OPINIONS

OF THE

ATTORNEY GENERAL

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engaged illegally in practice in the state of Washington but who could show that they had been in "continuous practice in one locality within the state for the past two years." The court held that although their practices were illegal, they could still qualify. The court pointed out that the offenses were purely statutory, were misdemeanors, and did not involve moral turpitude, and although the persons had violated the existing licensing law, this was not so extraordinary as to attribute to the word "practice" as used in the statute "any other than its ordinary meaning". See also *State v. Carson,* (1910) 231 Mo. 1, 132 S.W. 587.

It should be mentioned that there are many cases where illegal operations by motor carriers have been held by the courts not to be qualifying experience under the grandfather provisions. See *Rowley v. Public Service Commission,* (1947) 185 P. 2d 514. However, the court in the *Rowley* case did not cite and distinguish the *Alton* case. Also, many of the older cases involving medical licenses have denied the use of illegal experience for a license under the grandfather clause, but in many of these cases the statutes specifically require that the experience be *lawful* by using such terms as "lawful practice", "legal practitioner" and "legally engaged". The following three widely quoted cases involved such language: *Commonwealth v. Petry,* (1923) 81 Pa. Sup. 27, 263 U.S. 704 (Certiorari denied); *State ex rel. Eberts v. The Ohio State Medical Board,* (1899) 60 Ohio St. 21, 53 N.E. 298; and *Metcalfe v. State Board of Registration,* (1900) 123 Mich. 661, 82 N.W. 512.

In *McDonald v. Thompson,* (1938) 305 U.S. 263, the United States supreme court ruled that where authority had been asked of a regulatory agency and had been denied at the state level and the operation was then conducted in defiance of the refusal, the operator was not engaged in "bona fide operation" within the meaning of the Federal Motor Carrier Act. It would seem that this case could be in point in cases where the regulatory agency had specifically sought enforcement action against a plumber who was violating the licensing requirements and the plumber persisted in his operation in defiance of state regulation. However, it might also be said that in the absence of state enforcement effort, the language of the United States supreme court in the

Alton case regarding violations of state laws should receive paramount attention:

"Their violation is material only insofar as it may be relevant to establishing an absence of 'bona fide operation'."

In answer to your question, therefore, I am of the opinion that experience gained for qualifying purposes under the grandfather license clause of the plumbing law need not necessarily be all in compliance with local and state laws, especially if the offenses involved are purely statutory misdemeanors, do not involve moral turpitude, and no specific enforcement action has been taken against such applicant in regard to the activities through which qualifying experience was gained. This opinion is further substantiated by the lack of the terms "lawful", "legal", or "legally" in sec. 145.07 (1). Instead, the legislature has used only the terms "actively engaged" during the period in question "in the practical installation of plumbing in this state". This is clearly equivalent to the "bona fide operation" mentioned in the *Alton* case, supra, by the United States supreme court.

BCL:LLD

Anti-Secrecy — Wisconsin State Universities — Faculty meetings at Wisconsin state universities are subject to the provisions of sec. 14.90, and must be publicly held.

December 10, 1968.

EUGENE R. MCPHEE, *Director*
State Universities

You ask whether sec. 14.90, Stats., the Wisconsin antisecrecy law, applies to meetings of the faculties of the state universities.

In asking whether such meetings are covered by the antisecrecy law, you present the more fundamental question of what bodies are covered by sec. 14.90. This issue has never been clearly decided by the Wisconsin supreme court, nor

has it been directly addressed in any previous attorney general's opinion relating to the anti-secrecy law. Thus, in order to answer this fundamental question, it is necessary to examine closely the organiation and structure of sec. 14.90.

Sec. 14.90 (1) is the declaration of the public policy of the state concerning secrecy in government:

"In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of the state 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 affairs and the transaction of governmental business."

Sec. 14.90 (2) is the implementational or operational subsection of the statute. The language relevant to the question we are considering here is contained in the first sentence of that subsection:

"*To implement and insure the public policy herein expressed,* all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations, unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided * * *".

The opening phrase of this supplemental sentence (emphasized above) relates directly back to sub. (1). Thus, sub. (1) must be read not merely as expressing the public policy of the state towards open meetings, but also as an overall definition of the scope of sec. 14.90.

Sec. 14.90 (3) contains certain specifically defined exceptions to the blanket requirement that all described meetings be open. These stated exceptions provide for situations where the legislature believes open meetings would be *incompatible* with the conduct of governmental affairs and the transaction of governmental business. Except for specific situations provided for elsewhere in the statutes, sub. (3) lists the only circumstances where the legislature believes such incompatibility could occur. Furthermore, even if the subject matter of a meeting falls within the exceptions of sub. (3), the meeting is not automatically closed. Rather, such a meeting should *not* be closed unless an open meeting *would be incompatible* with the conduct of governmental affairs and the transaction of governmental business.

The scope of coverage of sec. 14.90 must be determined by an examination of the implementational first sentence of sub. (2). The repeated use of the word "all" ("*all* meetings of *all* * * * bodies * * * shall be open to *all* citizens at *all* times") demonstrates the legislature's intent that the statute be interpreted broadly. Similarly, the words "all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations," are used in their broad, generic sense, rather than as words of limitation. Taken as a whole, the language used in this implementational sentence demonstrates the legislative intent to make the statute as broad and inclusive as possible. Thus, I conclude that the scope of application of sec. 14.90, under sub. (2), is as broad as is necessary to insure the full implementation of the public policy contained in sub. (1).

Clearly, not all bodies are covered by the statute. The stated purpose of the open meeting law is to provide the public with the fullest information possible about the conduct of *public or governmental affairs.* Thus, meetings of bodies that are private and are not substantially related to the conduct of public or governmental affairs are not covered. It is sometimes difficult however, to draw a clear distinction between private and public bodies. Problems may also arise as to whether relationship between a particular body and a public or governmental institution is such that the meetings of that body are covered. Finally, fine distinctions must frequently be made to determine whether a particular group is a body within the purview of the statute. Your question relating to the faculties of the state universities falls into the latter two problem areas.

The prior discussion suggests a two-step approach to problems of whether sec. 14.90 applies to a particular body:

1. Does it perform functions by taking formal actions as a body at meetings?
2. Are those functions related to a public or governmental

institution, and do they constitute substantial participation in the affairs of that institution?

I will attempt to use this two-step approach in analyzing the question you present:

Are meetings of the faculties of state universities covered by sec. 14.90?

1. *Do the faculties of the Wisconsin State Universities perform functions by taking formal actions as a body at meetings?*

A basic but sometimes overlooked fact is that sec. 14.90 applies only to *meetings* of *bodies*. Thus meetings between the one-man head of a department and a member of his staff, or even a meeting of the entire staff of a department, may not be covered by the anti-secrecy law because the staff does not constitute a body. On the other hand, meetings of statutorily defined public bodies, such as the state university board of regents, clearly are covered by sec. 14.90.

The faculties of the state universities lie somewhere between these two extremes. The faculties of the state universities are not statutorily defined, nor specifically recognized, in CH. 37, Stats. On the other hand, the faculties of the state universities are more than mere groups of employes. They have constitutions and bylaws. They play a significant role in the formulation of policy for their respective universities, and in certain aspects of administration of those universities.

An examination of sec. 36.12, relating to the university provides a useful analogy at this point:

"36.12 President of the University. The president of the university shall be president of the several faculties and the executive head of the instructional force in all its departments; as such he shall have authority, subject to the board of regents, to give general direction to the instruction and scientific investigations of the several colleges, and so long as the interests of the institution require it he shall be charged with the duties of one of the professorships. The immediate government of the several colleges shall be intrusted to their respective faculties; but the regents may

regulate the courses of instruction and prescribe the books or works to be used in the several courses, and also confer such degrees and grant such diplomas as are usual in universities or as they shall deem appropriate, and confer upon the faculty by bylaws the power to suspend or expel students for misconduct or other cause prescribed in such bylaws."

In previous attorney general's opinions (49 OAG iv, 54 OAG i), it was stated that meetings of the faculty of the university of Wisconsin are covered by sec. 14.90. These opinions were based in part on the following language of sec. 36.12:

"The immediate government of the several colleges shall be intrusted to their respective faculties; * * *"

This phrase is significant, not because of the occurrence of the word "government" which, in context, is clearly used as a word of art, and would ordinarily be termed "administration." Rather, the phrase is significant in that it demonstrates, in the law itself, a recognition of the delegation of important public functions by the board of regents to the faculties of the several colleges of the university, and to the faculty of the university itself. Thus, the faculty of the university, and the faculties of its several colleges, are covered by sec. 14.90 because, acting formally as a body, they perform important university functions and exercise important powers delegated to them by the board of regents.

Although CH. 37, Stats., contains no such express recognition of the faculties of the state universities, the dissimiliarities between that chapter and CH. 36 reflect the fact that the university has always been regarded by the legislature as a large and diverse institution, whereas state university system was originally devised as a system of small state teachers' colleges. In recent years, however, the state university system has expanded immensely, both in enrollment and in curriculum, in order to meet the expanding needs for higher education in Wisconsin, and is now one of the largest educational systems in the country. The institutional structure of the individual state universities, reflecting this great change, have come to be quite similar to that

of the university of Wisconsin. Thus, the dissimilarities between the university of Wisconsin and the Wisconsin state universities which were the underlying basis for the contextual dissimilarities between CHS. 36 and 37 no longer exist in fact, and one could properly analogize between meetings of the faculty of the university of Wisconsin and the faculties of state universities and conclude that the latter are covered by sec. 14.90.

Neither CH. 36 nor CH. 37 specifically defines the respective faculty body. These chapters provide that the respective board of regents is vested with all ultimate authority for the government and administration of the university(ies). In each instance, policy-making and administrative functions performed by the faculty bodies are solely derived from the delegation of authority by the respective board of regents. Thus, the final determination of the applicability of sec. 14.90 must turn on the functions delegated by the respective board of regents to the faculties and being performed by the faculties, and not on the recognition of such delegation or lack thereof to be found in CH. 36 or CH. 37.

Because your opinion request related to the faculty of the state university—Stevens Point, I have studied their faculty handbook, constitution and bylaws, and it is my opinion that the structure of that faculty body does indeed provide for the taking of formal actions, as a body, with regard to delegated policy-making and administrative functions. I therefore conclude that the faculties of the state universities are bodies such as may be covered by sec. 14.90.

2. *Do the faculties of the Wisconsin State Universities perform functions related to a public institution, and do they participate substantially in the affairs of that institution?*

Sec. 14.90 (1) declares the policy of the state that "the public is entitled to the fullest and most complete information regarding the affairs of government." In sec. 14.90 (2) the legislature intended to fully implement that policy. The phrase "affairs of government" must be construed as being broader than the word "government" itself. Therefore, I conclude that sec. 14.90 relates not only to meetings of arms or agencies of state and local government, but also to meetings of governing and administrative bodies of all public

institutions. By public institution, I mean one that falls within the general definition of "public institution" found in *Black's Law Dictionary,* 4th Ed., page 941:

"*Public institution.* One which is created and exists by law or public authority, e.g., an asylum, charity, college, university, schoolhouse, etc."

There is no question that the state universities are public institutions.

Furthermore, it has already been determined that the board of regents of state universities is an arm or agency of the state. *Sullivan v. Board of Regents of Normal Schools,* (1932) 209 Wis. 242. Thus, to the extent that the faculties are performing governmental, policy-making or administrative functions delegated by the board of regents, they are directly related to an arm of the state.

The nature of the relationship of a particular body to a public institution is another problem area in determining the applicability of sec. 14.90, Stats. "Substantial participation" need not be direct participation in the government or administration of that institution. It has already been determined that advisory committees and groups dealing with governmental affairs and the transactions of governmental business have such a relationship and are covered by sec. 14.90, 54 OAG iv.

The faculty of a Wisconsin state university performs an important role in policy formation for that university. Indeed, the whole structure of the faculty body is designed for that purpose.

"The faculty is organized into councils and committees for policy formulation and advisory functions." (*Wisconsin State University—Stevens Point, faculty handbook,* page A-4.)

It is clear that the faculties of the state universities perform important advisory functions in formulation of policy for their respective institutions.

Furthermore, a state university faculty apparently performs important functions in the government or administration of the university itself. For example, the Wisconsin state university—Whitewater catalogue outlines the respon-

sibility of the graduate faculty in the administration of the school of graduate studies:

"The Graduate Council is the committee responsible for the formulation of policy for the School of Graduate Studies. Its decisions are subject to approval by the entire graduate faculty. Members of the Graduate Council are elected by the graduate faculty. The Graduate Library Committee administers the allocation of funds for the purchase of library material and other matters concerning the development of the library as it pertains to the Graduate School. The Graduate Standards Committee deals with academic standards, probation and dismissal. All committees report their actions to the entire graduate faculty and all committee actions are subject to the approval of that body."

Similarly, the participation of the faculty of Wisconsin state university—Stevens Point in the administration of that university is evidenced by the following quotation from the faculty bylaws:

"No action, of a committee responsible to the Faculty, shall become operative as an action of the university until it has been reported to the Faculty at a regular or special meeting under the procedures outlined below: * * *" *Wisconsin State University—Stevens Point, Faculty Bylaws,* p. 18.

I, therefore, conclude that the faculties of the state universities are advisory to, and participate substantially in, the administration of their respective institutions. It is my opinion, therefore, that meetings of the faculties of the state universities must be publicly held, and open to all citizens at all times as required by sec. 14.90, Stats., subject to only the exceptions provided in sub. (3) of that statute, and to any other exceptions that may be provided by law.

BCL:SMS

Investment Board—Student Loans—Investments by the Wisconsin investment board under sec. 25.17 (3) (bf) lie within the sound discretion of the board to the extent that the liquidity of the general fund is involved.

December 18, 1968.

HOWARD A. SMART
Executive Director
State Investment Board

At the direction of the trustees of the state investment board you have requested my opinion whether the trustees have discretion in the investment of monies in the general fund for the purposes set forth in sec. 25.17 (3) (bf), Stats. It is my opinion that such discretion does reside in the trustees of the state investment board. Under sec. 39.32, Stats., the commission for higher educational aids is authorized to make certain loans to students. Sec. 25.17 (3) (bf), provides for the investment by the state investment board in such loans.

Sec. 25.17 (3) (bf) reads as follows:

"* * * The board shall:

"(3) (bf) Invest sums not exceeding $20,000,000 outstanding at any one time of the balances of the general fund in advance to the state commission for higher education aids for the purpose of making additional loans to needy students under s. 39.32. Such loans shall initially be made by the state commission for higher educational aids from the appropriations under s. 20.235 (1) (g). Despite the specific provisions of sub. (1), the responsibility for collection of the interest and principal on such loans to students shall rest in the state commission for higher educational aids and the function of the investment board shall be limited to advancing funds to the state commission for higher educational aids for not to exceed 95% of such loans outstanding and collectible, based upon the certificates of the state commission for higher educational aids as to the current status of the student loans made, due and collectible under s. 39.32, and to periodically receiving from the appropriations made by s. 20.235 (1) (e), (g), (i) and (m) payments of principal and interest on the advances made to the state commission for higher educational aids, interest to be computed monthly at 4% per annum on the unpaid principal balance of the advances, made prior to July 1, 1966, and at the maximum rate allowable under P. L. 89-329 and P. L. 89-287, or 4%, whichever