clerk of court nor the county board has the authority to adopt a non-refundable processing fee for persons desiring to pay a fine or forfeiture imposed by the court through installment payments in the absence of a statute specifically providing for such processing fee. OAG 12-92 223

Ordinance concerning sale of property

County ordinances delegating the authority to decide the terms under which county property will be sold and delegating the authority to negotiate certain public works contracts to county committees do not impermissibly infringe upon the administrative duties and powers of the county executive. OAG 9-91 49

Property, conveyance of private corporation

A county board may not give land to a private corporation. The adequacy as consideration for the conveyance of land of a promise by a private corporation to build and operate a factory on the land involves the application of the public purpose doctrine to the specific facts of the conveyance. OAG 29-92 341

Salaries and wages

Discretionary authority to grant increases to elected county officials based upon the performance or length of service of the incumbent may not be delegated to a committee of the county board because the board itself lacks the authority to establish such a compensation scheme. The compensation of elected county officials who do not participate in establishing their own salaries may be increased but not decreased during their terms of office. OAG 17-92 258

Sale of county property

County ordinances delegating the authority to decide the terms under which county property will be sold and delegating the authority to negotiate certain public works contracts to county committees do not impermissibly infringe upon the administrative duties and powers of the county executive. OAG 9-91 49
COUNTY EXECUTIVE
Outagamie County Board
County ordinances delegating the authority to decide the terms under which county property will be sold and delegating the authority to negotiate certain public works contracts to county committees do not impermissibly infringe upon the administrative duties and powers of the county executive. OAG 9-91 ........................................ 49

Veto powers
A veto of an appropriation by the county executive under section 59.031(5), Stats., does not restore the appropriation to the level in the county executive’s proposed budget. OAG 10-92 .............. 214

COUNTY HIGHWAY COMMISSIONER
Indefinite term of office
A county board may provide that the term of office of the county highway commissioner is indefinite. OAG 8-91 ................. 46

COUNTY HUMAN SERVICES BOARD
Composition
Under section 46.23(4)(a)1., Stats., officers, employes and directors of public or private entities that furnish "human services" to a county may not be appointed to the county’s human services board. The prohibition contained in section 46.23(4)(a)1. does not extend to the appointment of members of the immediate family that do not provide human services to the board, but other legal and practical considerations may mitigate strongly against such appointments. OAG 5-91 .......................................................... 30

Liability
Under section 46.23(4)(a)1., Stats., officers, employes and directors of public or private entities that furnish "human services" to a county may not be appointed to the county’s human services board. The prohibition contained in section 46.23(4)(a)1. does not extend to the appointment of members of the immediate family that do not provide human services to the board, but other legal and practical considerations may mitigate strongly against such appointments. OAG 5-91 .......................................................... 30

CRIMINAL LAW
Extradition
A Wisconsin law enforcement officer may transport a prisoner out of state for emergency medical treatment. Upon leaving Wisconsin, a law enforcement officer from the receiving state must take custody of the prisoner. The prisoner may be brought back to Wisconsin using the Uniform Criminal Extradition Act, section 976.03, Stats. OAG 7-91 .......................................................... 41
DISCRIMINATION

Indian logos, mascots or nicknames

Discrimination such as the use by public schools of American Indian logos, mascots or nicknames does come within the purview of section 118.13 of the Wisconsin statutes. OAG 25-92 321

Schools and school districts

Discrimination such as the use by public schools of American Indian logos, mascots or nicknames does come within the purview of section 118.13 of the Wisconsin statutes. OAG 25-92 321

Wisconsin Administrative Code

Discrimination such as the use by public schools of American Indian logos, mascots or nicknames does come within the purview of section 118.13 of the Wisconsin statutes. OAG 25-92 321

DISTRICT ATTORNEY

Investigators

It is the responsibility of the county to develop position descriptions, determine salaries and compile a list of eligible applicants for investigative and support staff positions within the district attorney’s office. It is the district attorney’s responsibility to approve each new member of the investigative and support staff and to supervise such staff after it is hired. OAG 3-91 19

Staff positions

It is the responsibility of the county to develop position descriptions, determine salaries and compile a list of eligible applicants for investigative and support staff positions within the district attorney’s office. It is the district attorney’s responsibility to approve each new member of the investigative and support staff and to supervise such staff after it is hired. OAG 3-91 19

EMPLOYEE TRUST FUNDS BOARD

Accumulated sick leave conversion credit

Statutory changes to the state accumulated sick leave conversion credit program contained in 1991 Wisconsin Act 39 (1991 budget bill) which determine the conversion credit based on a salary rate determined after terminating employment violate article IV, section 26 of the Wisconsin Constitution.

The Employee Trust Funds board has the standing to allege that the statutory changes are unconstitutional notwithstanding the general rule that state agencies or public officers cannot question the constitutionality of a statute. OAG 7-92 187

Authority to set rates to retirement fund

The Employee Trust Funds Board must under section 40.05(2n), Stats., divide post-1990 contribution rate adjustments between employer and employee contributions. An increase in employee contributions based upon such division is not a constitution contract clause violation. The
EMPLOYE TRUST FUNDS BOARD (continued)

Authority to set rates to retirement fund (continued)

Board lacks the authority to redetermine the unfunded accrued actuarial liability for calendar year 1991 rate setting purposes as an alternative to a contribution increase. OAG 17-91 .......................... 101

Constitutionality of ASLCC in Budget Bill for 1991

Statutory changes to the state accumulated sick leave conversion credit program contained in 1991 Wisconsin Act 39 (1991 budget bill) which determine the conversion credit based on a salary rate determined after terminating employment violate article IV, section 26 of the Wisconsin Constitution.

The Employe Trust Funds board has the standing to allege that the statutory changes are unconstitutional notwithstanding the general rule that state agencies or public officers cannot question the constitutionality of a statute. OAG 7-92 .......................... 187

Contributions by employe and employer

The Employe Trust Funds Board must under section 40.05(2n), Stats., divide post-1990 contribution rate adjustments between employer and employe contributions. An increase in employe contributions based upon such division is not a constitution contract clause violation. The Board lacks the authority to redetermine the unfunded accrued actuarial liability for calendar year 1991 rate setting purposes as an alternative to a contribution increase. OAG 17-91 .......................... 101

Employe and employer contributions to retirement fund

The Employe Trust Funds Board must under section 40.05(2n), Stats., divide post-1990 contribution rate adjustments between employer and employe contributions. An increase in employe contributions based upon such division is not a constitution contract clause violation. The Board lacks the authority to redetermine the unfunded accrued actuarial liability for calendar year 1991 rate setting purposes as an alternative to a contribution increase. OAG 17-91 .......................... 101

EMPLOYE TRUST FUNDS, DEPARTMENT OF

Board authority discussed

The Employe Trust Funds Board must under section 40.05(2n), Stats., divide post-1990 contribution rate adjustments between employer and employe contributions. An increase in employe contributions based upon such division is not a constitution contract clause violation. The Board lacks the authority to redetermine the unfunded accrued actuarial liability for calendar year 1991 rate setting purposes as an alternative to a contribution increase. OAG 17-91 .......................... 101
EMPLOYER AND EMPLOYEE

Employer service company

Strict compliance with all criteria in section 108.02(12m), Stats., and section 108.065 is required before a company will qualify as an employer service company and the employer for unemployment compensation purposes. OAG 3-92 .......................... 154

Fire department

Classification of chapter 213 and chapter 181, Stats., fire departments; Public sector versus private sector departments; The classification of a fire department depends upon the statute under which it was organized. OAG 11-91 .......................... 61

Leasing company

Strict compliance with all criteria in section 108.02(12m), Stats., and section 108.065 is required before a company will qualify as an employer service company and the employer for unemployment compensation purposes. OAG 3-92 .......................... 154

Temporary help service company

Strict compliance with all criteria in section 108.02(12m), Stats., and section 108.065 is required before a company will qualify as an employer service company and the employer for unemployment compensation purposes. OAG 3-92 .......................... 154

ETHICS, STATE BOARD OF

Public officials

An individual who is required to file a Statement of Economic Interests and who is a beneficiary of a trust which provides that the individual will receive a share of the trust’s corpus upon the death of the individual’s parent if he or she survives the parent, must identify on his or her Statement of Economic Interests, the securities held by the trust if the individual’s interest in the securities is valued at $5,000 or more. OAG 6-92 .......................... 183

The ethics law does not prohibit a state public official from purchasing items and services that are made available to the official because he or she holds public office. If the opportunity to purchase the item or service itself has substantial value, the ethics code prohibits the purchase of the item or service. OAG 8-92 .......................... 201

Purchase of goods and services

The ethics law does not prohibit a state public official from purchasing items and services that are made available to the official because he or she holds public office. If the opportunity to purchase the item or service itself has substantial value, the ethics code prohibits the purchase of the item or service. OAG 8-92 .......................... 201
ETHICS, STATE BOARD OF (continued)
Statement of economic interests
An individual who is required to file a Statement of Economic Interests and who is a beneficiary of a trust which provides that the individual will receive a share of the trust’s corpus upon the death of the individual’s parent if he or she survives the parent, must identify on his or her Statement of Economic Interests, the securities held by the trust if the individual’s interest in the securities is valued at $5,000 or more. OAG 6-92

EXTRADITION
Emergency medical treatment
A Wisconsin law enforcement officer may transport a prisoner out of state for emergency medical treatment. Upon leaving Wisconsin, a law enforcement officer from the receiving state must take custody of the prisoner. The prisoner may be brought back to Wisconsin using the Uniform Criminal Extradition Act, section 976.03, Stats. OAG 7-91

FEES
Courts
Neither the clerk of court nor the county board has the authority to adopt a non-refundable processing fee for persons desiring to pay a fine or forfeiture imposed by the court through installment payments in the absence of a statute specifically providing for such processing fee. OAG 12-92

If a domestic abuse petition is filed under section 813.12(2), Stats., in conjunction with an action affecting the family commenced under chapter 767, no separate filing fee is applicable because a filing fee already would have been collected by the clerk under section 814.61(1) when one of the family actions enumerated under section 767.02(1) was commenced. In the absence of a pending family action, a domestic abuse action under section 813.12 is commenced with service of the petition upon the respondent if a copy of the petition is filed before service or promptly after service, and the clerk of court is authorized to collect a fee under section 814.61(1) when a domestic abuse action is commenced in this manner. Under section 813.127, however, there is only one fee applicable where a petitioner combines in one action two or more petitions for domestic abuse, child abuse or harassment if the respondent is the same person in each petition. After a final judgment has been entered in the divorce action, any person filing a petition for a domestic abuse restraining order would be required to pay a separate filing fee except when the same person already has paid a fee under section 814.61(7) for revision of a judgment or order and that petition is still pending. OAG 14-92
FEES (continued)

Domestic abuse petition

If a domestic abuse petition is filed under section 813.12(2), Stats., in conjunction with an action affecting the family commenced under chapter 767, no separate filing fee is applicable because a filing fee already would have been collected by the clerk under section 814.61(1) when one of the family actions enumerated under section 767.02(1) was commenced. In the absence of a pending family action, a domestic abuse action under section 813.12 is commenced with service of the petition upon the respondent if a copy of the petition is filed before service or promptly after service, and the clerk of court is authorized to collect a fee under section 814.61(1) when a domestic abuse action is commenced in this manner. Under section 813.127, however, there is only one fee applicable where a petitioner combines in one action two or more petitions for domestic abuse, child abuse or harassment if the respondent is the same person in each petition. After a final judgment has been entered in the divorce action, any person filing a petition for a domestic abuse restraining order would be required to pay a separate filing fee except when the same person already has paid a fee under section 814.61(7) for revision of a judgment or order and that petition is still pending.

OAG 14-92 ............................................................. 231

Municipalities

A municipality must pay the five dollar fee imposed under section 814.63(2), Stats., upon disposition of a forfeiture action in circuit court for a municipal ordinance violation. The fee may not be passed on to the defendant. OAG 2-92 ......................................................... 151

Processing fees

Neither the clerk of court nor the county board has the authority to adopt a non-refundable processing fee for persons desiring to pay a fine or forfeiture imposed by the court through installment payments in the absence of a statute specifically providing for such processing fee. OAG 12-92 ......................................................... 223

FIRE DEPARTMENT

Private employer

Classification of chapter 213 and chapter 181, Stats., fire departments: Public sector versus private sector departments: The classification of a fire department depends upon the statute under which it was organized. OAG 11-91 ......................................................... 61

Public employer

Classification of chapter 213 and chapter 181, Stats., fire departments: Public sector versus private sector departments: The classification of a fire department depends upon the statute under which it was organized. OAG 11-91 ......................................................... 61
FIRE DEPARTMENT (continued)

State regulation
Classification of chapter 213 and chapter 181, Stats., fire departments; Public sector versus private sector departments; The classification of a fire department depends upon the statute under which it was organized. OAG 11-91

Volunteer department
Classification of chapter 213 and chapter 181, Stats., fire departments; Public sector versus private sector departments; The classification of a fire department depends upon the statute under which it was organized. OAG 11-91

FISH AND GAME

Game farm
The shining prohibition of section 29.245, Stats., does apply to game, fur and deer farms. OAG 2-91

Shining
The shining prohibition of section 29.245, Stats., does apply to game, fur and deer farms. OAG 2-91

FORFEITURES

County Board
Neither the clerk of court nor the county board has the authority to adopt a non-refundable processing fee for persons desiring to pay a fine or forfeiture imposed by the court through installment payments in the absence of a statute specifically providing for such processing fee. OAG 12-92

Processing fees
Neither the clerk of court nor the county board has the authority to adopt a non-refundable processing fee for persons desiring to pay a fine or forfeiture imposed by the court through installment payments in the absence of a statute specifically providing for such processing fee. OAG 12-92

GAMBLING

Constitutionality
Under article IV, section 24 of the Wisconsin Constitution the Legislature may not authorize any scheme involving prize, chance, and consideration without amending the constitution unless the scheme falls within the bingo, raffle, on-track pari-mutuel or state lottery exceptions to the constitution. OAG 10-91

Indians
If any element of the Oneida tribe television bingo game occurs off the reservation, it is subject to prosecution under Wisconsin criminal law. OAG 27-92
GOVERNOR

Budget Adjustment Act of 1991

The Governor's partial veto of section 1117g of 1991 Wisconsin Act 269 did not result in a complete and workable law. The partial veto, therefore, was invalid. Because the Governor's approval was not necessary for the bill to become law, the invalidity of the partial veto results in the law being enforced as passed by the Legislature.

Veto

The Governor's partial veto of section 1117g of 1991 Wisconsin Act 269 did not result in a complete and workable law. The partial veto, therefore, was invalid. Because the Governor's approval was not necessary for the bill to become law, the invalidity of the partial veto results in the law being enforced as passed by the Legislature.

HOTELS, BOARDING HOUSES AND RESTAURANTS

See also BED AND BREAKFAST

Alcohol beverage consumption

An owner of a bed and breakfast establishment who does not hold an alcohol beverages license may personally consume alcohol beverages or serve alcohol beverages at social events held on the premises without violating section 125.09(1), Stats., provided that consumption of alcohol beverages occurs in a portion of the bed and breakfast establishment that is not open to the public or to renters.

Proprietors of a bed and breakfast establishment may solicit and accept voluntary contributions from guests at a social event held on the premises to defray costs of alcohol beverages, but bed and breakfast proprietors who do not hold an alcohol beverages license may not serve alcohol beverages at a social event where alcohol beverages are served only to those who pay an admission fee, without violating section 125.04(1). OAG 11-92

Liquor license laws

An owner of a bed and breakfast establishment who does not hold an alcohol beverages license may personally consume alcohol beverages or serve alcohol beverages at social events held on the premises without violating section 125.09(1), Stats., provided that consumption of alcohol beverages occurs in a portion of the bed and breakfast establishment that is not open to the public or to renters.

Proprietors of a bed and breakfast establishment may solicit and accept voluntary contributions from guests at a social event held on the premises to defray costs of alcohol beverages, but bed and breakfast proprietors who do not hold an alcohol beverages license may not serve alcohol beverages at a social event where alcohol beverages are served only to those who pay an admission fee, without violating section 125.04(1). OAG 11-92
INDIANS

ATM (Automated Teller Machine) regulation
The Wisconsin Commissioner of Banking does have a compelling interest in regulating banking activities on Indian reservations under chapters 217 and 218 and section 138.09, Stats., even though Public Law 280 does not specifically grant such regulatory authority. OAG 28-92 .................................................. 337

Banking activities on reservations
The Wisconsin Commissioner of Banking does have a compelling interest in regulating banking activities on Indian reservations under chapters 217 and 218 and section 138.09, Stats., even though Public Law 280 does not specifically grant such regulatory authority. OAG 28-92 .................................................. 337

Bingo
If any element of the Oneida tribe television bingo game occurs off the reservation, it is subject to prosecution under Wisconsin criminal law. OAG 27-92 .................................................. 332

County-tribal law enforcement agreements
A county has statutory authority to enter into a joint law enforcement agreement with an Indian tribe which locates a joint telecommunications terminal in a tribal building, so long as the terminal is properly secured, supervised and under the control of a county law enforcement agency. OAG 16-91 ......................... 91

Discrimination
Discrimination such as the use by public schools of American Indian logos, mascots or nicknames does come within the purview of section 118.13 of the Wisconsin statutes. OAG 25-92 ......................... 321

Law enforcement
A county has statutory authority to enter into a joint law enforcement agreement with an Indian tribe which locates a joint telecommunications terminal in a tribal building, so long as the terminal is properly secured, supervised and under the control of a county law enforcement agency. OAG 16-91 ......................... 91

Menominee county
A county has statutory authority to enter into a joint law enforcement agreement with an Indian tribe which locates a joint telecommunications terminal in a tribal building, so long as the terminal is properly secured, supervised and under the control of a county law enforcement agency. OAG 16-91 ......................... 91

Oneida Tribe
If any element of the Oneida tribe television bingo game occurs off the reservation, it is subject to prosecution under Wisconsin criminal law. OAG 27-92 .................................................. 332
INDIANS (continued)

Telecommunications

A county has statutory authority to enter into a joint law enforcement agreement with an Indian tribe which locates a joint telecommunications terminal in a tribal building, so long as the terminal is properly secured, supervised and under the control of a county law enforcement agency. OAG 16-91 91

INSURANCE

Commissioner of Insurance

The Commissioner of Insurance lacks the authority to regulate administrators of self-funded or self-insured employee benefit plans under section 3516r of 1991 Wisconsin Act 39 (the budget bill) since such regulation is preempted by ERISA and therefore precluded by section 633.16, Stats., as created by the bill. OAG 20-92 290

Self-insured or self-funded employee benefit plans

The Commissioner of Insurance lacks the authority to regulate administrators of self-funded or self-insured employee benefit plans under section 3516r of 1991 Wisconsin Act 39 (the budget bill) since such regulation is preempted by ERISA and therefore precluded by section 633.16, Stats., as created by the bill. OAG 20-92 290

INSURANCE, COMMISSIONER OF

Employee benefit plans

The Commissioner of Insurance lacks the authority to regulate administrators of self-funded or self-insured employee benefit plans under section 3516r of 1991 Wisconsin Act 39 (the budget bill) since such regulation is preempted by ERISA and therefore precluded by section 633.16, Stats., as created by the bill. OAG 20-92 290

INTOXICATING LIQUORS

Bed and breakfast

An owner of a bed and breakfast establishment who does not hold an alcohol beverages license may personally consume alcohol beverages or serve alcohol beverages at social events held on the premises without violating section 125.09(1), Stats., provided that consumption of alcohol beverages occurs in a portion of the bed and breakfast establishment that is not open to the public or to renters. Proprietors of a bed and breakfast establishment may solicit and accept voluntary contributions from guests at a social event held on the premises to defray costs of alcohol beverages, but bed and breakfast proprietors who do not hold an alcohol beverages license may not serve alcohol beverages at a social event where alcohol beverages are served only to those who pay an admission fee, without violating section 125.04(1). OAG 11-92 218
LAND

County property

Although a county may not acquire land specifically for the purpose of leasing that land to a private entity licensed to operate a racetrack under section 562.05(1)(a), Stats., it may lease land initially acquired for a valid public purpose to such a private entity, unless the circumstances of the lease demonstrate that the land has become surplus land. OAG 14-91

A county board may not give land to a private corporation. The adequacy as consideration for the conveyance of land of a promise by a private corporation to build and operate a factory on the land involves the application of the public purpose doctrine to the specific facts of the conveyance. OAG 29-92

Surplus land

Although a county may not acquire land specifically for the purpose of leasing that land to a private entity licensed to operate a racetrack under section 562.05(1)(a), Stats., it may lease land initially acquired for a valid public purpose to such a private entity, unless the circumstances of the lease demonstrate that the land has become surplus land. OAG 14-91

LANDLORD AND TENANT

Security deposits

Security deposits: interpretation of the phrase "surrender of the premises" as used in Wisconsin Administrative Code section Ag 134.06(2) (1990), created Feb. 1980, effective May 1, 1980; The phrase "surrender of the premises" is analogous to the term "vacating the premises," coupled with the knowledge or reason to know of the vacating by the landlord. Therefore, under Wisconsin law, security deposits must be returned within twenty-one days from the time the tenants physically and permanently vacate the premises, where the landlord knows or has reason to know that the premises have been vacated. OAG 15-91

LAW ENFORCEMENT

Extradition

A Wisconsin law enforcement officer may transport a prisoner out of state for emergency medical treatment. Upon leaving Wisconsin, a law enforcement officer from the receiving state must take custody of the prisoner. The prisoner may be brought back to Wisconsin using the Uniform Criminal Extradition Act, section 976.03, Stats. OAG 7-91

Hospitals

Pursuant to section 51.20(14), Stats., the director of the county department under section 51.42 or 51.437 may request the sheriff of the county in which an individual was placed under emergency detention to transport that individual to another designated inpatient
LAW ENFORCEMENT (continued)

Hospitals (continued)

facility prior to the initial court hearing under chapter 51, and the
sheriff must do so within a reasonable time. OAG 22-92 299

Sheriffs

A Wisconsin law enforcement officer may transport a prisoner out of
state for emergency medical treatment. Upon leaving Wisconsin, a
law enforcement officer from the receiving state must take custody of
the prisoner. The prisoner may be brought back to Wisconsin using
the Uniform Criminal Extradition Act, section 976.03, Stats.
OAG 7-91 41

Pursuant to section 51.20(14), Stats., the director of the county
department under section 51.42 or 51.437 may request the sheriff of
the county in which an individual was placed under emergency
detention to transport that individual to another designated inpatient
facility prior to the initial court hearing under chapter 51, and the
sheriff must do so within a reasonable time. OAG 22-92 299

Transporting criminal across state lines

A Wisconsin law enforcement officer may transport a prisoner out of
state for emergency medical treatment. Upon leaving Wisconsin, a
law enforcement officer from the receiving state must take custody of
the prisoner. The prisoner may be brought back to Wisconsin using
the Uniform Criminal Extradition Act, section 976.03, Stats.
OAG 7-91 41

LEGISLATION

Accumulated sick leave conversion credit

Statutory changes to the state accumulated sick leave conversion credit
which determine the conversion credit based on a salary rate
determined after terminating employment violate article IV, section 26
of the Wisconsin Constitution.
The Employe Trust Funds board has the standing to allege that the
statutory changes are unconstitutional notwithstanding the general rule
that state agencies or public officers cannot question the
constitutionality of a statute. OAG 7-92 187

Budget Adjustment Act of 1991

The Governor's partial veto of section 1117g of 1991 Wisconsin Act
269 did not result in a complete and workable law. The partial veto,
therefore, was invalid. Because the Governor's approval was not
necessary for the bill to become law, the invalidity of the partial veto
results in the law being enforced as passed by the Legislature.
OAG 26-92 327
LEGISLATION (continued)

Budget Bill for 1991

Section 1148m of 1991 Wisconsin Act 39 does not violate article IV, sections 18 or 31 of the Wisconsin Constitution. OAG 4-92 ........... 167

Statutory changes to the state accumulated sick leave conversion credit program contained in 1991 Wisconsin Act 39 (1991 budget bill) which determine the conversion credit based on a salary rate determined after terminating employment violate article IV, section 26 of the Wisconsin Constitution.

The Employe Trust Funds board has the standing to allege that the statutory changes are unconstitutional notwithstanding the general rule that state agencies or public officers cannot question the constitutionality of a statute. OAG 7-92 ......................... 187

Cable television; splitter fee prohibition

The federal Cable Communications Policy Act, 47 U.S.C. § 521 (1991), does not preempt state prohibition of mandatory fees for the use of splitter devices. OAG 16-92 .......................... 248

"Classification" legislation

Section 1148m of 1991 Wisconsin Act 39 does not violate article IV, sections 18 or 31 of the Wisconsin Constitution. OAG 4-92 ....... 167

"Private or local" legislation

Section 1148m of 1991 Wisconsin Act 39 does not violate article IV, sections 18 or 31 of the Wisconsin Constitution. OAG 4-92 ....... 167

Vetoes, Governor

The Governor's partial veto of section 1117g of 1991 Wisconsin Act 269 did not result in a complete and workable law. The partial veto, therefore, was invalid. Because the Governor's approval was not necessary for the bill to become law, the invalidity of the partial veto results in the law being enforced as passed by the Legislature. OAG 26-92 .................................................. 327

LIABILITY

Physicians giving immunizations

Volunteer physicians who give immunizations for local public agencies under rules of the Department of Health and Social Services are not state agents for purposes of liability indemnification. OAG 1-91 .... 1

Volunteer drivers

"Volunteer Registration Form" utilized by county human services department to register volunteer drivers who transport department clients is ineffectve to release county from civil liability in event client is injured or killed in accident. Moreover, an attempt by a county to obtain such a release from liability may violate public policy. OAG 4-91 .............................. 23
LICENSES AND PERMITS

Bed and breakfast; alcohol beverages

An owner of a bed and breakfast establishment who does not hold an alcohol beverages license may personally consume alcohol beverages or serve alcohol beverages at social events held on the premises without violating section 125.09(1), Stats., provided that consumption of alcohol beverages occurs in a portion of the bed and breakfast establishment that is not open to the public or to renters.

Proprietors of a bed and breakfast establishment may solicit and accept voluntary contributions from guests at a social event held on the premises to defray costs of alcohol beverages, but bed and breakfast proprietors who do not hold an alcohol beverages license may not serve alcohol beverages at a social event where alcohol beverages are served only to those who pay an admission fee, without violating section 125.04(1). OAG 11-92 ................................. 218

Collection agencies

Section 218.04, Stats., requires licensure of nonresident collection agencies and solicitors that conduct business with Wisconsin residents solely by mail or telephone. Applying the licensing requirements to such agencies and solicitors would not impermissibly burden interstate commerce. OAG 19-92 ................................. 283

Marriage license residency requirements

Wisconsin residents who have not resided in their current county of residence for 30 days prior to application for a marriage license under section 765.05, Stats., must, like nonresidents, apply for a marriage license in the county in which the marriage ceremony will be performed. Persons in military service who are stationed in Wisconsin may obtain marriage licenses in the Wisconsin county in which they reside and Wisconsin residents in the military who are stationed out of state and can show that they intend to remain Wisconsin residents can apply for marriage licenses in their county of residence in Wisconsin. OAG 15-92 ................................. 236

Residency requirements

Wisconsin residents who have not resided in their current county of residence for 30 days prior to application for a marriage license under section 765.05, Stats., must, like nonresidents, apply for a marriage license in the county in which the marriage ceremony will be performed. Persons in military service who are stationed in Wisconsin may obtain marriage licenses in the Wisconsin county in which they reside and Wisconsin residents in the military who are stationed out of state and can show that they intend to remain Wisconsin residents can apply for marriage licenses in their county of residence in Wisconsin. OAG 15-92 ................................. 236
LOBBYING

Expenses paid to public official

The lobbying law prohibition against furnishing anything of pecuniary value to state officials includes fair market exchanges unless the fair market exchange is between a principal and a state official and the item or service is available to the general public. A lobbyist cannot sell to or purchase from a state official anything of pecuniary value even if it is also available to the general public under the same terms and conditions. The exception in section 13.625(7), Stats., for the furnishing and receipt of certain expenses applies to officials, employees and candidates who are not state public officials under chapter 19, subchapter III. An organization which employs a lobbyist may not furnish food or drink to a state official who is a member, officer or director of the organization unless it also furnishes those items to the general public. "Available to the general public" discussed. OAG 9-92

Public employe

The lobbying law prohibition against furnishing anything of pecuniary value to state officials includes fair market exchanges unless the fair market exchange is between a principal and a state official and the item or service is available to the general public. A lobbyist cannot sell to or purchase from a state official anything of pecuniary value even if it is also available to the general public under the same terms and conditions. The exception in section 13.625(7), Stats., for the furnishing and receipt of certain expenses applies to officials, employees and candidates who are not state public officials under chapter 19, subchapter III. An organization which employs a lobbyist may not furnish food or drink to a state official who is a member, officer or director of the organization unless it also furnishes those items to the general public. "Available to the general public" discussed. OAG 9-92

State official, selling or purchasing

The lobbying law prohibition against furnishing anything of pecuniary value to state officials includes fair market exchanges unless the fair market exchange is between a principal and a state official and the item or service is available to the general public. A lobbyist cannot sell to or purchase from a state official anything of pecuniary value even if it is also available to the general public under the same terms and conditions. The exception in section 13.625(7), Stats., for the furnishing and receipt of certain expenses applies to officials, employees and candidates who are not state public officials under chapter 19, subchapter III. An organization which employs a lobbyist may not furnish food or drink to a state official who is a member, officer or director of the organization unless it also furnishes those items to the general public. "Available to the general public" discussed. OAG 9-92
LOTTERIES

Casino type gambling

Under article IV, section 24 of the Wisconsin Constitution the Legislature may not authorize any scheme involving prize, chance, and consideration without amending the constitution unless the scheme falls within the bingo, raffle, on-track pari-mutuel or state lottery exceptions to the constitution. OAG 10-91

Legislature

Under article IV, section 24 of the Wisconsin Constitution the Legislature may not authorize any scheme involving prize, chance, and consideration without amending the constitution unless the scheme falls within the bingo, raffle, on-track pari-mutuel or state lottery exceptions to the constitution. OAG 10-91

LOTTERY BOARD

See also GAMBLING; LOTTERIES

Authority of

Under article IV, section 24 of the Wisconsin Constitution the Legislature may not authorize any scheme involving prize, chance, and consideration without amending the constitution unless the scheme falls within the bingo, raffle, on-track pari-mutuel or state lottery exceptions to the constitution. OAG 10-91

MARRIAGE AND DIVORCE

Domestic abuse petition filing fees

If a domestic abuse petition is filed under section 813.12(2), Stats., in conjunction with an action affecting the family commenced under chapter 767, no separate filing fee is applicable because a filing fee already would have been collected by the clerk under section 814.61(1) when one of the family actions enumerated under section 767.02(1) was commenced. In the absence of a pending family action, a domestic abuse action under section 813.12 is commenced with service of the petition upon the respondent if a copy of the petition is filed before service or promptly after service, and the clerk of court is authorized to collect a fee under section 814.61(1) when a domestic abuse action is commenced in this manner. Under section 813.127, however, there is only one fee applicable where a petitioner combines in one action two or more petitions for domestic abuse, child abuse or harassment if the respondent is the same person in each petition. After a final judgment has been entered in the divorce action, any person filing a petition for a domestic abuse restraining order would be required to pay a separate filing fee except when the same person already has paid a fee under section 814.61(7) for revision of a judgment or order and that petition is still pending. OAG 14-92
MARRIAGE AND DIVORCE (continued)

Residency requirements
Wisconsin residents who have not resided in their current county of residence for 30 days prior to application for a marriage license under section 765.05, Stats., must, like nonresidents, apply for a marriage license in the county in which the marriage ceremony will be performed. Persons in military service who are stationed in Wisconsin may obtain marriage licenses in the Wisconsin county in which they reside and Wisconsin residents in the military who are stationed out of state and can show that they intend to remain Wisconsin residents can apply for marriage licenses in their county of residence in Wisconsin. OAG 15-92

MENOMINEE INDIANS

County-tribal law enforcement agreements
A county has statutory authority to enter into a joint law enforcement agreement with an Indian tribe which locates a joint telecommunications terminal in a tribal building, so long as the terminal is properly secured, supervised and under the control of a county law enforcement agency. OAG 16-91

Law Enforcement
A county has statutory authority to enter into a joint law enforcement agreement with an Indian tribe which locates a joint telecommunications terminal in a tribal building, so long as the terminal is properly secured, supervised and under the control of a county law enforcement agency. OAG 16-91

Telecommunications
A county has statutory authority to enter into a joint law enforcement agreement with an Indian tribe which locates a joint telecommunications terminal in a tribal building, so long as the terminal is properly secured, supervised and under the control of a county law enforcement agency. OAG 16-91

MUNICIPALITIES

Forfeiture action
A municipality must pay the five dollar fee imposed under section 814.63(2), Stats., upon disposition of a forfeiture action in circuit court for a municipal ordinance violation. The fee may not be passed on to the defendant. OAG 2-92

ONEIDA INDIANS

Bingo
If any element of the Oneida tribe television bingo game occurs off the reservation, it is subject to prosecution under Wisconsin criminal law. OAG 27-92
OPEN MEETING

City council

The exemption in section 19.85(1)(c), Stats., of the open meetings law only authorizes a governmental body to convene in closed session to consider employment, compensation, promotion or performance evaluation of a specific public employe or employes. The purpose of the exemption is to protect the public employe who is being considered, not to protect the governmental body. The exemption does not permit a governmental body to convene in closed session to consider employment, compensation, promotion or performance evaluation policies to apply to a position of employment in general, but may permit a governmental body to convene in closed session to apply those general policies to a specific employe or employes.

OAG 5-92 ........................................ 176

Closed session

The exemption in section 19.85(1)(c), Stats., of the open meetings law only authorizes a governmental body to convene in closed session to consider employment, compensation, promotion or performance evaluation of a specific public employe or employes. The purpose of the exemption is to protect the public employe who is being considered, not to protect the governmental body. The exemption does not permit a governmental body to convene in closed session to consider employment, compensation, promotion or performance evaluation policies to apply to a position of employment in general, but may permit a governmental body to convene in closed session to apply those general policies to a specific employe or employes.

OAG 5-92 ........................................ 176

Exemptions

The exemption in section 19.85(1)(c), Stats., of the open meetings law only authorizes a governmental body to convene in closed session to consider employment, compensation, promotion or performance evaluation of a specific public employe or employes. The purpose of the exemption is to protect the public employe who is being considered, not to protect the governmental body. The exemption does not permit a governmental body to convene in closed session to consider employment, compensation, promotion or performance evaluation policies to apply to a position of employment in general, but may permit a governmental body to convene in closed session to apply those general policies to a specific employe or employes.

OAG 5-92 ........................................ 176

Governmental or quasi-governmental corporation

The term "quasi-governmental corporation" in section 19.82(1), Stats., includes private corporations which closely resemble governmental corporations in function, effect or status. As currently organized, the Milwaukee Economic Development Corporation and Metropolitan Milwaukee Enterprise Corporation constitute "quasi-governmental" corporations within the meaning of section 19.82(1) and are, therefore, subject to the open meetings law. OAG 20-91 ................. 129
OPEN MEETING (continued)

Metropolitan Milwaukee Enterprise Corporation
The term "quasi-governmental corporation" in section 19.82(1), Stats., includes private corporations which closely resemble governmental corporations in function, effect or status. As currently organized, the Milwaukee Economic Development Corporation and Metropolitan Milwaukee Enterprise Corporation constitute "quasi-governmental" corporations within the meaning of section 19.82(1) and are, therefore, subject to the open meetings law. OAG 20-91 129

Milwaukee Economic Development Corporation
The term "quasi-governmental corporation" in section 19.82(1), Stats., includes private corporations which closely resemble governmental corporations in function, effect or status. As currently organized, the Milwaukee Economic Development Corporation and Metropolitan Milwaukee Enterprise Corporation constitute "quasi-governmental" corporations within the meaning of section 19.82(1) and are, therefore, subject to the open meetings law. OAG 20-91 129

Quasi-governmental corporation
The term "quasi-governmental corporation" in section 19.82(1), Stats., includes private corporations which closely resemble governmental corporations in function, effect or status. As currently organized, the Milwaukee Economic Development Corporation and Metropolitan Milwaukee Enterprise Corporation constitute "quasi-governmental" corporations within the meaning of section 19.82(1) and are, therefore, subject to the open meetings law. OAG 20-91 129

PHYSICIANS AND SURGEONS

Liability
Volunteer physicians who give immunizations for local public agencies under rules of the Department of Health and Social Services are not state agents for purposes of liability indemnification. OAG 1-91 1

Volunteers
Volunteer physicians who give immunizations for local public agencies under rules of the Department of Health and Social Services are not state agents for purposes of liability indemnification. OAG 1-91 1

PRISONS AND PRISONERS

Emergency detention
Pursuant to section 51.20(14), Stats., the director of the county department under section 51.42 or 51.437 may request the sheriff of the county in which an individual was placed under emergency detention to transport that individual to another designated inpatient facility prior to the initial court hearing under chapter 51, and the sheriff must do so within a reasonable time. OAG 22-92 299
Emergency medical treatment
A Wisconsin law enforcement officer may transport a prisoner out of state for emergency medical treatment. Upon leaving Wisconsin, a law enforcement officer from the receiving state must take custody of the prisoner. The prisoner may be brought back to Wisconsin using the Uniform Criminal Extradition Act, section 976.03, Stats.
OAG 7-91 ................................................................. 41

Extradition
A Wisconsin law enforcement officer may transport a prisoner out of state for emergency medical treatment. Upon leaving Wisconsin, a law enforcement officer from the receiving state must take custody of the prisoner. The prisoner may be brought back to Wisconsin using the Uniform Criminal Extradition Act, section 976.03, Stats.
OAG 7-91 ................................................................. 41

Transfers of prisoners
Pursuant to section 51.20(14), Stats., the director of the county department under section 51.42 or 51.437 may request the sheriff of the county in which an individual was placed under emergency detention to transport that individual to another designated inpatient facility prior to the initial court hearing under chapter 51, and the sheriff must do so within a reasonable time. OAG 22-92 ....... 299

Transporting criminal across state lines
A Wisconsin law enforcement officer may transport a prisoner out of state for emergency medical treatment. Upon leaving Wisconsin, a law enforcement officer from the receiving state must take custody of the prisoner. The prisoner may be brought back to Wisconsin using the Uniform Criminal Extradition Act, section 976.03, Stats.
OAG 7-91 ................................................................. 41

PROPERTY

Joint tenants
The register of deeds and county or municipal tax listing officials may accept for filing, as an alternative to other statutory proceedings, for the eventual purpose of changing tax bill listings an affidavit of identity containing a legal description of the premises, the date and place of death of the decedent and full identification of both the decedent and the surviving joint tenant. County and municipal tax listing officials and the register of deeds have no authority to record or file any vital record including a death certificate except where the register of deeds acts as the local registrar under section 69.07, Stats.
OAG 13-91 ................................................................. 73
PUBLIC ASSISTANCE

Fraud investigation

Information contained in a county paternity case file may be released for purposes of fraud investigation of the public assistance programs specified in section 49.53, Stats. OAG 13-92 226

PUBLIC OFFICIALS

Lobbying law

The lobbying law prohibition against furnishing anything of pecuniary value to state officials includes fair market exchanges unless the fair market exchange is between a principal and a state official and the item or service is available to the general public. A lobbyist cannot sell to or purchase from a state official anything of pecuniary value even if it is also available to the general public under the same terms and conditions. The exception in section 13.625(7), Stats., for the furnishing and receipt of certain expenses applies to officials, employees and candidates who are not state public officials under chapter 19, subchapter III. An organization which employs a lobbyist may not furnish food or drink to a state official who is a member, officer or director of the organization unless it also furnishes those items to the general public. "Available to the general public" discussed. OAG 9-92 205

Political activities

Classified employees, including classified employees of legislative service agencies can run for nonpartisan office. An agency cannot prohibit its classified employees from running for nonpartisan office except in certain circumstances. OAG 12-91 68

Purchases of goods and services

The ethics law does not prohibit a state public official from purchasing items and services that are made available to the official because he or she holds public office. If the opportunity to purchase the item or service itself has substantial value, the ethics code prohibits the purchase of the item or service. OAG 8-92 201

Salaries and wages

Discretionary authority to grant increases to elected county officials based upon the performance or length of service of the incumbent may not be delegated to a committee of the county board because the board itself lacks the authority to establish such a compensation scheme. The compensation of elected county officials who do not participate in establishing their own salaries may be increased but not decreased during their terms of office. OAG 17-92 258

Statement of economic interests

An individual who is required to file a Statement of Economic Interests and who is a beneficiary of a trust which provides that the individual will receive a share of the trust's corpus upon the death of the individual's parent if he or she survives the parent, must identify on
PUBLIC OFFICIALS (continued)

Statement of economic interests (continued)

his or her Statement of Economic Interests, the securities held by the trust if the individual's interest in the securities is valued at $5,000 or more. OAG 6-92 .............................................. 183

Trust fund

An individual who is required to file a Statement of Economic Interests and who is a beneficiary of a trust which provides that the individual will receive a share of the trust's corpus upon the death of the individual's parent if he or she survives the parent, must identify on his or her Statement of Economic Interests, the securities held by the trust if the individual's interest in the securities is valued at $5,000 or more. OAG 6-92 .............................................. 183

PUBLIC PROPERTY

County property

Although a county may not acquire land specifically for the purpose of leasing that land to a private entity licensed to operate a racetrack under section 562.05(1)(a), Stats., it may lease land initially acquired for a valid public purpose to such a private entity, unless the circumstances of the lease demonstrate that the land has become surplus land. OAG 14-91 .............................................. 80

County property, sale of

County ordinances delegating the authority to decide the terms under which county property will be sold and delegating the authority to negotiate certain public works contracts to county committees do not impermissibly infringe upon the administrative duties and powers of the county executive. OAG 9-91 .............................................. 49

Racetrack

Although a county may not acquire land specifically for the purpose of leasing that land to a private entity licensed to operate a racetrack under section 562.05(1)(a), Stats., it may lease land initially acquired for a valid public purpose to such a private entity, unless the circumstances of the lease demonstrate that the land has become surplus land. OAG 14-91 .............................................. 80

RADIOACTIVE WASTE REVIEW BOARD

Powers

Only the Radioactive Waste Review Board is authorized to negotiate agreements with the federal government regarding the disposal of high-level nuclear waste and transuranic waste either in a high-level radioactive waste repository or a monitored retrievable storage facility. Local units of government may apply for grants to provide funds to support information and education efforts related to potential negotiation for those sites. Those applications must be reviewed and commented upon by the Radioactive Waste Review Board. OAG 23-92 ......................................................... 308
REGENTS, BOARD OF
Pay range for academic staff 1991-92
The University of Wisconsin Board of Regents' proposed action to raise by one percent the pay range minima and maxima of the academic staff for the 1991-1992 fiscal year requires prior approval by the Secretary of the Department of Employment Relations. OAG 21-91 138

REGISTER OF DEEDS
Certified copies of birth, death and marriage records
Consistent with his or her respective powers and duties under sections 69.03 and 69.05, Stats., and with the specific uniformity requirement of section 69.03(7), a local registrar does not possess the power to adopt and implement procedures more stringent than those directed by the state registrar of vital statistics for issuing certified copies of a vital record under section 69.21(1). OAG 6-91 35

Death certificate
The register of deeds and county or municipal tax listing officials may accept for filing, as an alternative to other statutory proceedings, for the eventual purpose of changing tax bill listings an affidavit of identity containing a legal description of the premises, the date and place of death of the decedent and full identification of both the decedent and the surviving joint tenant. County and municipal tax listing officials and the register of deeds have no authority to record or file any vital record including a death certificate except where the register of deeds acts as the local registrar under section 69.07, Stats. OAG 13-91 73

Joint tenants
The register of deeds and county or municipal tax listing officials may accept for filing, as an alternative to other statutory proceedings, for the eventual purpose of changing tax bill listings an affidavit of identity containing a legal description of the premises, the date and place of death of the decedent and full identification of both the decedent and the surviving joint tenant. County and municipal tax listing officials and the register of deeds have no authority to record or file any vital record including a death certificate except where the register of deeds acts as the local registrar under section 69.07, Stats. OAG 13-91 73

RESIDENCE, DOMICILE AND LEGAL SETTLEMENT
Deputy sheriff
In counties that have imposed no local residency requirement, only deputy sheriffs or undersheriffs appointed pursuant to section 59.21(1), Stats., are required to be county residents at the time of initial employment. OAG 18-91 119
Marriage license requirements
Wisconsin residents who have not resided in their current county of residence for 30 days prior to application for a marriage license under section 765.05, Stats., must, like nonresidents, apply for a marriage license in the county in which the marriage ceremony will be performed. Persons in military service who are stationed in Wisconsin may obtain marriage licenses in the Wisconsin county in which they reside and Wisconsin residents in the military who are stationed out of state and can show that they intend to remain Wisconsin residents can apply for marriage licenses in their county of residence in Wisconsin. OAG 15-92 .......................... 236

Racetrack ownership
Under 1987 Wisconsin Act 354 and section 562.05(3w)(a), Stats., residency for purposes of owning and operating a racetrack does not require fifty-one percent ownership by individuals. Wisconsin Administrative Code section RACE 1.01(9) (1990) is consistent with this legislative intent. OAG 19-91 .......................... 124

Employe Trust Funds Board
The Employe Trust Funds Board must under section 40.05(2n), Stats., divide post-1990 contribution rate adjustments between employer and employe contributions. An increase in employe contributions based upon such division is not a constitution contract clause violation. The Board lacks the authority to redetermine the unfunded accrued actuarial liability for calendar year 1991 rate setting purposes as an alternative to a contribution increase. OAG 17-91 .......................... 101

County Board
Discretionary authority to grant increases to elected county officials based upon the performance or length of service of the incumbent may not be delegated to a committee of the county board because the board itself lacks the authority to establish such a compensation scheme. The compensation of elected county officials who do not participate in establishing their own salaries may be increased but not decreased during their terms of office. OAG 17-92 .......................... 258

Public officials
Discretionary authority to grant increases to elected county officials based upon the performance or length of service of the incumbent may not be delegated to a committee of the county board because the board itself lacks the authority to establish such a compensation scheme. The compensation of elected county officials who do not participate in establishing their own salaries may be increased but not decreased during their terms of office. OAG 17-92 .......................... 258
SALARIES AND WAGES (continued)

University
The University of Wisconsin Board of Regents' proposed action to raise by one percent the pay range minima and maxima of the academic staff for the 1991-1992 fiscal year requires prior approval by the Secretary of the Department of Employment Relations. OAG 21-91

SCHOOLS AND SCHOOL DISTRICTS

CESA and purchase of real estate
School district members of cooperative educational service agencies who unsuccessfully oppose purchase of real estate are obliged to pay their share of the costs of the acquisition of that real estate, and the CESA may sue those districts if they do not fulfill their financial obligation. The board of control may set the appropriate share for the school districts if the money used for acquisition is not state or local aids under section 116.08(1), Stats. OAG 21-92

Discrimination
Discrimination such as the use by public schools of American Indian logos, mascots or nicknames does come within the purview of section 118.13 of the Wisconsin statutes. OAG 25-92

Indian logos, mascots or nicknames
Discrimination such as the use by public schools of American Indian logos, mascots or nicknames does come within the purview of section 118.13 of the Wisconsin statutes. OAG 25-92

Real estate purchases
School district members of cooperative educational service agencies who unsuccessfully oppose purchase of real estate are obliged to pay their share of the costs of the acquisition of that real estate, and the CESA may sue those districts if they do not fulfill their financial obligation. The board of control may set the appropriate share for the school districts if the money used for acquisition is not state or local aids under section 116.08(1), Stats. OAG 21-92

SHERIFFS

See also LAW ENFORCEMENT

Deputy sheriff
In counties that have imposed no local residency requirement, only deputy sheriffs or undersheriffs appointed pursuant to section 59.21(1), Stats., are required to be county residents at the time of initial employment. OAG 18-91

Residence requirements
In counties that have imposed no local residency requirement, only deputy sheriffs or undersheriffs appointed pursuant to section 59.21(1), Stats., are required to be county residents at the time of initial employment. OAG 18-91
SHERIFFS (continued)

Transportation of individual in emergency detention

Pursuant to section 51.20(14), Stats., the director of the county department under section 51.42 or 51.437 may request the sheriff of the county in which an individual was placed under emergency detention to transport that individual to another designated inpatient facility prior to the initial court hearing under chapter 51, and the sheriff must do so within a reasonable time. OAG 22-92 299

STATE EMPLOYEES
See CIVIL SERVICES; PUBLIC OFFICIALS

TAXATION

Joint tenants

The register of deeds and county or municipal tax listing officials may accept for filing, as an alternative to other statutory proceedings, for the eventual purpose of changing tax bill listings an affidavit of identity containing a legal description of the premises, the date and place of death of the decedent and full identification of both the decedent and the surviving joint tenant. County and municipal tax listing officials and the register of deeds have no authority to record or file any vital record including a death certificate except where the register of deeds acts as the local registrar under section 69.07, Stats. OAG 13-91 73

TELEVISION
See also LOTTERIES

Bingo

If any element of the Oneida tribe television bingo game occurs off the reservation, it is subject to prosecution under Wisconsin criminal law. OAG 27-92 332

Cable television; splitting devices

The federal Cable Communications Policy Act, 47 U.S.C. § 521 (1991), does not preempt state prohibition of mandatory fees for the use of splitter devices. OAG 16-92 248

UNEMPLOYMENT COMPENSATION

Employer service company

Strict compliance with all criteria in section 108.02(12m), Stats., and section 108.065 is required before a company will qualify as an employer service company and the employer for unemployment compensation purposes. OAG 3-92 154
UNEMPLOYMENT COMPENSATION (continued)

Leasing company
Strict compliance with all criteria in section 108.02(12m), Stats., and section 108.065 is required before a company will qualify as an employee service company and the employer for unemployment compensation purposes. OAG 3-92 154

Temporary help service company
Strict compliance with all criteria in section 108.02(12m), Stats., and section 108.065 is required before a company will qualify as an employee service company and the employer for unemployment compensation purposes. OAG 3-92 154

UNIFORM CRIMINAL EXTRADITION ACT

Emergency medical treatment
A Wisconsin law enforcement officer may transport a prisoner out of state for emergency medical treatment. Upon leaving Wisconsin, a law enforcement officer from the receiving state must take custody of the prisoner. The prisoner may be brought back to Wisconsin using the Uniform Criminal Extradition Act, section 976.03, Stats. OAG 7-91 41

UNIVERSITY

Pay range minima and maxima increase in 1991-92
The University of Wisconsin Board of Regents' proposed action to raise by one percent the pay range minima and maxima of the academic staff for the 1991-1992 fiscal year requires prior approval by the Secretary of the Department of Employment Relations. OAG 21-91 138

Salaries and wages
The University of Wisconsin Board of Regents' proposed action to raise by one percent the pay range minima and maxima of the academic staff for the 1991-1992 fiscal year requires prior approval by the Secretary of the Department of Employment Relations. OAG 21-91 138

VETO
See GOVERNOR; COUNTY EXECUTIVE

VITAL STATISTICS

Birth certificate
Consistent with his or her respective powers and duties under sections 69.03 and 69.05, Stats., and with the specific uniformity requirement of section 69.03(7), a local registrar does not possess the power to adopt and implement procedures more stringent than those directed by the state registrar of vital statistics for issuing certified copies of a vital record under section 69.21(1). OAG 6-91 35
VITAL STATISTICS (continued)

Copies of vital records

Consistent with his or her respective powers and duties under sections 69.03 and 69.05, Stats., and with the specific uniformity requirement of section 69.03(7), a local registrar does not possess the power to adopt and implement procedures more stringent than those directed by the state registrar of vital statistics for issuing certified copies of a vital record under section 69.21(1). OAG 6-91 35

Death certificate

Consistent with his or her respective powers and duties under sections 69.03 and 69.05, Stats., and with the specific uniformity requirement of section 69.03(7), a local registrar does not possess the power to adopt and implement procedures more stringent than those directed by the state registrar of vital statistics for issuing certified copies of a vital record under section 69.21(1). OAG 6-91 35

Local registrar

Consistent with his or her respective powers and duties under sections 69.03 and 69.05, Stats., and with the specific uniformity requirement of section 69.03(7), a local registrar does not possess the power to adopt and implement procedures more stringent than those directed by the state registrar of vital statistics for issuing certified copies of a vital record under section 69.21(1). OAG 6-91 35

State registrar

Consistent with his or her respective powers and duties under sections 69.03 and 69.05, Stats., and with the specific uniformity requirement of section 69.03(7), a local registrar does not possess the power to adopt and implement procedures more stringent than those directed by the state registrar of vital statistics for issuing certified copies of a vital record under section 69.21(1). OAG 6-91 35

WASTE MANAGEMENT

Counties

Section 59.07(135)(L), Stats., authorizes counties that are responsible units of government under section 159.09(1)(b) to levy taxes for capital and operating expenses incurred in connection with the operation of the county’s recycling program only upon those local units of government which have not become responsible units of government pursuant to section 159.09(1)(c). Section 59.07(135)(L) now authorizes counties to levy taxes for both capital and operating expenses incurred in connection with any other form of solid waste management function only upon local units of government which participate with the county in that form of solid waste management activity. Where both recycling and other kinds of solid waste management functions are performed in a single county facility, the county must use accounting principles to apportion the costs of those activities before levying taxes upon local units of government within the county. OAG 24-92 312
WASTE MANAGEMENT (continued)

Radioactive Waste Review Board

Only the Radioactive Waste Review Board is authorized to negotiate agreements with the federal government regarding the disposal of high-level nuclear waste and transuranic waste either in a high-level radioactive waste repository or a monitored retrievable storage facility. Local units of government may apply for grants to provide funds to support information and education efforts related to potential negotiation for those sites. Those applications must be reviewed and commented upon by the Radioactive Waste Review Board.

OAG 23-92 .................................................. 308

Solid waste facilities

Section 59.07(135)(L), Stats., authorizes counties that are responsible units of government under section 159.09(1)(b) to levy taxes for capital and operating expenses incurred in connection with the operation of the county’s recycling program only upon those local units of government which have not become responsible units of government pursuant to section 159.09(1)(c). Section 59.07(135)(L) now authorizes counties to levy taxes for both capital and operating expenses incurred in connection with any other form of solid waste management function only upon local units of government which participate with the county in that form of solid waste management activity. Where both recycling and other kinds of solid waste management functions are performed in a single county facility, the county must use accounting principles to apportion the costs of those activities before levying taxes upon local units of government within the county. OAG 24-92 .................................................. 312

Taxation

Section 59.07(135)(L), Stats., authorizes counties that are responsible units of government under section 159.09(1)(b) to levy taxes for capital and operating expenses incurred in connection with the operation of the county’s recycling program only upon those local units of government which have not become responsible units of government pursuant to section 159.09(1)(c). Section 59.07(135)(L) now authorizes counties to levy taxes for both capital and operating expenses incurred in connection with any other form of solid waste management function only upon local units of government which participate with the county in that form of solid waste management activity. Where both recycling and other kinds of solid waste management functions are performed in a single county facility, the county must use accounting principles to apportion the costs of those activities before levying taxes upon local units of government within the county. OAG 24-92 .................................................. 312

WISCONSIN RACING BOARD

Residency, definition of

Under 1987 Wisconsin Act 354 and section 562.05(3w)(a), Stats., residency for purposes of owning and operating a racetrack does not
WISCONSIN RACING BOARD (continued)
Residency, definition of (continued)
require fifty-one percent ownership by individuals. Wisconsin Administrative Code section RACE 1.01(9) (1990) is consistent with this legislative intent. OAG 19-91 .......................... 124

WISCONSIN RETIREMENT SYSTEM
Budget Bill of 1991
Section 1148m of 1991 Wisconsin Act 39 does not violate article IV, sections 18 or 31 of the Wisconsin Constitution. OAG 4-92 ........ 167

WORDS AND PHRASES
"Available to the general public" ................................. 205
"Classification" legislation ........................................ 167
"Consideration" ..................................................... 218
"Deemer clause" ...................................................... 290
Domicile ............................................................. 236
Discrimination ....................................................... 321
Employe service company ......................................... 154
"Enumerate" .......................................................... 146
"Furnish" .............................................................. 205
"General public" ...................................................... 205
"Governmental or quasi-governmental" .......................... 129
Indefinite term ...................................................... 46
Lottery ................................................................. 53
"Make" ................................................................. 327
Partisan .............................................................. 68
"Private or local" legislation ....................................... 167
Provider .............................................................. 30
Pupil harassment ..................................................... 321
"Quasi-governmental" ............................................... 129
"Public places" ....................................................... 218
INDEX

WORDS AND PHRASES (continued)

"Race-morning" .................................................. 264
Residence .......................................................... 236
Residency .......................................................... 124
"Saving clause" ..................................................... 290
Stereotyping ......................................................... 321
"Surrender of the premises" .................................... 86
"Tests" ................................................................. 264
Ticket ................................................................. 53