OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOLUME 78

January 1, 1989 through December 31, 1989

DONALD J. HANAWAY

ATTORNEY GENERAL

MADISON, WISCONSIN

1989

ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee ..... from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee ..... from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva ..... from Jan. 5, 1852, to Jan. 2 1854
GEORGE B. SMITH, Madison ..... from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point ..... from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh ..... from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay ..... from Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukee ..... from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown ..... from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona ..... from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam ..... from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Mineral Point ..... from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend ..... from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc ..... from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison ..... from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau ..... from Jan. 7, 1895, to Jan. 2, 1899
EMMET R. HICKS, Oshkosh ..... from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT,
Neillsville ..... from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison ..... from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center ..... from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock ..... from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson ..... from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel ..... from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee ..... from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison ..... from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay ..... from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Milwaukee ..... from Jan. 2, 1933, to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston ..... from Jan. 4, 1937, to Jan. 2, 1939
JOHN E. MARTIN, Milwaukee ..... from Jan. 2, 1939, to June, 5, 1948
GROVER L. BROADFOOT, Mondovi ..... from June 5, 1948, to Nov. 15, 1948
THOMAS E. FAIRCHILD, Milwaukee ..... from Nov. 15, 1948, to Jan. 1, 1951
VERNON W. THOMSON,
Richland Center ..... from Jan. 1, 1951, to Jan. 7, 1957
STEWART G. HONECK, Madison ..... from Jan. 7, 1957, to Jan. 5, 1959
JOHN W. REYNOLDS, Green Bay ..... from Jan. 5, 1959, to Jan. 7, 1963
GEORGE THOMPSON, LaCrosse ..... from Jan. 7, 1963, to Jan. 5, 1965
BRONSON C. La FOLLETTE, Madison ..... from Jan. 5, 1965, to Jan. 6, 1969
ROBERT W. WARREN, Green Bay ..... from Jan. 6, 1969, to Oct. 8, 1974

VICTOR A. MILLER, Saint Nazianz ..... from Oct. 8, 1974, to Nov. 25, 1974
BRONSON C. La FOLLETTE,
Madison ..... from Nov. 25, 1974, to Jan. 5, 1987
DONALD J. HANAWAY, DePere ..... from Jan. 5, 1987 to

DEPARTMENT OF JUSTICE

DONALD J. HANAWAY ..... Attorney General
MARK E. MUSOLF ..... Deputy Attorney General
WILLIAM S. BECKER[1] ..... Executive Assistant
ROBERT T. HARTY[2] ..... Executive Assistant

LEGAL STAFF

JAMES D. JEFFRIES ..... 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
RUSTAM A. BARBEE[1] ..... Assistant Attorney General
MARY D. BATT ..... Assistant Attorney General
DAVID J. BECKER ..... Assistant Attorney General
MARY V. BOWMAN ..... Assistant Attorney General
BURNEATTA L. BRIDGE ..... Assistant Attorney General
PETER J. CANNON ..... 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
STEVEN D. EBERT ..... Assistant Attorney General
SHARI T. EGGLESON ..... Assistant Attorney General
KATHLEEN M. FALK ..... Assistant Attorney General
DANIEL S. FARWELL ..... Assistant Attorney General
DAVID T. 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
J. DOUGLAS HAAG ..... Assistant Attorney General
JERRY L. HANCOCK ..... Assistant Attorney General
DAVID E. HOEL ..... Assistant Attorney General
CHARLES D. HOORNSTRA ..... Assistant Attorney General
ROBERT M. HUNTER ..... Assistant Attorney General
DONALD P. JOHNS ..... Assistant Attorney General
STEPHEN W. KLEINMAIER ..... Assistant Attorney General
JOANNE F. KLOPPENBURG ..... Assistant Attorney General
MICHAEL R. KLOS ..... Assistant Attorney General
CHARLES R. LARSEN ..... Assistant Attorney General
ROBERT W. LARSEN ..... Assistant Attorney General

JENNIFER SLOAN LATTIS ..... Assistant Attorney General
ALAN M. LEE ..... Assistant Attorney General
BARRY M. LEVENSON ..... Assistant Attorney General
LISA LEVIN ..... Assistant Attorney General
MICHAEL J. LOSSE ..... Assistant Attorney General
PAUL G. LUNDSTEN ..... Assistant Attorney General
PAMELA MAGEE-HEILPRIN ..... Assistant Attorney General
EDWARD S. MARION ..... Assistant Attorney General
ROBERT B. McCONNELL[3] ..... Assistant Attorney General
JAMES H. McDERMOTT ..... Assistant Attorney General
MAUREEN A. McGLYNN ..... Assistant Attorney General
JAMES C. McKAY, JR. ..... Assistant Attorney General
ARLEEN E. MICHOR[1] ..... Assistant Attorney General
DANIEL A. MILAN ..... Assistant Attorney General
MARGUERITE M. MOELLER ..... Assistant Attorney General
JOHN C. MURPHY[3] ..... Assistant Attorney General
LOWELL E. NASS ..... Assistant Attorney General
DIANE M. NICKS ..... Assistant Attorney General
STEPHEN J. NICKS ..... Assistant Attorney General
JOHN D. NIEMISTO ..... Assistant Attorney General
DANIEL J. O'BRIEN ..... Assistant Attorney General
KEVIN J. O'CONNOR ..... Assistant Attorney General
BRUCE A. OLSEN ..... Assistant Attorney General
MICHAEL E. PERINO ..... Assistant Attorney General
RICHARD A. PERKINS ..... Assistant Attorney General
DEIDRE K. PETERSON ..... Assistant Attorney General
P. PHILIP PETERSON ..... Assistant Attorney General
GREGORY POSNER-WEBER ..... Assistant Attorney General
THEODORE L. PRIEBE ..... Assistant Attorney General
PIERCE T. PURCELL ..... Assistant Attorney General
FRANK D. REMINGTON ..... Assistant Attorney General
ROBERT D. REPASKY ..... Assistant Attorney General
DAVID C. RICE ..... Assistant Attorney General
SHARON K. RUHLY ..... Assistant Attorney General
JENNIFER D. RYAN ..... Assistant Attorney General
NADIM SAHAR ..... Assistant Attorney General
JEROME S. SCHMIDT ..... Assistant Attorney General
WARREN M. SCHMIDT ..... Assistant Attorney General
GEORGE B. SCHWAHN ..... Assistant Attorney General
ROBERT A. SELK ..... Assistant Attorney General
CARL A. SINDERBRAND ..... Assistant Attorney General
DONALD W. SMITH ..... Assistant Attorney General
MARK E. SMITH ..... Assistant Attorney General
STEPHEN M. SOBOTA ..... Assistant Attorney General
DANIEL D. STIER ..... Assistant Attorney General
LORRAINE C. STOLTZFUS ..... Assistant Attorney General
DEWITT J. STRONG ..... Assistant Attorney General

MARYANN SUMI ..... 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, 1989

[2]Appointed, 1989

[3]Retired, 1989

OPINIONS

OF THE

ATTORNEY GENERAL

Volume 78

Counties; Law Enforcement; Police; Sheriffs; University; The University of Wisconsin has no authority to agree to hold harmless a county that incurs liability because of a university officer's torts, but the common law of indemnification would require such officer to indemnify that county and statutory indemnification would require the state to indemnify the officer when acting in the scope of his/her employment.

A county sheriff may deputize university campus police officers and restrict that deputization to particular times, places and crimes. An otherwise valid arrest would not be rendered invalid, however, solely because the officer exceeded the scope of that deputization. OAG 1–89

January 18, 1989

FRANK VOLPINTESTA, *Corporation Counsel*
Kenosha County

You have asked for my opinion as to the potential liability and other ramifications if campus police officers are deputized by a county sheriff to conduct law enforcement activities in a

specifically defined area immediately proximate to a university campus.

You first ask whether it is permissible to enter into an indemnification agreement by which the University of Wisconsin System would hold harmless the county from any and all litigation which may arise due to the acts or omissions of such campus police officers when exercising the powers of a deputy sheriff. As worded, your question must be answered in the negative. Nevertheless, the state would be responsible for the liabilities incurred by these officers even though the arrest authority derived solely from the deputization.

This department has consistently advised state agencies that they lack power to agree to indemnify another. The reason for that position has been, first, that no statute empowers a state agency to enter into such an agreement and state agencies have only such powers as are expressly granted or necessarily implied. *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 357, 190 N.W.2d 529 (1971), *vacated on other grounds*, 408 U.S. 915 (1972). I realize the application of this general rule to the Board of Regents may be limited, since it is given all powers "necessary or convenient" to the discharge of its responsibilities, section 36.09(1)(L), Stats., but that only leads to the second ground for the no-indemnification rule. Section 20.903 provides that no state agency may contract for any debt or liability against the state for any purpose without authority of law. Given the specificity of this statute, the consistent position of this department has been that a state agency needs express authority to enter into such an agreement.

This rule against indemnity agreements, however, is limited. It relates only to agreements creating a duty to be responsible for the liability the law imposes on another. It does not prevent a state agency from acknowledging that if the law makes its agents or employes liable the state will indemnify as required by section 895.46(1)(a). Nor does this rule modify the common law obligation of a tortfeasor to indemnify another who was required

to make a payment because of that tort. *See Swanigan v. State Farm Ins. Co.*, 99 Wis. 2d 179, 196, 299 N.W.2d 234 (1980). In other words, if a county were to incur a money judgment because of an act or omission of a campus police officer, that officer would have a duty to indemnify the county. And because the state itself must indemnify its officers, agents and employes for liabilities incurred when discharging their duties, section 895.46(1)(a), the state stands as the final indemnitor of the obligation.

With respect to the arrangement being contemplated between the university and the county, campus police, whose statutory powers of law enforcement are confined to campus property, 68 Op. Att'y Gen. 67 (1979), would be deputized to enforce laws on noncampus property. The reason behind this proposal, I am advised, is that a particular area near the campus is *de facto* a large part of campus life. The campus police would be assigned the duty as a regular part of their job duties as university employes. The fact that they have been given arrest powers through deputization, therefore, is irrelevant to the fact that they are exercising those powers as a regular part of their jobs and, consequently, are acting within the scope of their employment for purposes of the state's indemnity obligation under section 895.46(1)(a). *Also see* sec. 895.46(1)(d), Stats. (indemnity statute protects deputies).

In sum, under this proposed arrangement, the state stands as the final indemnitor, not as a result of an agreement to hold harmless, but as a matter of the operation of the statutory and common law of indemnification.

Your second and third questions can be disposed of together. You inquire whether it is permissible to limit deputization to particular times, places and crimes. In my opinion the sheriff can condition continued deputization on such limitations, although that limitation does not void the county-wide power of arrest

itself. A criminal defendant would not be able to escape a valid arrest because a particular deputy failed to follow the sheriff's job instructions; nor would the deputy be able to escape sanctions from the sheriff simply because the arrest was legally valid.

Section 59.21(2) empowers sheriffs to appoint "as many other deputies as he may deem proper." Further, the sheriff may deputize persons "to do particular acts." Sec. 59.21(5), Stats.

It is true, of course, that any deputy's arrest power is itself county-wide. *See* sec. 59.24, Stats., and 45 Op. Att'y Gen. 267, 269-70 (1956). But this fact hardly prevents a sheriff from confining a particular deputy or class of deputies to a particular area or task as a condition of continued deputization, even though an arrest outside the assignment could be valid. To suggest otherwise would be contrary to the references in section 59.21 to particular acts as well as to the historic breadth of the sheriff's powers to control the assignments of deputies. *Cf. Andreski v. Industrial Comm.*, 261 Wis. 234, 239-42, 52 N.W.2d 135 (1952).

DJH:CDH

Cemeteries; Corporations; Funeral Directors And Embalmers; Stock ownership of a subsidiary corporation by a parent corporation, considered alone, does not destroy the legal separate identities of the parent and subsidiary corporation. But the separateness of corporate identity will be disregarded if the subsidiary's policies, functions and actions are so controlled by the parent as to make the subsidiary a mere agent or instrument of the parent.

Whether parent and subsidiary corporations violate section 445.12(6), Stats., which prohibits an operator of a funeral establishment from being connected with a cemetery, depends upon facts relating to the legal separateness of the parent and subsidiary corporations. The facts related are insufficient to conclude whether section 445.12(6) is violated. OAG 2–89

January 20, 1989

MARLENE A. CUMMINGS, *Secretary*
Department of Regulation and Licensing

On behalf of the Funeral Directors Examining Board, you request my opinion as to the interpretation of section 445.12(6), Stats., as it relates to the ownership of funeral establishments and cemeteries in Wisconsin by separate corporate entities which, in turn, are wholly owned subsidiaries of a parent corporation.

Section 445.12(6) provides:

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

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

You state that the board has historically construed the statute to prohibit ownership of both a funeral establishment and a cemetery by the same person or entity. Construction of a statute by an administrative agency responsible for applying it is entitled to great weight and will be upheld if it is a rational statutory construction. *Blackhawk Teachers Federation v. WERC*, 109 Wis. 2d 415, 326 N.W.2d 247 (Ct. App. 1982).

35 Op. Att'y Gen. 186, 187–88 (1946), stated that the statute "was apparently intended to prevent funeral directors from acquiring an interest adverse to their clients in the purchase of cemetery lots, vaults, etc., through 'kickback' agreements with cemeteries, mausoleums and crematories."

An attorney general's interpretation of a statute is entitled to great weight when the Legislature subsequently amends the statute but leaves intact that part interpreted by the attorney general. *Town of Vernon v. Waukesha County*, 99 Wis. 2d 472, 299 N.W.2d 593 (Ct. App. 1980), *aff'd*, 102 Wis. 2d 686, 307 N.W.2d 227 (1981). In this case, section 445.12 was amended several times after the issuance of the 1946 opinion without materially changing that portion of the statute interpreted by the attorney general.

Therefore, it is my opinion that the Funeral Directors Examining Board's construction that the statute proscribes ownership of a funeral establishment and a cemetery by the same person or entity is a correct interpretation.

Your inquiry springs from a concern under the following facts recited in your letter:

Service Corporation International (SCI) is a corporation operating out of Houston, Texas. SCI has numerous holdings nationwide, including funeral establishments and cemeteries. SCI has established several operating divisions, with its Cemetery Division being located in San Diego, California,

and its Funeral Division in Houston, Texas. Recently, one of SCI's wholly owned subsidiaries, Funeral Corporation Wisconsin (FCW), purchased all of the issued and outstanding stock of a funeral establishment located in Beloit, Wisconsin. At that time, SCI also held all the preferred and common stock in a cemetery located in Appleton, Wisconsin. Furthermore, SCI through its wholly owned subsidiary Wisconsin Cemetery Services, Inc. (WCS), recently acquired all of the issued and outstanding capital stock of a cemetery in Oshkosh, Wisconsin.

The only additional information supplied (by the attorney for the corporations involved) is that subsidiary corporations FCW and WCS have separate officers and directors, have no written or formal agreements with each other and both report to separate divisions of SCI, the parent corporation.

The general rule is that stock ownership of the subsidiary by the parent corporation, by itself, does not destroy the separate corporate identities of the parent and subsidiary. *Miller v. Robertson*, 266 U.S. 243 (1924). With the exception of one case, *United States v. United Shoe Machinery Co.*, 234 F. 127 (E.D. Mo. 1916), involving a violation of the Clayton Act, the reported cases all adhere to the rule that stock ownership alone does not make the parent and subsidiary corporation legally one. *Richmond & I. Const. Co. v. Richmond, N., I. & B. R. Co.*, 68 F. 105, 109 (6th Cir. 1895); *East St. Louis Connecting Ry. Co. v. Jarvis*, 92 F. 735 (7th Cir. 1899). *See also* cases listed or discussed at 38 A.L.R. 3d 1102, 1123–27, para. 10.

Conversely, if the parent corporation so controls the subsidiary with respect to its finances, policies, functions and practices so that it can be said that the subsidiary has no mind of its own, the separate corporate identities of the parent and subsidiary will be disregarded. *Forest Home Dodge, Inc. v. Karns*, 29 Wis. 2d 78, 138 N.W.2d 214 (1965); *Edgar v. Fred Jones Lincoln–Mercury, Etc.*, 524 F.2d 162 (10th Cir. 1975). *Also see Wiebke v. Richardson & Sons, Inc.*, 83 Wis. 2d 359, 265 N.W.2d 571

(1978); *Consumer's Co-op of Walworth v. Olsen*, 142 Wis. 2d 465, 419 N.W.2d 211 (1988).

Several theories have been used to disregard the accepted legal fiction of the separate identity of wholly owned subsidiary corporations, including (1) an agency theory where the subsidiary corporation is so organized that it is merely an instrumentality or adjunct of the parent corporation, *Chicago, M. & St. P. Ry. Co. v. Minneapolis Civic & C. Ass'n*, 247 U.S. 490 (1918), (2) an alter ego theory where the subsidiary corporation is a mere business conduit for the parent corporation or where there is such a unity of ownership and interest that the separate identity of the parent and subsidiary does not exist, *Marr v. Postal Union Life Ins. Co.*, 40 Cal. App. 2d 725, 105 P.2d 649 (1940), and (3) an "instrumentality" theory where it can be shown that the parent controls and utilizes the subsidiary to commit a wrong, including violation of statutory mandates or duties. *Wiebke. Also see Cher v. Forum Intern., Ltd.*, 692 F.2d 634 (9th Cir. 1982).

Which theory applies in a particular case depends upon the relevant facts or the jurisdiction involved but regardless of the particular theory used, if the evidence shows that the separateness does not exist in fact, the separate corporate identities will be legally disregarded.

No single factor or circumstance is conclusive on the issue of whether a subsidiary corporation exists separately from its parent. *Sabine Towing & Transp. Co. v. Merit Ventures, Inc.*, 575 F. Supp. 1442 (E.D. Tex. 1983). Whether separate corporate identities between the parent and subsidiary exist is resolved through an examination of the totality of circumstances involved in the particular case.

One of the factors that may be considered is, of course, the stock ownership by the parent corporation. *Talen's Landing Inc. v. M/V Venture*, 656 F.2d 1157 (5th Cir. 1981). Evidence of the parent corporation's control of, or unity of interest with, the subsidiary may also be considered. *Krivo Industrial Sup. Co. v. National Distill. & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973),

reh'g denied, 490 F.2d 916 (5th Cir. 1974). Common officers or directors of the parent and subsidiary would also be considered relevant evidence, *Talen's Landing*, as well as domination by the parent in the finances, policy and practices of the subsidiary, *Edgar*.

Courts have also considered the fact that the parent corporation pays the salaries of the personnel and the expenses of the subsidiary. *C M Corp. v. Oberer Development Co.*, 631 F.2d 536 (7th Cir. 1980). In this respect, evidence concerning personnel decisions including promotions, benefits, etc., of the subsidiary employes would also be relevant. Whether the subsidiary has adequate capitalization has also been considered relevant evidence to the issue. *Olsen. Also see Nelson v. International Paint Co., Inc.*, 734 F.2d 1084, *reh'g denied*, 739 F.2d 633 (5th Cir. 1984).

Sabine Towing lists fifteen factors which I consider to be a nonexclusive list. They are: common or overlapping stock ownership between the parent and subsidiary; common or overlapping directors and officers; use of same corporate office; inadequate capitalization of the subsidiary; financing the subsidiary corporation by the parent; whether the parent existed solely as a holding company for its subsidiaries; the parent's use of the subsidiary's property and assets as its own; the nature of intercorporate loan transactions; incorporation of the subsidiary being caused by the parent; whether the parent and subsidiary file consolidated income tax returns; decision–making for the subsidiary made by the parent and its principals; whether the directors of the subsidiary act independently in the interest of the subsidiary or in the interest of the parent; the making of contracts between the parent and the subsidiary that are more favorable to the parent; observance of formal legal requirements; and the existence of fraud, wrong–doing or injustice to third parties.

Whether the circumstances involving SCI, WCS and FCW are such that their separate corporate identities should not be recognized is a factual question to be decided within the legal framework I have just summarized. It is obvious that all of the

elements of proof that might touch upon the factors that may be considered in resolving the issue have not been presented or evaluated. Thus, the issue cannot be resolved by this opinion.

Nevertheless, the facts presented are insufficient to warrant a conclusion that the separate identities of the subsidiary corporations should be disregarded and that the statute is violated.

DJH:WHW

Civil Service; Employer And Employe; Public Officials; Sheriffs; When section 63.065, Stats., permits a person to return from approved leave of absence to classified service without loss of seniority, the statute means that the person is treated for seniority purposes as though he or she never left the position in classified service. OAG 3–89

January 23, 1989

PATRICK J. FARAGHER, *Corporation Counsel*
Washington County

You have asked for my interpretation of a provision of section 63.065, Stats., which is applicable to the sheriff in your county by reason of section 59.21(8)(a).

The question has arisen because the incumbent sheriff, Clarence Schwartz, was recently defeated in the primary election after serving as sheriff for sixteen years. Prior to being elected sheriff, Schwartz was a deputy sheriff in the county civil service; and he has inquired about his rights to rejoin the department as a deputy sheriff.

Section 63.065 provides:

> A permanent employe in the classified service of any county having a population of 500,000 or more, who is elected to a county or state office shall be granted a leave of absence without pay from a position for the period of his or her entire service as an elected county or state officer and thereafter shall be entitled to return to the former position or to one with equivalent responsibility and pay in the classified service without loss of seniority or civil service status. At the discretion of the civil service commission, any elected state officer, while on leave of absence, may also be permitted to return to a former position or to one with equivalent responsibility and pay in the classified service for such periods of time as may be set by the commission. This section shall not apply to any department head in the classified service whenever the commission has established

a list of department heads or employes of any county department under s. 46.215.

You have concluded on the basis of section 63.065 and the opinion in 68 Op. Att'y Gen. 124 (1979) that Schwartz has the right to return to the sheriff's department "without loss of seniority." Your question is whether this means he returns with the same seniority he had when he left to become sheriff, or whether it means he returns with credit toward seniority for the time he spent as sheriff in addition to the seniority he had when he left the department.

In my opinion, Schwartz should be treated for seniority purposes as though he never left the position of deputy in the department. This conclusion is based on the definition of seniority, on the fact that the statute provides that Schwartz was on a leave of absence, on the interpretation of similar language in section 230.33, and on decisions interpreting provisions of the Selective Training and Service Act of 1940 that are similar to section 63.065.

Seniority is defined in Webster's Third New International Dictionary 2066 (1976) as:

> [S]tatus attained by length of continuous service (as in a company, institution, or organization or in a department, job, rank or occupational group) to which are attached by custom or prior collective agreement various rights or privileges (as preference in tenure, priority in promotion, and choice of work or shift) on the basis of ranking relative to others.

Consistent with this dictionary definition, the court in *Matter of Fidek*, 146 N.J. Super. 338, 369 A.2d 974, 977 (1977), said: "Seniority, obviously, refers to the length of continuous, unbroken service."

The continuous service that is the basis for seniority is usually not considered broken by an approved leave of absence. *See, e.g., Matter of Fidek*, 369 A.2d at 977. In Wisconsin, pursuant to section 230.33(1), classified state employes may be granted a

leave of absence to serve in an unclassified position; and the employe has a right, under the specified conditions, to be restored to the former classified position or an equivalent one "without loss of seniority." In this respect, section 230.33(1) is similar to section 63.065 by granting an employe a leave of absence and permitting him or her to return to the old position, or a like one, without loss of seniority.

Consistent with section 230.33(1), the rules promulgated by the Department of Employment Relations provide that permanent classified employes may be granted a leave of absence without pay to serve in an unclassified position. Wis. Admin. Code § ER 18.14(1) and (2)(b). In Wisconsin Administrative Code section ER 18.02(2)(b)1., the department rule provides that the continuous employment status of an employe eligible for annual leave shall not be considered interrupted if the employe was on an approved leave of absence. Together, these rules indicate that continuous service is not broken for the classified state employe who is on leave to work in unclassified service. This means that, under section 230.33(1) and the similarly worded section 63.065, when the employe returns from the leave of absence, he or she will be treated for seniority purposes as though he or she had not left the classified service.

Such an interpretation of section 63.065 is consistent with the interpretation given similar provisions of the Selective Training and Service Act of 1940. Under section 63.065, the permanent employe in classified service shall be granted a leave of absence without pay to serve as an elected official; and, after completion of the elected service, the employe is entitled to return to the former position, or one of equivalent responsibility or pay, without loss of seniority or civil service status. The Selective Training and Service Act of 1940, according to the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946), was designed to protect the veteran who was called to serve in the armed forces and it guaranteed that he was not penalized on his return by reason of his absence from his

civilian job. The Court explained that under the act the honorably discharged veteran who was still qualified to perform the duties of his old position must be restored to his former position "'or to a positon of like seniority, status, and pay.' § 8(b)(A), (B)." *Fishgold*, 328 U.S. at 284. The Court further said that the law also provided that the veteran "shall be 'restored without loss of seniority' and be considered 'as having been on furlough or leave of absence' during the period of his service for his country. . . . § 8(c)." *Fishgold*, 328 U.S. at 284. Explaining the meaning of these provisions to the veteran the Court said: "Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold*, 328 U.S. at 284–85.

Again referring to the same provisions later in the opinion, the Court said:

> As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence.

Fishgold, 328 U.S. at 285.

This interpretation of the Selective Training and Service Act of 1940 was again applied by the Supreme Court in *Accardi v. Pennsylvania Railroad Company*, 383 U.S. 225, 228–30 (1966). *See also Brown v. Watt Car & Wheel Co.*, 182 F.2d 570, 572 (6th Cir. 1950).

Under the similar interpretation of section 63.065, Schwartz is entitled to receive credit toward seniority for the time he was on leave of absence to serve as sheriff. To the extent that a collective bargaining agreement between the county and the deputies' union conflicts with section 63.065, the contract and the statute should be harmonized if possible; but if they cannot be

harmonized, the provisions of the collective bargaining agreement are probably superseded by the statute. *See Glendale Prof. Policemen's Asso. v. Glendale*, 83 Wis. 2d 90, 106, 264 N.W.2d 594 (1978) and *Drivers, etc., Local No. 695 v. WERC*, 121 Wis. 2d 291, 298, 359 N.W.2d 174 (Ct. App. 1984).

DJH:SWK

Court Commissioner; Marriage And Divorce; Court commissioners do not have the power to officiate at marriages outside the county for which they were appointed. OAG 4–89

February 16, 1989

EUGENE R. DUMAS, *Corporation Counsel*
Sauk County

You ask whether court commissioners have the power to officiate at marriages outside the county for which they were appointed. In my opinion, such power does not exist.

The powers of county officers are "conferred and limited" by statute. *Reichert v. Milwaukee County*, 159 Wis. 25, 35, 150 N.W. 401 (1914). Court commissioners have only such powers as the statutes confer. *Bicknell v. Tallman*, 3 Penn. 388, 389 (1852).

Among the persons authorized to officiate at marriages in the statute on marriages are "family court commissioner[s] appointed under s. 767.13 or court commissioner[s] appointed under s. 757.68." Sec. 765.16(5), Stats. Concomitantly, court commissioners are given the power to officiate at a marriage ceremony in the statute dealing with the duties and powers of court commissioners. Sec. 757.69(3)(a), Stats. Family court commissioners have the powers of a regular court commissioner. Sec. 767.13(1)(b), Stats. Therefore, family court commissioners, through section 757.68(3)(a), Stats., are clearly empowered to officiate at marriage ceremonies.

While the statutes are redundant in the conferral upon court commissioners of the power to officiate at marriages, the statutes are silent with respect to the locus of the exercise of that power. No statute suggests that the Legislature intended for court commissioners to exercise any of their powers, including the power to officiate at marriages, outside of their territorial jurisdiction. On the contrary, several statutory references imply

a limitation on the territorial scope of those powers. Some examples are noted in your letter.

Section 757.68(1) provides that "[e]ach court commissioner shall take and file the official oath in the office of clerk of the circuit court *of the county for which appointed* before performing any duty of the office." Section 767.13(1)(a) provides that "the circuit judges for the county . . . shall . . . appoint some reputable attorney . . . as the family court commissioner *for the county*." Section 767.13(3) provides that the family court commissioner for Shawano County is the family court commissioner "for Menominee County." From these references, I do not doubt that the Legislature intended court commissioners and family court commissioners to be county officials empowered to act in their county of appointment.

As you note in your letter, the prohibition against extra-territorial action was at one time constitutional. Wisconsin Constitution article VII, section 23, dealing with court commissioners, provided: "The legislature may provide for the appointment of one or more persons *in each organized county*, and may vest in such persons such judicial powers as shall be prescribed by law; provided, that such powers shall not exceed that of the judge of the circuit court at chambers." In *Fenelon and wife v. Butts, imp.*, 49 Wis. 342, 346 (1880), the court construed the emphasized language as implying a territorial limitation on the exercise of a court commissioner's power. Wisconsin Constitution article VII, section 23 was repealed in 1977. Thus, no explicit prohibition against extraterritorial activity exists, and the Legislature could by statute empower court commissioners to act outside their counties of appointment. The Legislature has not done so however.

It is also worth noting that a prior statute on whom can officiate at marriage ceremonies allowed that power to be exercised by a "court commissioner in the county in which he is elected or appointed." Sec. 245.05, Stats. (1957). This statute was repealed and for many years court commissioners did not have

any power to officiate at marriages. *See* 65 Op. Att'y Gen. 8, 9 (1976). One might argue that when the Legislature again empowered court commissioners to officiate at marriages, through the creation of section 757.69(3)(a), it evidenced an intent to not territorially restrict the exercise of the power. I have considered, but have found unpersuasive, such an argument. All of the powers of court commissioners are stated without regard to territorial exercise. One probably would not contend that a court commissioner could conduct court proceedings outside the county of his or her appointment. That the statute with respect to marriage ceremonies once contained a territorial restriction which no longer exists is insufficient authority to impute to the Legislature the intent to allow court commissioners to perform marriages outside their home counties.

One final point should be addressed. Section 765.22 provides:

> No marriage hereafter contracted shall be void by reason of want of authority or jurisdiction in the officiating person solemnizing such marriage, if the marriage is in other respects lawful, and is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

Thus, this opinion should not be a cause of concern to those who were married by commissioners outside of the commissioner's county of residence.

DJH:ESM

Employer And Employe; Public Officials; Sheriffs; A public employe departing a non-elected county position in the sheriff's office to assume the elective county office of sheriff is not entitled to reinstatement to the same or a similar position upon termination of service as such elective officer, in the absence of properly authorized civil service or contractual provisions so providing. OAG 5-89

February 16, 1989

GERALD L. ENGELDINGER, *Corporation Counsel*
Winnebago County

You have requested my opinion as to whether a detective-juvenile officer in a county sheriff's department, who subsequently is elected to and serves in the office of county sheriff for a number of years, is entitled to reinstatement to the same or a similar position in the sheriff's office once his tenure as sheriff is terminated.

Section 63.065, Stats., provides that:

> A permanent employe *in the classified service* of any county having a population of 500,000 or more, who is elected to a county . . . office shall be granted a leave of absence without pay . . . for the period of . . . service as an elected . . . officer and thereafter shall be entitled to return to the former position or to one with equivalent responsibility and pay *in the classified service* without loss of seniority or *civil service status*.

In 68 Op. Att'y Gen. 124 (1979), this office concluded that section 66.065 also applies to counties having a population of *less than* 500,000 which have adopted a civil service program for deputy sheriffs pursuant to section 59.21(8)(a), and which operate under a civil service system. In the situation you describe, the sheriff contends that he should be permitted to return to his former position in the sheriff's department because of section 63.065 and because "[e]ven though Winnebago County does not have a civil service ordinance in effect per se, it has been the

past practice of Winnebago County to very carefully follow the State statutes pertaining to civil service matters."

Our supreme court has made it clear that "in the absence of civil service regulations or properly authorized statutory rules governing labor relations, a municipal employe has no tenure in his public service. *Adamczyk v. Caledonia* (1971), 52 Wis. 2d 270, 190 N.W.2d 137." *Richards v. Board of Education*, 58 Wis. 2d 444, 451, 206 N.W.2d 597 (1973); *see also Castelaz v. Milwaukee*, 94 Wis. 2d 513, 520, 289 N.W.2d 259 (1980). Therefore, it is evident that a public employe departing a non-elective county position in the sheriff's office to assume the elective county office of sheriff is not entitled to subsequent reinstatement to the same or a similar position in such department upon termination of his service as such elective officer, in the absence of the right being bestowed upon him by such an appropriate enactment or contract.

As background for your inquiry, you advise that Winnebago County has adopted a civil service ordinance applicable to all employes, pursuant to sections 49.50(5) and 59.07(20). However, that ordinance is "limited to appeals from Winnebago County employes alleging discrimination and improper separation from County employment." You further advise that Winnebago County has not adopted a civil service program for deputy sheriffs pursuant to section 59.21(8)(a), which program would operate under a civil service commission and incorporate section 63.065, allowing a deputy leave of absence with reinstatement privileges during elective service. *See* 68 Op. Att'y Gen. 124. Moreover, the collective bargaining agreement covering the subject employe at the time of his election to the office of sheriff apparently contained no provisions preserving any right of reinstatement. Finally, at the time the employe left his non-elective county position to assume the office of sheriff, he was expressly advised in writing that "[t]he departure of an employee from a non-elected County position for the purpose of immediately assuming an elected County position shall automatically

constitute a *voluntary, simultaneous termination from the non-elected position, and a new hire into the elected position*," and that "[a]ll contractual benefits/obligations covering the non-elected position shall lapse effect as of the termination date."

Under the foregoing circumstances, it is my opinion that the former county employe to which your inquiry makes reference is not entitled to reinstatement to the same or a similar position to that previously held by him in the sheriff's office once his tenure as sheriff is terminated.

DJH:JCM

Criminal Law; Firearm Owners' Protection Act; Firearms; Section 941.29(5)(a), Stats., has been invalidated by congressional action. Pardons granted after November 15, 1986, will give recipients the right to receive, possess or transport in commerce firearms unless the pardon expressly provides otherwise. OAG 6–89

February 20, 1989

TOMMY G. THOMPSON, *Governor*

You have requested my opinion on the impact of the Firearm Owners' Protection Act, Pub. L. No. 99–308, 100 Stat. 449 (1986), on Wisconsin law prohibiting the possession of a firearm by a convicted felon. Sec. 941.29, Stats. You specifically ask:

1. Is section 941.29(5)(a), Stats., a valid section?
2. Do those pardons granted by this [your] office since September 16, 1986,[1] which do not expressly authorize the recipient to receive, possess or transport in commerce firearms, nonetheless give such recipients that right?
3. Do those pardons granted by [your office] since September 16, 1986, which do expressly authorize the recipient to receive, possess or transport in commerce firearms, give such recipients that right?

In my opinion, section 941.29(5)(a) has been invalidated by congressional action. It is also my opinion that any pardon granted by your office since November 15, 1986, will give the recipient the right to receive, possess or transport in commerce firearms *unless* the pardon "expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20) (Supp. 1988).

---

[1]You have identified September 16, 1986, as the date on which 18 U.S.C. app. § 1203 (1986) was repealed in favor of 18 U.S.C. § 921(a)(20) (1988). 18 U.S.C. § 921(a)(20) became effective November 15, 1986. 18 U.S.C. § 921 note (Supp. 1987).

Section 941.29 criminalizes possession of a firearm by persons convicted of a felony in Wisconsin, or convicted of a crime elsewhere that would be a felony if committed in Wisconsin. Section 941.29(5) relieves from the state firearm disability a person who:

> (a) Has received a pardon with respect to the crime or felony specified in sub. (1) and has been expressly authorized to possess a firearm under 18 USC app. 1203; or
>
> (b) Has obtained relief from disabilities under 18 USC 925(c).

18 U.S.C. app. § 1203 relieved from the federal firearms disability "any person who has been pardoned by . . . the chief executive of a State and has expressly been authorized by the . . . chief executive . . . to receive, possess, or transport in commerce a firearm." By invoking this particular section of federal law, the Wisconsin Legislature required a convicted felon to present a Governor's Pardon specifically authorizing him to receive, possess or transport firearms in order to be relieved from the state firearms disability under section 941.29(5)(a).

On May 19, 1986, Congress enacted the Firearm Owners' Protection Act (hereinafter FOPA). FOPA repealed 18 U.S.C. app. § 1203 and amended 18 U.S.C. § 922(g) (1988) to include the federal firearm possession offense. Convicted felons are still prohibited by federal law from possessing firearms; 18 U.S.C. § 921(a)(20) was amended to include the following language:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

This subsection became effective November 15, 1986. 18 U.S.C. § 921 note (Supp. 1987).

As you indicate in your letter, the intent of current federal law is to presume that a pardoned felon may possess firearms. FOPA "is designed to relieve the nation's sportsmen and firearm owners and dealers from unnecessary burdens under the Gun Control Act of 1968. . . . [it] [l]imits the forfeiture of firearms to only those involved in or intended to be involved in felony violations of the law." H.R. Rep. No. 495, 99th Cong., 2d Sess. 5, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1327–28. There is no doubt Congress was aware of the potential impact of FOPA on existing state laws. One commentator involved in the drafting of the legislation indicated:

> There was no difference of opinion between the parties on the advisability of consolidating all "prohibited persons" classes into a single provision. Some difference did arise over the exception for persons pardoned or whose convictions had been expunged. This was resolved by adding a proviso that the exception did not apply where the pardon or expungement order provided that the recipient might not own firearms.

Hardy, *The Firearm Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 614–15 (1987) (footnotes omitted). Congress explicitly recognized that the revisions contained in FOPA may have a "secondary effect" on state laws. *Id.* at 587 n.11. 18 U.S.C. § 927 (1976) provides that:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

One such secondary effect is the apparent invalidation of section 941.29(5)(a). Where the purpose of a federal statute cannot be accomplished or is otherwise frustrated by the presence of a state statute, the state statute is superseded by the federal authority to the extent of the conflict. *See Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). To the extent that a state law actually conflicts with the federal law, the state law is nullified. *Oefinger v. Zimmerman*, 601 F. Supp. 405, 411 (W.D. Penn. 1984). This may occur in cases when state law becomes an "obstacle to the accomplishment and execution of the full purposes and objectives of the federal enactment." *Id.* at 411–12.

Section 941.29(5)(a) requires that the pardon expressly restore the felon's right to receive, possess or transport in commerce firearms. This requirement no longer exists in federal law. 18 U.S.C. § 921(a)(20). To the extent that the state law frustrates both the specific language and intent of FOPA, the state statute is superseded by the federal law.

Statutes valid when enacted may also become unenforceable because of changes in the conditions to which the statutes apply. *See Chastleton Corporation v. Sinclair*, 264 U.S. 543 (1924). Here, the factual justification and basis for section 941.29(5)(a)—the requirement of 18 U.S.C. app. § 1203 that pardons expressly restore the right to receive, possess or transport in commerce firearms—no longer exists. 18 U.S.C. § 921(a)(20) has no such requirement. The house report on the history of FOPA indicates that it "expanded the class of persons eligible for relief from the disabilities imposed under the [Gun Control] Act. It benefits persons who have been convicted of a crime . . . [and] have been subsequently determined to have reformed." H.R. Rep. No. 495, 99th Cong., 2d Sess. 5, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1327, 1331. The factual changes created by FOPA effectively render section 941.29(5)(a) unenforceable.

Two Wisconsin commentators suggest an interim interpretation of the state disability provision:

> Section 941.29 of the Wisconsin Statutes does not apply to the convicted felon who has obtained relief from the Secretary of the Treasury as described above. *See* Wis. Stat. § 941.29(5)(b) (1985–86). The more difficult issue is whether one who receives a pardon is exempted under § 941.29(5)(a). The latter references the now repealed 18 U.S.C. app. 1203. Before that repeal, the effect of § 941.29(5)(a) was to relieve a convicted felon of the state firearms disability if he were pardoned of the offense and if the pardoning executive expressly authorized the person to possess a firearm. Pending corrective action by the Wisconsin legislature, an interpretation of § 941.29(5)(a) that seemingly effectuates legislative intent is one that exempts the pardoned felon but only if express executive authorization to possess a firearm has been given.

1 Hammer and Donohoo, *Substantive Criminal Law in Wisconsin* 460 (1988).

I also conclude that pardons granted by your office since November 15, 1986, that do not expressly authorize the recipient to receive, possess or transport in commerce firearms will nonetheless give the recipient that right, unless the pardon "expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20). Pardons granted since November 15, 1986, which expressly authorize the recipient to receive, possess or transport in commerce firearms will give the recipient that right. *Id.* The period of time between the passage of FOPA and the effective date of this particular subsection was undoubtedly provided to give states the opportunity to evaluate their existing legislation and practices in light of revised federal law.

DJH:GPW

Attorney General; County Board; Superfund Amendments And Reauthorization Act Of 1986; A local emergency planning committee created by the county board pursuant to section 59.07(146), Stats., is in many respects treated as other county committees. The county board has the authority to appropriate funds for the committee and the county's relationship to the committee is the same as the county's relationship to the other county bodies created under section 59.07, with the exception that the county must be consistent with the authority exercised by the state emergency response commission. The county corporation counsel should provide legal advice and assistance to the LEPC. If the LEPC or its members are sued, the attorney general represents them; and the state would pay the judgment if the requirements of section 895.46 have been satisfied. OAG 7–89

February 20, 1989

ROBERT G. OTT, *Acting Corporation Counsel*
Milwaukee County

You have asked questions concerning the level of financial responsibility the county has with respect to a local emergency planning committee (LEPC) created pursuant to Title III of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99–499, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 1613, 1728 and 1987 Wisconsin Act 342.

The two laws provide for the creation of a state emergency response commission and LEPCs as part of a program established to provide the public with information on the hazardous chemicals in their communities. The program requires each owner and operator of a facility at which a hazardous chemical is produced, used or stored above threshold quantities to supply information about each hazardous chemical to state and local officials who make the information available to the public. H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 59, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2841.

The LEPCs receive and provide information to the public concerning hazardous chemicals at facilities in the county; and they develop emergency response plans for their communities to protect the public from emergency releases of hazardous substances. H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 60, *reprinted in* 1986 U.S. Code Cong. & Admin. News at 2842. Among other things, the plan must: identify routes likely to be used for the transportation of hazardous substances; establish methods and procedures to be followed by facility owners and operators and local emergency and medical personnel to respond to any release of such substances; establish procedures for effective and timely notification to persons designated in the emergency plan and to the public that a release of hazardous substances has occurred; establish methods for determining the occurrence of a release and the area or population likely to be affected by the release; and establish evacuation plans, including provisions for precautionary evacuation and alternative traffic routes. 42 U.S.C. § 11003 (1988).

Title III provides that the Governor shall appoint the state emergency response commission and that the commission shall designate emergency planning districts, which, where appropriate, may be existing political subdivisions. 42 U.S.C. § 11001(a) and (b) (1988). The law provides that the commission shall appoint members of the LEPCs and it designates groups that shall be represented on the committees. 42 U.S.C. § 11001(c) (1988).

To implement the federal program in Wisconsin, the Legislature enacted 1987 Wisconsin Act 342. In sections 1 and 2, the act provides for the creation of the commission in a manner consistent with the federal law. Pursuant to 1987 Wisconsin Act 342, section 5, the LEPCs are created by the county boards.

You have asked the following questions concerning the county's financial responsibility in regard to the LEPC in Milwaukee County:

1. Other than the requirement that the County appoint the members of the local emergency planning committee (or at least to nominate such members) is there any legal relationship between the counties and the local emergency planning committee which imposes any affirmative duties on the counties, such as seeing to it that the LEPC's carry out their duties?
2. Do the Counties have a financial responsibility for the operation of the local emergency planning committee and, if so, what is the extent of such financial responsibility?
3. Is there any requirement that county government provide legal or other support services to the LEPC's?
4. In view of the fact that the members of the local emergency planning committees, if properly appointed, are subject to the same immunity and legal responsibility provisions of state law as state employees, what legal risks do LEPC members assume and who will defend them and assume financial responsibility if they fail to perform their duties or if they miss statutory deadlines?

To answer these questions, it is necessary to consider changes made in 1987 Assembly Bill 99 before it was enacted as 1987 Wisconsin Act 342. Assembly Bill 99 was enacted essentially in the form it took after the adoption of Assembly Substitute Amendment 2. The substitute amendment itself was amended; and for the purpose of answering your questions, the important amendment was made by Assembly Amendment 4, which was concerned with the creation of the LEPCs.

Set forth in the left column are the relevant sections of Substitute Amendment 2 as it was introduced. In the right column are the relevant sections of Substitute Amendment 2 as amended by Assembly Amendment 4.

Assembly Substitute Amendment 2 as introduced	Assembly Substitute Amendment 2 as amended by Assembly Amendment 4
SECTION 5. 59.07(145) of the statutes is created to read:	SECTION 5. 59.07(145) of the statutes is created to read:
59.07(145) LOCAL EMERGENCY PLANNING COMMITTEES. (a) Make recommendations to the state emergency response commission regarding appointments to the local emergency planning committee for that county, established by the state emergency response commission under 42 USC 11001(c).	59.07(145) LOCAL EMERGENCY PLANNING COMMITTEES. (a) Shall create a local emergency planning committee, which shall have the powers and duties established for such committees under 42 USC 11000 to 11050 and under ss. 166.20 and 166.21. The board shall control all expenditures by any committee appointed by the board under this paragraph.
(b) Implement programs and undertake activities which are designed to prepare the county to cope with emergencies involving the accidental release of hazardous substances and which are consistent with but in addition to the minimum requirements of s. 166.20 and 42 USC 11000 to 11050.	(This paragraph was not affected by Amendment 4.)
(c) Control all expenditures by local emergency planning	(This paragraph was deleted by Amendment 4.)

committees under s. 166.20 of county revenues derived from taxes imposed by the county.

. . . .

SECTION 11. 893.82(2)(d) of the statutes is amended to read:

893.82(2)(d) "State officer, employe or agent" includes an officer, employe or agent of any nonprofit corporation operating a museum under a lease agreement with the state historical society *and a member of a local emergency planning committee appointed by the state · emergency response commission under s. 166.20(2)(a).*

SECTION 11. 893.82(2)(d) of the statutes is amended to read:

893.82(2)(d) "State officer, employe or agent" includes an officer employe or agent of any nonprofit corporation operating a museum under a lease agreement with the state historical society *and a member of a local emergency planning committee appointed by a county board under s. 59.07(145)(a).*

SECTION 12. 895.46(1)(e) of the statutes is amended to read:

895.46(1)(e) Any nonprofit corporation operating a museum under a lease agreement with the state historical society and all officers, directors, employes and agents of such a corporation, *and any local*

SECTION 12. 895.46(1)(e) of the statutes is amended to read:

895.46(1)(e) Any nonprofit corporation operating a museum under a lease agreement with the state historical society and all officers, directors, employes and agents of such a corporation *and any local*

emergency planning committee appointed by the state emergency response commission under s. 166.20(2)(a) and all members of such a committee, are covered by this subsection.

emergency planning committee appointed by a county board under s. 59.07(145)(a) and all members of such a committee, are covered by this subsection.

The history of 1987 Wisconsin Act 342 indicates that the Legislature treated the LEPCs as county committees in some respects and as state committees in other respects. The LEPCs are treated as county committees insofar as they are created by the county boards and all their expenditures are subject to the control of the county boards. The evolution of 1987 Wisconsin Act 342 reflects a legislative intent that the counties provide funds and support for the LEPCs. Although there is no express authorization for the county to appropriate funds for the committees, the county boards have such authority by necessary implication. In *State ex rel. Teunas v. Kenosha County*, 142 Wis. 2d 498, 504, 418 N.W.2d 833 (1988), the court explained that the county board's authority can be granted expressly or by necessary implication: "It has consequently become well recognized 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.'"

The power of the county board to create the LEPC and the power to control all the expenditures of the committee necessarily implies that the county board is authorized to provide the committee with the funds it must expend in order to perform its duties. *See* 38 Op. Att'y Gen. 54, 58 (1949), where it was concluded that the power to provide funds to enable a committee to function was obviously implied from the power of the county board to establish the committee.

In addition, as proposed in section 5 of Assembly Substitute Amendment 2, section 145(c)* clearly contemplated that county funds would be used by the LEPC because that section gave the county board control over the committee's expenditure of county revenues derived from taxes imposed by the county. Assembly Amendment 4 deleted section 145(c); but it added a sentence to section 145(a) giving the county board control over all expenditures of the committee. In light of this change, the Legislature must have intended that county funds would be used by the LEPC since all of its expenditures are controlled by the county board.

The Legislature treated the LEPC as a state body in section 893.82(1)(b), which provides that members of the LEPC are considered a "[s]tate officer, employe or agent" for the purpose of section 893.82.

Your first question asks whether there is any legal relationship between the county and the LEPC that imposes any affirmative duties on the county, such as seeing to it that the LEPC carries out its duties. The requirements that the county create the LEPC and control all of its expenditures along with the county's necessarily implied authority to appropriate money to the LEPC suggest that the legal relationship between the county and the LEPC is the same as the relationship between the county and any of its other committees. On the other hand, management of the committee is not totally within the control of the county because the state emergency response commission is required to "supervise and coordinate the activities of" the LEPC. 42 U.S.C. § 11001(a) (1988) and sec. 166.20(2), Stats. In my opinion, these apparently conflicting provisions are harmonized by treating the legal relationship between the county and the LEPC the same as

---

*1987 Wisconsin Act 403, section 78, renumbered section 59.07(145) to 59.07(146), Stats. However, in this opinion the reference will be to section 59.07(145) because that was the number used in the legislation that is being considered.

the county's relationship with its other committees except that in exercising control over the LEPC the county must be consistent, and not in conflict with, the authority exercised by the commission.

In response to your second question, the county board has a financial responsibility to the LEPC. The county board has the authority to appropriate funds for the LEPC, and the county cannot arbitrarily deny funds to such an extent that the LEPC cannot perform its statutorily required duties. *See Schultz v. Milwaukee County*, 250 Wis. 18, 23, 26 N.W.2d 260 (1947), and 77 Op. Att'y Gen. 113, 118–19 (1988). Money is also available in the form of grants that are awarded by the commission. *See* sec. 166.21, Stats.

Because the LEPC is treated as a county committee for most purposes, the county should provide it the same legal and support services that are provided to other county committees. Sections 59.07(44) and 59.456 define the duties of the corporation counsel and, except as section 893.82 provides to the contrary, he or she should advise and assist the LEPC as he or she would other county committees.

Finally, you ask whether LEPC members are subject to the same immunity and legal responsibility provisions of state law as state employes, what legal risks are assumed by LEPC members and who would defend them and assume financial responsibility if they fail to perform their duties.

LEPC members are included within the definition of state officers, employes or agents for the purpose of section 893.82, which applies to civil actions or proceedings against state officers, employes or agents while placing a limit on the amounts recoverable against state officers, employes or agents and provides the attorney general with adequate time to investigate claims and an opportunity to effect compromises without a civil action or proceeding. *See* sec. 893.82(1) and (3), Stats.

Section 893.82 obviously contemplates that the attorney general will represent the state officers, employes or agents; but the statute that authorizes the attorney general to represent state officers, employes or agents is section 165.25(6), which provides, in part:

> At the request of the head of any department of state government, the attorney general may appear for and defend any state department, or any state officer, employe or agent of the department in any civil action or other matter brought before a court or an administrative agency which is brought against the state department, or officer, employe or agent for or on account of any act growing out of or committed in the lawful course of an officer's, employes or agent's duties.

A problem is that section 165.25(6) does not expressly authorize the attorney general to represent members of LEPCs. In section 893.82(2)(d), members of LEPCs along with officers, employes or agents of any nonprofit corporation operating a museum under a lease agreement with the state historical society are included within the definition of "state officer, employe or agent" for the purpose of section 893.82. In section 165.25(1), (6) and (6m), the nonprofit corporation operating a museum under a lease agreement with the state historical society and its officials, employes and agents are expressly considered to be a state department and state officers, employes or agents. *See* sec. 165.25(8), Stats. Therefore, when section 165.25 authorizes the attorney general to represent state officers, employes or agents, the authorization includes the officers, employes and agents of the nonprofit corporation operating a museum under lease with the state historical society. Section 893.82 then applies to the action or proceeding where the attorney general is representing those officers, employes or agents. Section 165.25 does not, however, contain a similar express authorization for the attorney general to represent the members of LEPCs.

Nevertheless, the inclusion of LEPC members within the coverage of section 893.82 reflects the Legislature's intent that

the attorney general represent the members of LEPCs as he and his office represent state officers, employes and agents.

If the LEPC or its members are sued, who pays the judgment? The LEPC and its members are protected because section 895.46(1)(e) provides that they along with the nonprofit corporation operating a museum under a lease with the state historical society and the corporation's officers, directors, employes and agents are covered by section 895.46. Pursuant to section 895.46, the state and its political subdivisions pay for judgments or portions of judgments entered against their public officers or employes if the officers or employes are proceeded against in their official capacity or as individuals because of acts committed while carrying out duties as officers or employes and the jury or the court finds that the officer or employe was acting within the scope of employment. The question is whether the judgment against the LEPC and its members would be paid by the state or the county.

The fact that the county creates the LEPC, controls its expenditures, can appropriate money to it and can supervise it would lead to the conclusion that for the purpose of section 895.46 the LEPC and its members would be a county committee and county officers or employes and the county would be responsible for the judgment entered against them.

On the other hand, there are factors indicating that the LEPC and its members are a state body and state officers or employes for the purpose of section 895.46. LEPC members are state officers, employes or agents for the purpose of section 893.82, which reflects the legislative intent that the attorney general represent them and consider settlement of the claims against them. If the attorney general is representing the LEPC members and settling the claims, it would be logical to conclude that the state would pay the judgment.

In addition, it seems clear that the attorney general represents the nonprofit corporation operating a museum under a lease with the historical society and its officers, employes, directors and

agents and that the state would pay the judgment entered against them. The fact that the LEPC is included with that nonprofit corporation in sections 893.82(2)(d) and 895.46(1)(e) indicates that the Legislature intended them to be treated the same.

For these reasons, it is my opinion that, where the requirements of section 895.46 have been satisfied, the state would pay the judgment entered against the LEPC or its members.

Although this opinion attempts to answer your questions, the inconsistencies in some statutes and the absence of express authorization in others could provide the bases for challenging the conclusions I have reached. The only way to guarantee that the will of the Legislature will be carried out is for the Legislature to eliminate the inconsistencies and clarify the authority of the state and the county and their officials through additional legislation.

DJH:SWK

Counties; Ordinances; Counties possess the statutory authority to enact and enforce ordinances prohibiting the issuance of bad checks and trespassing but do not have the authority to enact and enforce ordinances prohibiting battery and theft. OAG 8–89

March 17, 1989

EDWARD E. LEINEWEBER, *District Attorney*
Richland County

You ask for my opinion on the following question: in light of the Wisconsin Supreme Court's decision in *State ex rel. Teunas v. Kenosha County*, 142 Wis. 2d 498, 418 N.W.2d 833 (1988), do counties possess the statutory authority to enact ordinances prohibiting battery, theft, trespassing and the issuance of bad checks?

It is my opinion that counties are authorized to enact ordinances prohibiting the issuance of bad checks and trespassing but do not have the authority to enact ordinances prohibiting battery and theft.

Pursuant to the provisions of Wis. Const. art. IV, § 23, "the powers of the county boards of supervisors are limited to those which are conferred by the legislature[.]" *Teunas*, 142 Wis. 2d at 503. Thus, it is well established that "a county board has only such powers as are 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).

The question of a county's authority to enact an ordinance prohibiting the issuance of worthless checks can be answered easily. Such authority has been expressly conferred. Section 59.07(103), Stats., authorizes a county board to "[e]nact and enforce an ordinance to prohibit conduct which is the same as or similar to conduct prohibited by s. 943.21 or 943.24, or both, and provide a forfeiture for a violation of the ordinance." Section 943.24 prohibits the intentional issuance of worthless checks. A

county therefore has express authority to enact a worthless check ordinance, assuming, of course, that the ordinance is similar to and not in conflict with section 943.24.

There are no statutes comparable to section 59.07(103) that expressly confer upon a county the authority to enact ordinances prohibiting trespassing, theft or battery. If such authority exists, it can be found only under section 59.07(64), which confers upon a county board the general power to "[e]nact ordinances to preserve the *public peace and good order* within the county."

Section 59.07(64) was created by chapter 651, Laws of 1955, as part of a legislative revision of section 59.07. It has been the subject of several opinions issued by me and my predecessor attorneys general. In the earliest of these opinions, 46 Op. Att'y Gen. 12 (1957), it was stated that the statutory revision "was apparently intended to broaden the county board's powers." That opinion concluded that section 59.07(64) authorized a county's enactment of ordinances prohibiting disorderly conduct and public drunkenness. Other opinions have interpreted section 59.07(64) to authorize county enactment of ordinances regulating curfew, 56 Op. Att'y Gen. 126 (1967); prohibiting trespass to land, similar to section 943.13, 69 Op. Att'y Gen. 92 (1980); and prohibiting false alarms, 72 Op. Att'y Gen. 153 (1983).

In the most recent opinion on section 59.07(64), I concluded that its grant of general power to enact ordinances in furtherance of "public peace and good order" did not authorize a county's enactment of an ordinance prohibiting the possession and sale of marijuana. 77 Op. Att'y Gen. 205 (1988). My opinion was based upon the Wisconsin Supreme Court's analysis of section 59.07(64) in *State ex rel. Teunas v. Kenosha County*, 142 Wis. 2d 498, 418 N.W.2d 833 (1988).

You ask whether, in light of *Teunas*, a county possesses the authority under section 59.07(64) to enact ordinances prohibiting theft, battery and trespass to land. With respect to trespass, the question is whether *Teunas* has undermined my predecessor's opinion in 69 Op. Att'y Gen. 92 (1980), that section 59.07(64)

confers upon counties the power to enact trespass ordinances. While *Teunas* is not precise in its analysis of the issue, I believe that *Teunas* supports, rather than undermines, the prior trespass opinion. I also believe that under *Teunas* counties do not possess the authority to enact theft and battery ordinances.

In *Teunas*, the Wisconsin Supreme Court concluded that section 59.07(64)'s grant of power to counties to enact ordinances to preserve "the public peace and good order" did not authorize Kenosha County's enactment of an obscenity ordinance similar to section 944.21. The court noted that in the same session in which it had created section 59.07(64), the Legislature had also reorganized the criminal code and had placed in chapter 947 "those crimes which relate to crimes against 'public peace, order and other interests.'" *Teunas*, 142 Wis. 2d at 507. Among the crimes placed in chapter 947 were prohibitions on disorderly conduct, vagrancy, drunkenness and unlawful assemblies. *Id.* at 507–08. The court further noted that the chapter had been amended since its creation, but still contains crimes of a "substantially similar nature." *Id.* at 508 (footnote omitted). Most significantly, the court observed that in reorganizing the criminal code, the Legislature had created a separate chapter relating to crimes against sexual morality. It was in this chapter, chapter 944, that the Legislature ultimately placed the obscenity statute that Kenosha County sought to enact in county ordinance form. *Id.*

Because section 59.07(64) and chapter 947 were created in the same legislative session, the court stated in *Teunas* that their respective uses of "public peace" and "order" could not be ignored. *Id.* at 509. Thus, the court concluded that "public peace and good order," as used in section 59.07(64), is "not to be so broadly interpreted as to include the power to regulate obscenity, an area contemporaneously categorized by the legislature as conceptually distinct." *Id.*

But the court's analysis did not conclude there. The court did not hold that a county's authority to enact ordinances in the

interest of preserving "public peace and good order" is limited to the enactment of ordinances prohibiting conduct found in chapter 947 of the statutes. Instead, the court upheld the authority of counties to adopt ordinances dealing with conduct outside of chapter 947 when that conduct falls within "those areas traditionally recognized as concerning public peace and order." *Id.* at 513. What kind of conduct is that? The court answered that question by relying upon a passage from a municipal law treatise, a passage quoted in 46 Op. Att'y Gen. 12, 13 (1957). The court said:

> We find . . . persuasive an earlier opinion of the attorney general in which the attorney general, in stating that the ordinances covering disorderly conduct and drunkenness were within a county's power under sec. 59.07(64), quoted the following passage as representative of authority existing under statutory power to regulate public peace and order:
>
> > "Under charter or statutory power, ordinances may be enacted against disturbing the public order and peace by disorderly or boisterous conduct; unusual noises and other boisterous and improper conduct; abusive or indecent language, cursing, swearing, or any loud or boisterous talking; drunken, noisy and disorderly conduct; disorderly shouting, dancing and assembling; noisy, rude, insulting and disorderly words or conduct toward another; affrays and fighting; riots and disorderly or boisterous assemblages; molesting religious and other lawful meetings; undue or unnecessary blowing of whistles of factories, shops and the like; playing of musical instruments at certain hours except in specified appropriate places such as homes, churches and public buildings; parading in public thoroughfares with bands of music, and making various kinds of noises, without legal permits; holding unlawful public meetings in streets and public places; and ringing

> bells for auction sales, etc., playing on hand organs and other musical instruments, giving false alarms of fire, etc." 6 E. McQuillin, Municipal Corporations, 614 (3d ed. 1980) (unrevised edition quoted in 46 Op. Att'y Gen. 12, 13 (1957)).
>
> The conduct outlined by McQuillin is consistent with that found under ch. 947 dealing with "public peace" and "order" and subsequent opinions of the attorney general. *See, e.g.*, 72 Op. Att'y Gen. 153 (1983) (authority to enact ordinance regulating false alarms); 69 Op. Att'y Gen. 92 (1980) (authority to enact ordinance regulating trespass to land); 56 Op. Att'y Gen. 126 (1967) (authority to enact ordinance regulating curfew). The ordinance in the case at bar, regulating obscene material, is of a genre facially distinct from those areas traditionally recognized as concerning public peace and order.

Teunas, 142 Wis. 2d at 512–13.

Pursuant to *Teunas*, it appears that counties have authority under section 59.07(64) to enact ordinances dealing with conduct prohibited in chapter 947 as well as conduct in "areas traditionally recognized as concerning public peace and order." *Id.* at 513. A "representative," but not necessarily exclusive, list of such conduct is found in the McQuillin passage quoted by the court. And the conduct listed in the McQuillin passage is deemed by the court to be "consistent" with the conduct dealt with in the cited attorney general opinions, including 69 Op. Att'y Gen. 92 (1980), which upheld the authority of counties to enact trespass ordinances. Thus, while the issue is hardly free from doubt, the court in *Teunas* appears to have approved 69 Op. Att'y Gen. 92 (1980), and to have upheld a county's authority to adopt a trespass ordinance under section 59.07(64).

While trespass has apparently been deemed by the court in *Teunas* as conduct in an area "traditionally recognized as concerning public peace and order," it is my view that battery and theft cannot be so described. Neither offense appears in

chapter 947. The statutes prohibiting various forms of theft are found in chapter 943. The statutory prohibitions on the various forms of battery are found in chapter 940. Neither battery nor theft appears in the "representative" McQuillin list of offenses cited by the court in *Teunas*.

I, therefore, conclude that counties possess the statutory authority to enact and enforce ordinances prohibiting the issuance of bad checks and trespassing but do not have the authority to enact and enforce ordinances prohibiting battery and theft.

DJH:WLG

Criminal Law; Prisons And Prisoners; Words And Phrases; A criminal defendant who receives consecutive sentences that in the aggregate exceed one year, but individually are all less than one year, should be incarcerated in a county jail rather than the Wisconsin prison system. OAG 9–89

March 22, 1989

RAYMOND L. PELRINE, *District Attorney*
Eau Claire County

You have requested my opinion on two issues relating to the proper place of incarceration for a criminal defendant required to serve consecutive misdemeanor or felony sentences, each less than one year, but in the aggregate totalling more than one year. Paraphrasing your questions, you ask:

(1) Where should a criminal defendant be incarcerated when he or she is sentenced on multiple misdemeanor counts and receives consecutive sentences that in the aggregate exceed one year, but individually each sentence is for less than one year?

(2) Where should a criminal defendant be incarcerated when he or she is sentenced on multiple felony counts and receives consecutive sentences that in the aggregate exceed one year, but individually each sentence is for less than one year?

In my opinion, the proper location for incarceration in both of the above–described situations is a county jail, not the Wisconsin state prison system.

The Legislature has attempted to address the problem created when a criminal penalty statute authorizes imprisonment but does not prescribe the place of confinement. The present version of the relevant statute, section 973.02, Stats., provides as follows: "Place of imprisonment when none expressed. When a statute authorizes imprisonment for its violation but does not prescribe the place of imprisonment, 1) a sentence of less than one year shall be to the county jail . . . ." Unfortunately, section 973.02 does not

explicitly answer your inquiry. A review of the legislative history is also barren of explicit guidance. Therefore, I am compelled to turn to other sources.

An earlier version of this statute was discussed at length in *State ex rel. Gaynon v. Krueger*, 31 Wis. 2d 609, 619–20, 143 N.W.2d 437 (1966):

> In view of [previous] cases, sec. 959.044 made the length of the sentence not the grade of the offense the controlling factor in determining the place of imprisonment for felonies and misdemeanors. As a result, a sentence of more than one year for a felony *must* be served in a prison but a sentence of less than one year for that same offense *must* be served in the county jail.

(Emphasis added.) Although *Krueger* does not explicitly answer your inquiry involving an aggregate of sentences which individually involve less than one year, it does confirm that the length of the sentence, not the grade, classification or nature of the offense, is the controlling factor in determining the place of imprisonment for both misdemeanors and felonies. In my opinion, to be consistent with a literal interpretation of section 973.02 and *Krueger*, each sentence of less than one year must be served in a county jail.[1]

It is important to recognize that the imposition of consecutive sentences for multiple misdemeanors or felonies that each require less than one year of incarceration, but in the aggregate exceed one year, does not transform those consecutive sentences into one long sentence. No matter what the total aggregate length is, consecutive sentences are merely what the specific term implies – – consecutive. The second sentence is to follow the first sentence,

---

[1]The conclusion must be distinguished from the situation where a defendant is sentenced to both the Wisconsin state prisons *and* to a county jail or house of correction for separate crimes. In the latter situation, the defendant must serve all sentences whether concurrent or consecutive in the state prisons. *See* sec. 973.03, Stats.

the third sentence is to follow the second sentence, and each successive sentence is to follow the one preceding it.

The general rule for construction of words and phrases is set forth in section 990.01(1): "All words and phrases shall be construed according to the common and approved usage . . . ." The common and ordinary meaning of a word may be established from definitions given by a recognized dictionary. *State v. Mauthe*, 123 Wis. 2d 288, 298, 366 N.W.2d 871 (1985); *State v. Wittrock*, 119 Wis. 2d 664, 670, 350 N.W.2d 647 (1984); *State v. Ehlenfeldt*, 94 Wis. 2d 347, 356, 288 N.W.2d 786 (1980). "Consecutive" is defined as "[s]uccessive; succeeding one another in regular order; to follow in uninterrupted succession." *Black's Law Dictionary* 276 (5th ed. 1979). "Consecutive sentences" is also defined in *Black's Law Dictionary* at 276 as "[w]hen one sentence of confinement is to follow another in point of time, the second sentence is deemed to be consecutive." *Accord* 24B C.J.S. *Criminal Law* § 1996(1) (1962).[2]

Accordingly, the first of two consecutive sentences is served before the second one begins. Each sentence is separate and distinct. Each sentence must be viewed independently in order to determine the place at which the sentence must be served. In this manner, section 973.02 is easily applied.[3]

---

[2]Both the dictionary definitions and the treatise definition are supported by the rationale and holding of the Wisconsin Supreme Court in *Grobarchik v. State*, 102 Wis. 2d 461, 467-69, 307 N.W.2d 170 (1981). In *Grobarchik*, the court addressed the question of whether "consecutive" probation may be ordered to commence upon a defendant's release on a separate sentence. While construing the phrase "consecutive to a sentence of imprisonment," the court assumes, without expressly stating, that "consecutive" means that the probationary period must commence after the separate sentence is fully served, whether or not the defendant has acquired early release.

[3]There is only one statutory exception to the treatment of consecutive sentences as separate and distinct. Section 53.11(3)(a) requires that for prison inmates, for computation of good time credit *only*, consecutive sentences shall be construed as one continuous sentence. The exception does not apply to the computation of good

(continued...)

The treatment of consecutive sentences as separate and distinct sentences for determining a criminal defendant's proper place of imprisonment is further supported by a literal interpretation of section 973.02. The statute provides that: "1) *a sentence* of less than one year shall be to the county jail, 2) *a sentence* of more than one year shall be to the Wisconsin state prisons." The consistent use of the phrase "a sentence" implies that each individual sentence should be looked at separately for applying the statutory provision.

Finally, I have been advised that this treatment of the sentencing and incarceration provisions of the Wisconsin statutes is consistent with the long-standing interpretation and application of these provisions by the Department of Health and Social Services. Such long-standing interpretation and application of the statute by the agency charged with its administration must be given great weight when interpreting that statute. *See* 2A Singer, Sutherland Statutory Construction § 49.05 (Sands 4th ed. 1984); *see also West Bend Education Ass'n v. WERC*, 121 Wis. 2d 1, 12, 357 N.W.2d 534 (1984), citing *Nottelson v. ILHR Department*, 94 Wis. 2d 106, 115-18, 287 N.W.2d 763 (1980). *See also Chevrolet Division, G. M. C., v. Industrial Comm.*, 31 Wis. 2d 481, 488, 143 N.W.2d 532 (1966).

As a result of the preceding authorities and considerations, it is my opinion that where a criminal defendant is sentenced on two either multiple misdemeanor or felony counts, or a combination thereof, and receives consecutive sentences that in the aggregate exceed one year, but individually are all less than

---

[3](...continued)
time credit for individuals incarcerated in a county jail. Sec. 53.43, Stats. Consequently, the argument that consecutive sentences in a county jail are separate and distinct is supported by the fact that not even the only statutory exception permitting the aggregating of sentences is applicable to individuals serving sentences in a county jail.

one year, the defendant should be incarcerated in a county jail. The length of each sentence is the determining factor, and each sentence must be viewed separately. Aggregated consecutive sentences, each less than one year, do not create one long sentence capable of service in the Wisconsin prison system.

DJH:JSS

Compatibility; Coroner; Sheriffs; The offices of coroner and deputy coroner are incompatible with that of city police officer; and the office of coroner is incompatible with that of assistant chief of a volunteer fire department. OAG 10–89

April 13, 1989

PATRICK J. FARAGHER, *Corporation Counsel*
Washington County

DENNIS E. KENEALY, *Corporation Counsel*
Ozaukee County

You have asked for my opinion concerning the compatibility of the office of coroner with that of police officer or assistant chief of a volunteer fire department.

In November 1988, in Washington County a city police officer was elected coroner and in Ozaukee County a second assistant chief of a village volunteer fire department was elected coroner. Because of uncertainty concerning the compatibility of the offices, each person declined the office of coroner.

Mr. Faragher has asked whether the offices of coroner and deputy coroner are incompatible with that of city police officer. Mr. Kenealy has asked whether the office of coroner is incompatible with that of second assistant chief of a village volunteer fire department.

Because no statute covers the question of the compatibility of these offices, it is necessary to refer to the common law rules of incompatibility. 74 Op. Att'y Gen. 51, 52 (1985). The standard for determining whether two offices are incompatible was established by the Wisconsin Supreme Court in *State v. Jones*, 130 Wis. 572, 575–76, 110 N.W. 431 (1907), where the "court held that if one office were superior in some respect to another, so that the duties exercised under each might conflict to the public detriment, the offices were incompatible." 75 Op. Att'y Gen. 28, 30 (1986). In explaining in a later case that public policy determines whether offices are incompatible, the supreme

court said in *Martin v. Smith*, 239 Wis. 314, 326, 1 N.W.2d 163 (1941), that public offices are incompatible "where the nature and duties of two offices were such as to render it improper from considerations of public policy for one person to discharge the duties of both."

It is not necessary to decide whether deputy coroner, city police officer or assistant chief of a volunteer fire department are public offices or public positions because both offices and positions are covered by the doctrine of incompatibility. *Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 396, 347 N.W.2d 614 (Ct. App. 1984), and 75 Op. Att'y Gen. at 30.

At the outset, the distinction between incompatibility of office and conflict of interest should be noted. Quoting from 63A Am. Jur. 2d *Public Officers and Employees* § 79 (1984), the difference was explained in 74 Op. Att'y Gen. at 52–53:

> Incompatibility of office or a position is not the same as a conflict of interest. Incompatibility of office or position involves a conflict of duties between two offices or positions. While this conflict of duties is also a conflict of interest, a conflict of interest can exist when only one office or position is involved, the conflict being between that office or position and a nongovernmental interest. Incompatibility of office or position requires the involvement of two governmental offices or positions. Moreover, incompatibility of office or position may be sufficient for a vacation of an office when conflict of interest is not.

For the reasons stated in 75 Op. Att'y Gen. at 31–33, I must conclude that the offices of coroner and deputy coroner are incompatible with that of city police officer. In that opinion it was concluded that the appointment of local law enforcement officers as assistant medical examiners would create an incompatibility of office. 75 Op. Att'y Gen. at 31–33. The finding of incompatibility was based upon the conflicting orders the assistant medical examiner/law enforcement officer may receive concerning the investigation of a death that was the subject of an

inquest and upon the conflicts that could arise if the medical examiner were required to carry out the duties of the sheriff when the assistant medical examiner was a deputy sheriff or other law enforcement officer who had been deputized by the sheriff.

An inquest can be ordered only by the district attorney; and he or she can do so when the appropriate grounds exist. Sec. 979.04(1), Stats. A conflict that can arise for the police officer who serves as coroner or deputy coroner is the same as the conflict that can arise for the officer serving as medical examiner or assistant medical examiner, which was explained in 75 Op. Att'y Gen. at 31:

> The district attorney may request the coroner/medical examiner to conduct a preliminary investigation prior to a decision to order an inquest. Sec. 979.04(3), Stats. It is the district attorney who may determine the scope of the investigation. *Id.* By the terms of the statute, any other investigation conducted by any law enforcement agency is not to be limited or prevented by the coroner/medical examiner's investigation. *Id.* By making this division of investigative authority, the Legislature demonstrated its intent to protect the integrity of the separate investigations.
>
> On a practical level, any law enforcement officer serving as assistant medical examiner could be confronted with a conflict of office. The conduct of a death investigation could result in the law enforcement officer, who is also acting as assistant medical examiner, being placed in a position of trying to serve two masters. Conceivably, a district attorney's request for a limited investigation could conflict with the law enforcement agency's plans for investigation. An individual employed both as a law enforcement officer and as an assistant medical examiner would then be required to fill the two conflicting orders. From the standpoint of public policy, such an overlapping of duties would frustrate the legislative plan.

Another possible conflict facing the coroner or the deputy coroner, as well as a medical examiner or his assistant, who also serves as deputy sheriff or other law enforcement officer deputized by the sheriff was explained in 75 Op. Att'y Gen. at 31–32.

> The conflict is particularly manifest in the office of county sheriff. Sheriffs, under the Wisconsin Constitution article VI, section 3, are not to hold any other office. Deputy sheriffs, in carrying out the sheriffs' duties, similarly encounter problems of conflict between their duties and those of the medical examiners' offices.
>
> Under section 59.34(2), the coroner must perform the duties of sheriff when there is no sheriff or undersheriff. The coroner, under section 59.34(3), must also serve and execute process and "perform all other duties of the sheriff" when the sheriff is a party or when the clerk of court requests the coroner to do so upon a party's petition under section 59.395(6).
>
> . . . .
>
> If a deputy sheriff, who also served as an assistant medical examiner, were directed to serve such process because the sheriff was a party, that deputy would be violating the separation of duties as mandated by statute. Accordingly, I believe that the office of sheriff or deputy would be incompatible with that of medical examiner in your county for this additional reason.
>
> The same considerations which apply to deputy sheriffs would also apply to law enforcement officers. In many counties the offices of sheriff and other law enforcement agencies overlap, as I have previously noted:
>
> > [I]t has been a well recognized practice for sheriffs in this state to deputize law enforcement officers of other local law enforcement agencies in their county on a cooperative basis. This has been done so as to obviate

> the jurisdictional problems that might arise because of the limited power such officers otherwise would have to act beyond their municipal boundaries.

68 Op. Att'y Gen. 334, 342 (1979); *see also*, 61 Op. Att'y Gen. 79, 85 (1972).

The possible conflicts arising out of an inquest investigation and the coroner performing the duties of the sheriff were the reasons for concluding that the office of coroner was incompatible with a tribal police officer in 77 Op. Att'y Gen. 293 (1988).

The same conflicts discussed in the opinions in 77 Op. Att'y Gen. 293 and 75 Op. Att'y Gen. 28 lead me to conclude that the offices of coroner and deputy coroner are incompatible with that of the city police officer.

Mr. Faragher also asks for consideration of the conclusion in 20 Op. Att'y Gen. 296, 297 (1931), that the offices of deputy sheriff and constable would be deemed compatible on the basis of a general practice for many years of appointing constables deputy sheriffs. After noting that under the literal application of the law the two offices were incompatible, the opinion cited two supreme court cases for the principle that "the general understanding of a law and the constant practice under it for a long period of years by all officers charged with the execution of it, unquestioned by any public or private action, is strong if not conclusive evidence of its true meaning." 20 Op. Att'y Gen. at 297 citing *Scanlan v. Childs*, 33 Wis. 663, 666 (1873), and *State ex rel. Hayden v. Arnold*, 151 Wis. 19, 31, 138 N.W. 78 (1912). Mr. Faragher states that it is currently a common practice for police officers to serve as deputy coroners; and he suggests that this practice should render the offices compatible.

It would not be appropriate to invoke in this opinion the rule of statutory construction used in the 1931 attorney general opinion because I am not satisfied that it is a matter of general practice that police officers serve as deputy coroners or that, if

there is such a practice, it has gone unchallenged. Even if such evidence were presented, rather than invoking a doubtful rule of statutory construction* to approve the service of police officers as coroners or deputy coroners, it would be better if the Legislature authorized such a service. The Legislature recently took such action in 1987 Wisconsin Act 27, section 1217nr where it created section 66.11(4) to provide that a volunteer firefighter or emergency technician in a city, village or town whose annual compensation, including fringe benefits, does not exceed $2,500 may also hold an elected office in that city, village or town. Similar legislation for police officers and coroners or deputy coroners would unmistakably establish the compatibility of the offices.

A possible conflict in investigatory functions, similar to that which renders the offices of coroner and police officer incompatible, also renders the office of coroner incompatible with the assistant fire chief of a village volunteer fire department. The chief of the fire department or his designee is required to investigate fires in which property damage exceeds $500 and fires of unknown origin to determine whether they were the result of negligence, accident or design. Sec. 165.55(1), (10) and (10m), Stats. If a person were killed in a fire and an inquest ordered, the coroner who was also a member of a volunteer fire department may receive conflicting instructions about the investigation of the fire.

The fire chief is also responsible for conducting inspections of buildings to determine and cause to be eliminated any fire hazard or any violation of any law relating to fire hazards or the prevention of fires. Sec. 101.14(2), Stats. The chief may

---

*The rule cited in 20 Op. Att'y Gen. at 297 is of doubtful validity at this time because subsequent decisions of the supreme court have approved the principle that a customary violation of the plain language of a law gives no authority for continuing such violation. *Racine v. Morgan*, 39 Wis. 2d 268, 287, 159 N.W.2d 129 (1968).

designate inspectors to make the inspections. Sec. 101.14(2)(d), Stats. If a person is killed in a fire in a building that was inspected or should have been inspected by the fire department, the coroner who also serves in that fire department may face a conflict if there is an inquest investigation. The coroner may have to determine whether the fire department properly inspected the building. The conflict arises if the coroner serves in the fire department that is being investigated.

Because of these possible conflicts I must conclude that the office of coroner is also incompatible with that of assistant chief of a village volunteer fire department.

DJH:SWK

51.42/51.437 Board; Words And Phrases; The appointing authority has broad discretion to determine the interests and abilities of persons appointed to a "51.42 board." OAG 11-89

April 24, 1989

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

This is in response to your request for an opinion on the meaning of the phrase "recognized ability and demonstrated interest" in section 51.42(4)(b)1., Stats.

Section 51.42(4)(b)1. deals with the composition of the County Community Program Board (the "51.42 Board" or Board), and provides that in a single-county department of community programs, the 51.42 Board shall be composed of:

> [P]ersons of recognized ability and demonstrated interest in the problems of the mentally ill, developmentally disabled, alcoholic or drug dependent persons and shall have representation from the interest group of the mentally ill, the interest group of the developmentally disabled, the interest group of the alcoholic and the interest group of the drug dependent.

Your letter states that a question has arisen regarding the appointment to the 51.42 Board in your county of a person who, as a member of the county board, has served on a number of committees including the Social Services Board, but who "does not have any member of his immediate family, or as far as I have been able to discover, any person in his extended family who is developmentally disabled." The question thus is whether this individual has the requisite "recognized ability and demonstrated interest."

The language in question is not defined in the statutes nor case law. Its plain meaning, therefore, is its legal meaning. In my opinion, resort to a dictionary (usually necessary to discern plain meaning) is not even necessary to define the terms recognized

ability and demonstrated interest; their meaning seems self-evident. The more difficult question is who is the one who must recognize a prospective appointee's ability and to whom must the prospective appointee's interest have been demonstrated, in order to qualify that individual for an appointment to the 51.42 Board? In other words, are a prospective appointee's recognized ability and demonstrated interest objective determinations, which would suggest that a person's qualifications could be challenged and judged by some weighing of evidence, or are the criteria evaluated by subjective standards?

In my opinion, the appointing authority (either the county executive or the county board of supervisors, depending upon the county) is vested with the discretion to appoint individuals whom he/she/it subjectively believes are qualified; that is, persons whom the appointing authority recognizes as able and persons who have demonstrated their interest in the work of the 51.42 Board. No one else need be satisfied.

In *Pawlisch v. Barry*, 126 Wis. 2d 162, 376 N.W.2d 368 (Ct. App. 1985), the court held that by enacting a statute empowering county executives to make appointments to boards of health with no qualification other than "broad social viewpoint" and "serious interest in [community] health protection," "[t]he legislature must have intended [the county executive] to apply his judgment as to which members would reflect his social policy." *Id.* at 167. This is a strong statement of the power of appointing officials to make executive appointments unrestrained unless otherwise restricted by the terms of the statute, according to their own personal criteria. Therefore, it is up to the appointing authority to select persons whom it recognizes and who have demonstrated to it an ability and interest in the problems of mentally ill, developmentally disabled, alcoholic and drug dependent persons. How ability and interest are to be gauged is for the appointing authority to decide.

The statute also requires that the 51.42 Board "shall have representation from the interest group" of the groups served by

the Board. The term "interest group" is undefined. It probably does not require that mentally ill, developmentally disabled, alcoholic and drug dependent persons be appointed as members of the Board (although certainly they are eligible). It must, therefore, refer to those individuals who, to the satisfaction of the appointing authority, are able and interested in the problems of the particular group.

One may ask if to be eligible, even a demonstrably interested and recognized-as-able person has to be a member of an organization (such as the Alliance for the Mentally Ill). I would say not. The dictionary defines an "interest group" as "a group of persons having a common identifying interest that often provides a basis for action." Webster's Ninth New Collegiate Dictionary 631 (1984). A "group" can be "a number of individuals . . . having some unifying relationship." *Id.* at 539. Thus, one need not be a member of any particular organization.

To summarize, subject to the statute's other requirements, the appointing authority can select anyone whom he/she/it recognizes or believes to be able to address the problems of one or more of the groups of persons served by the 51.42 Board and who has demonstrated to the appointing authority's satisfaction that ability, regardless of a third person's opinion and regardless of whether or not the prospective appointee is formally affiliated with a particular organization. In other words, the appointing authority can appoint anyone who, in its subjective opinion, is interested in and able to address the problems of the mentally ill, developmentally disabled, alcoholic and drug dependent persons served by the Board. I do not believe that the courts would recognize any further constraints on the power of appointment.

DJH:ESM

Emergency Medical Treatment; Interstate Compact On Mental Health; Medical Aid; Public Health; It would be inadvisable to treat individuals transported across state lines for emergency medical care differently than other individuals when determining whether emergency detention proceedings should be initiated pursuant to section 51.15, Stats.

While section 51.15(7) does not authorize contractual agreements with counties outside of Wisconsin, sections 51.75(11), 51.87(3) and 66.30(5) each contain a legal mechanism through which financial or other responsibility for the care and treatment of individuals from such counties may be shared under certain specified circumstances. OAG 12–89

April 27, 1989

TIM A. DUKET, *District Attorney*
Marinette County

You indicate that hospitals in Menominee, Michigan, and Marinette, Wisconsin, have recently been consolidated and that all hospital activities are now being conducted in Marinette. You also indicate that as a result of this consolidation, some individuals in need of emergency medical treatment are now brought from Menominee County, Michigan, to the emergency room in Marinette. Pursuant to section 51.15(1), Stats., law enforcement officers in Marinette County now routinely transport any such individuals who apparently are appropriate subjects for commitment to Brown County Mental Health Center in Green Bay, Wisconsin. If deemed appropriate by health care professionals affiliated with that facility, involuntary commitment procedures are then pursued under section 51.20, and all costs of detention and commitment are then absorbed by Marinette County.

You ask two questions because of your concern about the absorption of these costs by Marinette County. Your first question may be stated as follows: Instead of transporting

individuals who have been conveyed to the emergency room from Menominee County, Michigan, and who are apparently in need of commitment to an approved treatment facility such as the Brown County Mental Health Center, may law enforcement officials from Marinette County, Wisconsin, transport such individuals back across state lines and then turn them over to Michigan authorities so that they can utilize Michigan's mental health care system?

In my opinion, it would be inadvisable to treat individuals transported across state lines for emergency medical care differently than other individuals when determining whether emergency detention proceedings should be initiated pursuant to section 51.15.

Although your description of this fact situation is very limited, my understanding is that the individuals you describe are not under any form of custody or detention in either Michigan or Wisconsin until such time as emergency detention proceedings are initiated by law enforcement officials in Marinette County pursuant to section 51.15.

Once emergency detention proceedings are initiated, the individual must be transported to an approved treatment facility pursuant to section 51.15(2). If emergency detention proceedings are not initiated, law enforcement officers in both Wisconsin and Michigan lack any basis for detaining such individuals against their will. If an individual has not been detained under section 51.15(2), that individual may be transported by a law enforcement officer to the border or across state lines, so long as the individual's consent is not withdrawn. But potential liability problems might arise from a refusal to initiate emergency detention proceedings solely in order to use this option.

I am aware that, in Wisconsin, "[t]here is general personal tort immunity for a public official acting within the scope of his official authority and in the line of his official duties." *Cords v. Anderson*, 80 Wis. 2d 525, 539, 259 N.W.2d 672 (1977). Certainly, any law enforcement official has broad discretion to

determine whether emergency detention proceedings should be initiated. However, as I understand your inquiry, for purely financial reasons, certain law enforcement officials in Marinette County propose to transport some individuals across state lines who would otherwise be detained pursuant to section 51.15 solely because those individuals were originally transported across state lines by law enforcement authorities from Menominee County, Michigan.

With respect to private physicians, the Wisconsin Supreme Court has held that where it is "foreseeable to a psychiatrist, exercising due care, that by failing to warn a third person or by failing to take action to institute detention or commitment proceedings someone would be harmed, negligence will be established." *Schuster v. Altenberg*, 144 Wis. 2d 223, 240, 424 N.W.2d 159 (1988). While public officials such as law enforcement officers enjoy broader immunity than private physicians, in light of the court's decision in *Schuster*, a law enforcement officer could conceivably be held liable for failure to commence emergency detention proceedings pursuant to section 51.15. Caution is particularly warranted in the situation presented by your inquiry, since the Michigan courts, when employing a conflict of laws analysis, are not obligated to accord the same degree of immunity to Wisconsin public officials that they enjoy when suit is brought against them in Wisconsin courts. Given these considerations, there is at least some potential risk of liability if individuals transported from Menominee County, Michigan, are treated differently than other individuals when deciding whether emergency detention proceedings should be initiated pursuant to section 51.15.

Your second question may be stated as follows: May Marinette and/or Brown County enter into an intercounty agreement with Menominee County, Michigan, under section 51.15(7) for the care or treatment of such individuals?

In my opinion, the counties may not enter into such an agreement under section 51.15(7). However, sections 51.75(11),

51.87(3) and 66.30(5) each contain a legal mechanism through which financial or other responsibility for the care and treatment of such individuals may be transferred or shared under certain specified circumstances.

Section 51.15(7) provides as follows:

> INTERCOUNTY AGREEMENTS. Counties may enter into contracts whereby one county agrees to conduct commitment hearings for individuals who are detained in that county but who are taken into custody under this section in another county. Such contracts shall include provisions for reimbursement to the county of detention for all reasonable direct and auxiliary costs of commitment proceedings conducted under this section and s. 51.20 by the county of detention concerning individuals taken into custody in the other county and shall include provisions to cover the cost of any voluntary or involuntary services provided under this chapter to the subject individual as a result of proceedings or conditional suspension of proceedings resulting from the notification of detention.

The first sentence of section 51.15(7) limits its applicability to individuals "who are taken into custody *under this section* in another county." The procedure referred to in the italicized language is that contained in section 51.15(1)–(6). Menominee County, Michigan, law enforcement officials have no authority to initiate section 51.15 proceedings when transporting individuals to an emergency room in Wisconsin as a result of events occurring in Michigan.

In addition, under the fact situation presented by your inquiry, emergency detention proceedings are initiated in Marinette County by law enforcement officials from Marinette County. Therefore, while Marinette County may enter into an agreement with Brown County pursuant to section 51.15(7) for the care and treatment of individuals transported by law enforcement officials from Marinette County to the Brown County Mental Health Center, Menominee County, Michigan, is not a proper party to

any agreement entered into solely under the provisions of section 51.15(7). Since emergency detention proceedings under section 51.15 may only be initiated in Wisconsin counties, section 51.15(7) has no application to counties outside Wisconsin.

One statute which addresses an aspect of the problem posed by your inquiry is section 51.75, which provides in part as follows:

The contracting states solemnly agree that:

(1) ARTICLE I. . . . [T]he party states find that the necessity of and desirability for furnishing such care and treatment bears no primary relation to the residence or citizenship of the patient but that, on the contrary, the controlling factors of community safety and humanitarianism require that facilities and services be made available for all who are in need of them. . . .

. . . .

(3) ARTICLE III. (a) Whenever a person physically present in any party state is in need of institutionalization by reason of mental illness or mental deficiency, he shall be eligible for care and treatment in an institution in that state irrespective of his residence, settlement or citizenship, qualifications.

. . . .

(7) ARTICLE VII. (d) Nothing in this compact shall be construed to prevent any party state or subdivision thereof from asserting any right against any person in regard to costs for which such party state or subdivision thereof may be responsible pursuant to any provision of this compact.

. . . .

(11) ARTICLE XI. The duly constituted administrative authorities of any 2 or more party states may enter into supplementary agreements for the provision of any service or facility or for the maintenance of any institution on a joint or cooperative basis whenever the states concerned find that such agreements will improve services, facilities or

> institutional care and treatment in the fields of mental illness or mental deficiency. No such supplementary agreement shall be construed so as to relieve any party state of any obligation which it otherwise would have under other provisions of this compact.

In addition, section 51.76 provides as follows:

> Pursuant to the interstate compact on mental health, the secretary [of the Wisconsin Department of Health and Social Services] shall be the compact administrator and, acting jointly with like officers of other party states, may promulgate rules to carry out more effectively the terms of the compact. The compact administrator shall cooperate with all departments, agencies and officers of and in the government of this state and its subdivisions in facilitating the proper administration of the compact or any supplementary agreement entered into by this state thereunder.

Detailed provisions for the transfer of patients from Wisconsin to other states are contained in section 51.77.

Michigan is a signatory to the Interstate Compact on Mental Health. *See* Mich. Comp. Laws §§ 330.1920–330.1930. Read together, sections 51.75(11) and 51.76 permit the secretary of the Wisconsin Department of Health and Social Services ("department") to contract with Michigan's compact administrator for reimbursement for the cost of care and treatment provided to individuals transported from Michigan to the State of Wisconsin. If the appropriate officials from the respective states are willing to enter into such a supplementary agreement pursuant to section 51.75(11), the department could then reimburse any affected Wisconsin counties for the cost of care and treatment which they incur in treating individuals transported to Wisconsin by Michigan law enforcement authorities.

Another statute which could be applied to the problem presented by your inquiry is section 51.87. This statute applies to

both involuntary commitments and voluntary placements of residents from one state to another. Sec. 51.87(8) and (10), Stats. However, the limitation contained in the last sentence of section 51.87(9) is critical. Absent the enactment of an appropriate statute by the state of Michigan recognizing the validity of applicable Wisconsin commitment laws, the provisions of section 51.87 may not be utilized. Since your inquiry contains no information as to whether Michigan has enacted such a law, it would be inappropriate for me to determine at this time whether section 51.87 could be utilized to alleviate some of the problems you describe.

A statutory option for obtaining financial reimbursement by means of a contract between the counties involved is contained in section 66.30(5), which provides as follows:*

> Any municipality may contract with municipalities of another state for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by statute to the extent that laws of such other state or of the United States permit such joint exercise.
>
> (a) Every agreement made under this subsection shall, prior to and as a condition precedent to taking effect, be submitted to the attorney general who shall determine whether the agreement is in proper form and compatible with the laws of this state.

Under section 66.30(1), the term "municipality" includes counties. When a cooperative agreement is entered into pursuant

---

*No contract under section 66.30 may contravene any of the specific provisions of section 51.87. *See, e.g., Employees Local 1901 v. Brown County*, 146 Wis. 2d 728, 735, 432 N.W.2d 571 (1988). It may be, however, that section 66.30 affords at least some reimbursement options which are not foreclosed by section 51.87. Since "I have received no tentative opinion examining the applicability of such . . . statut[e]," *see* 77 Op. Att'y Gen. 287, 291 n.3 (1988), the precise application of section 66.30(5) to your fact situation cannot be ascertained in this opinion. *See* 62 Op. Att'y Gen. Preface (1973).

to section 66.30(5), section 66.30(2) provides that, "each [municipality] may act under the contract to the extent of its lawful powers and duties."

You do not indicate whether, under Michigan law, Menominee County, Michigan, has the authority to fund the cost of treatment for any or all individuals transported to Marinette County for emergency medical care. However, to the extent that such authority exists, Marinette County may contract with Menominee County pursuant to section 66.30(5) for reimbursement for the cost of care and treatment of those individuals for whom Marinette County has been assuming financial responsibility.

For the reasons indicated, I therefore conclude that it would be inadvisable to treat individuals transported across state lines for emergency medical care differently than other individuals when determining whether emergency detention proceedings should be initiated pursuant to section 51.15. I further conclude that, while section 51.15(7) does not authorize contractual agreements with counties outside of Wisconsin, sections 51.75(11), 51.87(3) and 66.30(5) each contain a legal mechanism through which financial or other responsibility for the care and treatment of individuals from such counties may be transferred or shared under certain specified circumstances.

DJH:FTC

Natural Resources, Department Of; Open Meeting; Department of Natural Resources advisory committees that have at least some members who are not officers or employes of the DNR and that are appointed by the board, the secretary, district directors, bureau directors or property managers are subject to the open meetings law. OAG 13–89

April 28, 1989

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

You have asked for my advice on the applicability of the open meetings law to Department of Natural Resources advisory committees.

As you point out, the department has a variety of advisory committees. Some committees are created by statute, such as the snowmobile recreation council created by section 15.347(7), Stats., whose members are appointed by the Governor with the advice and consent of the Senate, and the off–the–road vehicle advisory council created by section 15.347(11), whose members are appointed by the natural resources board. Other advisory committees may be appointed by a department district director, bureau director or property manager who wants to learn about public concerns regarding a specific activity. An example of such a committee was the voluntary aquatic nuisance control review panel composed of citizens appointed by a bureau director. The panel was designed to provide citizen and local government advice to the department assessment of the effect on the public of program changes. Also, the Winnebago comprehensive planning project used several committees. Department employes served on some of those committees along with citizens. All the committees discussed and referred to in this opinion have at least some members who are not officers or employes of the DNR.

The open meetings law applies to a governmental body, as that term is defined in section 19.82(1):

> "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.

The committee referred to in the definition includes advisory committees as well as committees that have been delegated decision-making authority. *State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979), and Wisconsin Open Meetings Law, A Statutory Summary and a Digest of Opinions of the Attorney General, July 31, 1978 at 9. In *Swanson*, the supreme court stated that a committee is not required to have the authority to bind its parent body before it is subject to the open meetings law. The court explained that the "ultimate question is whether the members of a governmental body have convened for the purpose of exercising the responsibilities, authority, power, or duties delegated to or vested in the body, sec. 19.82(2), Stats., and not whether the governmental body is empowered to exercise the final powers of its parent body." *Swanson*, 92 Wis. 2d at 317.

The advisory committees created by statute clearly fall within the definition in section 19.82(1) because of the manner in which they are created.

The committees created by the natural resources board are included within the definition because the board is a governmental body and the committees it creates by rule or order are, in turn, governmental bodies. The kind of order needed to create the committees is not defined in the open meetings law;

but by reason of section 990.01(1), the word is to be construed according to its common and approved usage. Webster's Third New International Dictionary 1588 (1976) defines "order" to include: "3 a . . . (2): an authoritative mandate usu. from a superior to a subordinate." The board would, therefore, be creating a committee by order whenever it authorizes the committee and assigns the duties and functions of the committee. Neither the statute nor the dictionary definition require that the order be formal. All that is required to create a governmental body is a directive creating the body and assigning it duties. If a formal order were required, the open meetings law might be evaded by the creation of "informal" bodies. Therefore, the interpretation that the open meetings law does not require that the order be formal is consistent with the statement by the Florida Supreme Court that the sunshine law "'should be construed so as to frustrate all evasive devices.'" *Wood v. Marston*, 442 So. 2d 934, 940 (Fla. 1983).

Committees created by order of the secretary of the department would be governmental bodies, just as those created by the board, because the secretary possesses many of the powers and duties of the board. Sec. 15.05(1)(b), Stats.

The committees created by the department district directors, bureau directors and property managers are also governmental bodies and subject to the open meetings law. The head of the department may delegate and redelegate to any officer or employe of the department any function vested by law in the head. Sec. 15.02(4), Stats. Because public officials are presumed to act within the law and within their authority, *Herro v. Dept. of Natural Resources*, 67 Wis. 2d 407, 426, 227 N.W.2d 456 (1975) and *Ferguson v. Kenosha*, 5 Wis. 2d 556, 568, 93 N.W.2d 460 (1958), it must be presumed that the district and bureau directors and property managers act within the scope of delegated authority when they create committees and appoint committee members. The advisory committees, therefore, are treated the same as if

they were created by the board or the secretary and are subject to the open meetings law.

This conclusion is consistent with the analysis in *Greene v. Athletic Council of Iowa State U.*, 251 N.W.2d 559 (Iowa 1977), where the Iowa Supreme Court held that the athletic council created by university administrative officials was a public body subject to the open meetings statute because it was authorized by law when it was delegated authority of the state board of regents.

The conclusion that the advisory committees appointed by directors and property managers, as well as those by the board and the secretary, are subject to the open meetings law is consistent with the declaration in section 19.81(1) that it is "to be the policy of this 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 business." The open meetings law is to be construed liberally to achieve this purpose. Sec. 19.81(4), Stats. Whether created by the board, directors or property managers, the advisory committees are an affair of government because their actions affect the decisions of the department and its employes; and because the committees are an affair of government, the public is entitled to the fullest information about them, pursuant to the policy stated in section 19.81(1).

For the reasons I have discussed, I conclude that the advisory committees to the Department of Natural Resources are subject to the open meetings law whether they are created by the board, the secretary, district directors, bureau directors or property managers.

DJH:SWK

Ambulances; Confidential Reports; Public Records; Under present law, ambulance records relating to medical history, condition or treatment are confidential while other ambulance call records are subject to disclosure under the public records law. OAG 14–89

June 1, 1989

JAY GRIGGS, *Publisher*
Hudson Star–Observer

You have asked for my opinion on the state of the law regarding access to records on ambulance calls. As you are well aware, the subject twice received the attention of the Legislature during the last session and, as indicated by the legal opinions you have received from other sources, the meaning of the resultant current law is in contention.

Special attention is now given to ambulance records in section 146.50(12), Stats. This section was initially created by 1987 Wisconsin Act 70 and then amended by 1987 Wisconsin Act 399. It reads as follows:

> (12) CONFIDENTIALITY OF RECORDS. (a) All records made by a licensed ambulance service provider or an ambulance attendant relating to the administration of emergency care procedures to and the handling and transportation of sick, disabled or injured persons shall be maintained as confidential patient health care records subject to the requirements of ss. 146.82 and 146.83 and, if applicable, s. 146.025(5)(a) (intro.), (6), (8) and (9). For the purposes of this paragraph, a licensed ambulance service provider and a licensed ambulance attendant shall be considered to be a health care provider under s. 146.81(1). Nothing in this paragraph permits disclosure to a licensed ambulance service provider or a licensed ambulance attendant under s. 146.025(5)(a), except under s. 146.025(5)(a)11.

> (b) Notwithstanding par. (a), a licensed ambulance service provider, who is an authority, as defined in s. 19.32(1), may make available, to any requester, information contained on a record of an ambulance run which identifies the ambulance service provider and ambulance attendants involved; date of the call; dispatch and response times of the ambulance; reason for the dispatch; location to which the ambulance was dispatched; destination, if any, to which the patient was transported by ambulance; and name, age and gender of the patient. No information disclosed under this paragraph may contain details of the medical history, condition or emergency treatment of any patient.

Prior to this enactment, records of an ambulance service which fell within the definition of an "authority" under section 19.32(2) were subject to the general provisions of the state public records law. That is, records in the custody of an "authority" are presumed to be available for inspection and copying unless access is specifically limited by statute or common law or unless the custodian properly determines that the interests to be protected by nondisclosure outweigh the general presumption in favor of access. *Hathaway v. Green Bay School Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984).

The first sentence of section 146.50(12)(a) clearly creates a specific statutory confidentiality provision which is incorporated into the public records law by sections 19.35(1)(a) and 19.36(1). It states as a general rule that ambulance call records are to be treated as confidential patient health care records.

However, section 146.50(12)(b) then goes on to provide that "nothwithstanding par. (a)," an ambulance service provider "may make available, to any requester" certain specified types of information.

Your district attorney is of the opinion that the use of the term "may" in section 146.50(12)(b) grants the ambulance provider the discretion to determine which of the authorized information will

be released. Under this interpretation, the term "may" confers personal discretion on the custodian.

An attorney representing media interest has maintained that the provisions of section 146.50(12)(b) are intended to make the described information available under the general provisions of the public records law. Under this interpretation, the phrase "may make available" is used as a general exception to the confidentiality provision. The effect is that notwithstanding the confidentiality provision, the described information may be made available under the public records law.

In my opinion, a reasonable person could arrive at either one of these interpretations. Both interpretations are consistent with the common meaning of the term "may" in that both are permissive. The difference is that the former interpretation confers personal discretionary authority on individual ambulance record custodians. The latter interpretation is an acknowledgement that the custodian may make the described records available in compliance with the public records law without fear of violating the confidentiality provision.

I agree with the suggestion of the media's counsel that the Legislature probably used the term "may" rather than "shall" in section 146.50(12)(b) because the use of "shall" would have made this an absolute right of access statute. The provision would have required the custodian to make available the kinds of information described in section 146.50(12)(b) and the use of the terms "*shall* make available" in this specific setting would have barred the custodian from withholding any information under the common law balancing test which is otherwise available as a possible exception under the general public records law. *State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983).

The strength of either interpretation depends on one's focus. If you focus on the provisions of section 146.50(12) alone, the interpretation conferring personal discretion on the custodian appears intended. But if the provision is read in context with an

overarching public records law, the other interpretation has more appeal.

In legal parlance, the statute may be considered ambiguous because a reasonable person could reasonably arrive at either of the two competing interpretations, and such ambiguity can stem from the interaction with another statute. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 87, 398 N.W.2d 154 (1987). Given this ambiguity, it is appropriate to examine the legislative history, purpose and context of the legislation involved[1] and in particular to look for indicia of the intended relationship between the provisions of section 146.50(12) and the public records law.

An examination of the drafting file in the Legislative Reference Bureau reveals that the provisions in section 146.50(12) actually arose out of an ongoing disagreement over whether ambulance records were subject to disclosure under the public records law. The language in section 146.50(12) was apparently drafted and submitted by the Department of Health and Social Services with the following rationale expressed:

> *Rationale*
>
> For the past two or three years there has been a disagreement between the media and ambulance providers regarding whether ambulance reports are confidential patient records or not. The media has argued that they are public records; providers have argued that they are patient records. Clarification is needed. These amendments allow disclosure of basic information about an ambulance run, but preserve the confidentiality of patient specific information.

1987 Assembly Bill 678, Legislative Reference Bureau file.

The page on which the foregoing appears is dated July 1, 1985. Another record in the file provides the following "Explanatory Note":

---

[1]*Showers*, 135 Wis. 2d at 87.

> A great deal of information contained in the ambulance run report forms and other reports completed during ambulance care and transportation of a patient deal with the medical condition of the patient. Release of such information to the public without appropriate safeguards could be embarrassing or detrimental to the patient. For these reasons, medical records in general have been exempted from the open records provisions in the statutes. However, since the licensed ambulance attendant and EMT–Paramedic are not specifically included in the definition of "health care professionals" in s. 146.81(1), Wis. Stats., most ambulance run records do not fall into the category of confidential patient health care records.
>
> The attorney general has issued an informal opinion that ambulance run reports created by services falling under the open records law must be handled under that law unless they specifically fit under some statutory grant of confidentiality. While the case can be made that certain ambulance run reports are confidential because they are completed under the direction of a physician and others might be exempted from open records treatment under a balancing test, the entire area is ambiguous under current law. DHSS legal counsel has advised that the best way to clear up this ambiguity is to specify in the statutes how ambulance run records are to be treated. This change accomplishes that clarification by making the medical portions of ambulance run records confidential patient health care records.

1987 Assembly Bill 678, Legislative Reference Bureau file.

From this information, it is clear that a primary purpose of section 146.50(12) was to address public records issues and it follows necessarily that its provisions are intended to be read in the context of the overarching public records law.

In light of the materials in the drafting file, it becomes more clear that the primary purpose of the confidentiality provision is to protect patient medical information and not other information

about ambulance operations. There is the sense of compromise. The most sensitive information is made confidential; the rest is not.

Therefore, it is my opinion that in enacting section 146.50(12)(b), the Legislature intended that the information described therein be subject to the public records law. The individual custodians of ambulances do not have total personal discretion to grant or deny access. Pursuant to the public records law, a custodian on a case-by-case basis may consider denying access to the kind of information described in section 146.50(12)(b) only if he or she determines that the interest to be protected by nondisclosure outweighs the general presumption in favor of access.

DJH:RWL

Municipalities; Plats And Platting; Towns; Towns with village powers lack statutory authority to unilaterally vacate streets in recorded subdivision plats. OAG 15-89

June 1, 1989

RAY A. SUNDET, *Corporation Counsel*
La Crosse County

You ask whether towns with village powers possess statutory authority to unilaterally vacate streets in recorded subdivision plats. In my opinion, the answer is no.

Answering your question requires determining whether a town exercising village powers pursuant to section 60.22(3), Stats., can discontinue a street in a recorded subdivision in a town under sections 61.36 and 66.296, despite the fact that specific authority to take such action is granted to counties under section 236.445. Furthermore, it must be determined whether the exercise of such powers would conflict with section 80.02, which relates to towns and town boards.

Under section 60.22(3), if authorized at a town meeting, a town board "may exercise powers relating to villages and conferred on village boards *under ch. 61, except those powers which conflict with statutes relating to towns and town boards.*" "Except as otherwise provided by law," village boards receive a general grant of power to manage their streets under section 61.34(1). Under section 61.36, village boards are given general authority to "lay out, open, change, widen or extend . . . and improve, repair or discontinue" streets and other public grounds. However, specific authority and procedures by which village boards and most cities are to discontinue streets is provided under section 66.296, which states in pertinent part:

> (1) The whole or any part of *any* road, *street*, slip, pier, lane or alley, *in any city of the second, third or fourth class or in any incorporated village*, may be discontinued by the common council or village board upon the written petition

> of the owners of all the frontage of the lots and lands abutting upon the portion thereof sought to be discontinued, and of the owners of more than one-third of the frontage of the lots and lands abutting on that portion of the remainder thereof which lies within 2,650 feet of the ends of the portion to be discontinued, or lies within so much of that 2,650 feet as shall be within the corporate limits of the city or village. . . .
>
> (2)(a) As an alternative, proceedings covered by this section may be initiated by the common council or village board by the introduction of a resolution declaring that since the public interest requires it, the whole or any part of any road, street, slip, pier, lane or alley in the city or village is thereby vacated and discontinued.

Section 80.02, which is applicable to towns, provides in part as follows:

> Town highways; petition to lay, alter or discontinue. When 6 or more resident freeholders wish to have a highway laid out, widened, altered or discontinued in their town, they may make application in writing to the supervisors of said town for that purpose. . . . No town board shall discontinue any part of a state trunk or county trunk highway, nor discontinue any highway when such discontinuance would deprive the owner of lands of access therefrom to a highway.

The term highway can include all public ways and thoroughfares. *See* section 990.01(12). Special statutes apply to the vacation of highways on and across town lines, section 80.11, to highways on and across town and municipal boundaries, section 80.12, and to the vacation of unrecorded roads that are in the process of becoming public highways by user, section 80.32(1).

Counties receive specific authority to discontinue streets in recorded plats in towns under section 236.445, which provides as follows:

> Discontinuance of streets by county board. Any county board may alter or discontinue any street, slip or alley *in any recorded plat in any town in such county*, not within any city or village, in the same manner and with like effect as provided in s. 66.296.

A town board exercising village powers might contend that either section 61.36, alone, or sections 61.36 and 66.296, together, grant the authority to discontinue a street in a recorded subdivision. However, legislative history, precedent and cardinal rules of construction render such a contention erroneous. Moreover, a town board exercising village powers to discontinue such streets pursuant to sections 61.36 and 66.296 would necessarily create the type of conflict clearly prohibited by section 60.22(3).

A town board exercising village powers is not entitled to discontinue streets pursuant to section 61.36, which grants villages the general authority to take such action. The Legislature has separately provided villages the general grant of power to discontinue streets and the specific authority and procedures by which to do so since 1872. *See* ch. 188, section 64, Laws of 1872. The statute currently granting the general power, section 61.36, was previously enacted as section 61.69 in chapter 187, section 3, Laws of 1933, and then renumbered in chapter 205, sections 6 and 7, Laws of 1943. Just prior to 1933, the relevant language of section 61.36 granting general authority to discontinue village streets appeared in statutes listing general village board powers. *See* sec. 61.34(12), Stats. (1923–33).

Prior to the creation of section 66.296 in 1951, which provides villages and most cities specific authority and uniform procedures to discontinue streets, villages discontinued streets under section 61.38, Stats. (1923–49), which granted them specific authority and procedures to do so. *See* ch. 662, Laws of 1951. By

consistently providing distinct statutes on this matter, it is clear that the Legislature always intended that when villages discontinued streets, they were to take such action pursuant to a statute that specifically provided them the authority and procedures to do so, and not pursuant to a general grant of authority such as is now contained in section 61.36. A town exercising village powers should not be entitled to take action that a village would be unable to do.

Assuming, for the sake of argument, that there is actually a conflict in the statutes, the above interpretation of legislative intent wholly complies with the cardinal rule of statutory construction that specific statutes control over general statutes. *Caldwell v. Percy*, 105 Wis. 2d 354, 375, 314 N.W.2d 135 (Ct. App. 1981); *citing State v. Kruse*, 101 Wis. 2d 387, 393, 305 N.W.2d 85 (1981). Moreover, the supreme court has indicated that when a street or road is discontinued the more specific statute must be employed where arguably two applicable statutes could apply. *State ex rel. Welch v. Chatterton*, 239 Wis. 523, 527–28, 300 N.W. 922 (1941). In *Chatterton*, in fact, the supreme court invalidated the discontinuance of a street by a village under section 61.38, Stats. (1939) (predecessor of section 66.296) because the street vacated was also part of a road extending over a village–town boundary and such discontinuances were controlled by the more specific procedures provided in sections 80.11 and 80.12, Stats. (1939). *Id.* at 527–28.

The holding in *Chatterton* is inconsistent with a view that concurrent jurisdiction exists to discontinue streets in a recorded subdivision in towns for counties under section 236.445, and towns exercising village powers pursuant to sections 60.22(3) and 61.36. Because section 60.22(3) is a general statute permitting towns to exercise village powers and section 61.36 is a statute granting general authority to villages to discontinue streets, while section 236.445 is a specific statute permitting counties to vacate streets in recorded plats in towns, the rationale of *Chatterton*

indicates that section 236.445 is controlling to the exclusion of section 61.36.

Also, interpretations that render a statute superfluous should be avoided. *Van Cleve v. Hemminger*, 141 Wis. 2d 543, 548, 415 N.W.2d 571 (Ct. App. 1987), *citing State v. Wachsmuth*, 73 Wis. 2d 318, 324, 243 N.W.2d 410 (1976). To interpret section 61.36 as sufficient to grant villages, and thus ultimately towns exercising village powers, the authority in question would render section 66.296 superfluous in that villages could then discontinue streets under either statute. More importantly, such an interpretation would allow discontinuances of streets without any procedures for doing so, obviously an unreasonable result. Statutes must be construed so as to avoid absurd and unreasonable results. *DeMars v. LaPour*, 123 Wis. 2d 366, 372, 366 N.W.2d 891 (1985). Thus, it is clear that a town exercising village powers cannot discontinue a street in a recorded subdivision pursuant to section 61.36.

A town might argue that the general grant of authority to discontinue streets in section 61.36 necessarily implies the power to do so under section 66.296. Such a contention, however, would ignore section 236.445.

The Legislature specifically granted the authority to discontinue streets in a recorded subdivision in a town to counties under section 236.445. *Chatterton* and the rule that specific statutes control over general ones, again apply. Thus, a town exercising village powers cannot discontinue a street in a recorded subdivision pursuant to section 66.296, either.

Even absent all these arguments, allowing a town to utilize the provisions of sections 61.36 and 66.296 to discontinue streets in recorded subdivisions would create a conflict with section 80.02 which relates to the vacation of highways by town boards. Such a conflict is prohibited by section 60.22(3).

The Wisconsin Supreme Court has employed the following test in order to determine whether a conflict exists under section 60.22(3):

> In order that there be a conflict it is not necessary that the plans oppose each other at every point. It is sufficient if they are fundamentally inconsistent. It may be contended that there is no conflict if only that part of sec. 905 which authorizes the village board to assess the entire cost of improvements to abutting property owners be considered as adopted. The difficulty with that contention is that the statute does not provide for two things but for one thing. If the powers enumerated in secs. 905 and 906 are exercised they conflict with the powers conferred upon towns, and the powers enumerated in secs. 905 and 906 are therefore not conferred upon towns by the adoption of a resolution under sub. (13), sec. 776, Stats. It makes no difference that in a particular instance the town board might not fully exercise the powers enumerated in said sections. The question is not whether a town board can exercise a part of the powers enumerated in such a way that there would be no conflict in a particular instance. The question is, Do the powers, if exercised, conflict? If they do, then the power is not conferred either in whole or in part.

Gertz v. Vaughn, 163 Wis. 557, 566, 158 N.W. 298 (1916).

In the absence of any more specific statute, towns vacate highways which, as defined by section 990.01(12), could include streets within their boundaries pursuant to the procedure contained in section 80.02. An application for discontinuance must be filed by six resident freeholders. 57 Op. Att'y Gen. 225 (1968). The application must describe the lands that will be benefited, injured or damaged by the proposed vacation. Sec. 80.02, Stats. Notice must be given by registered mail to all of the owners and occupants of record of land abutting the entire highway to the Department of Natural Resources and the county

land conservation committee. Sec. 80.05(2), Stats. A Class 2 notice must also be published. Sec. 80.05(2)(c), Stats.

In contrast, villages acting pursuant to section 61.36 must, as already noted, utilize the procedures contained in section 66.296. An application is not necessarily required; the village board may simply introduce a resolution. Sec. 66.296(2)(a), Stats. Where a written petition is filed, no minimum number of landowners is required, but all landowners along the area to be vacated, together with a minimum number of adjacent landowners, must sign the petition. Sec. 66.296(1), Stats. The notice must be served like a summons, rather than by registered mail, but only on those landowners abutting the portion to be vacated. Sec. 66.296(2)(a), Stats. The notice must be published as a Class 3, rather than a Class 2 notice. Sec. 66.296(5), Stats. And, if a certain number of objections is filed by landowners within 2,650 feet, the street may not be vacated. Sec. 66.296(2)(c), Stats.

If section 61.36 affords a town with village powers additional authority to vacate public roads and streets, then it necessarily permits a town to vacate such roads and streets under either section 80.02 or under section 66.296. However, under *Gertz*, because the vacation procedure contained in section 80.02 is radically different than that contained in section 66.296, the use of the latter procedure by a town conflicts with section 80.02 relating to town boards and is therefore impermissible under section 60.22(3).

Finally, statutes must be construed so as to avoid absurd and unreasonable results. *DeMars*, 123 Wis. 2d at 372. For the sake of argument, if every objection noted above were ignored, there is still no statutory provision precluding a county from discontinuing streets in recorded subdivisions in towns with village powers. If a town with village powers could proceed pursuant to sections 61.36 and 66.296, it could discontinue a street despite a county's refusal to do so. Similarly, a county could discontinue such a street after a town with village powers had refused to do so. In such circumstances, developers and

landowners would inevitably engage in forum shopping, setting one unit of government against the other. More importantly, from a municipal planning standpoint, the exercise of such powers by both units of government would undoubtedly have deleterious implications by placing them at cross-purposes with each other. Such a result could not possibly have been intended by the Legislature.

Therefore, in summary, I conclude that towns exercising village powers pursuant to section 60.22(3) are not entitled to discontinue a street in a recorded subdivision under either sections 61.36 or 66.296. A town must request the county to proceed under sections 236.445 and 66.296, or initiate an action to alter the plat in the circuit court pursuant to sections 236.40 through 236.43.

DJH

Indians; Law Enforcement; Oneida Indians; Sheriffs; While sheriffs lack statutory or common law authority to contract to provide county dispatch services to outside entities such as tribal public safety departments, sheriffs do have exclusive authority to instruct their deputies as to how such dispatch services should be performed in furtherance of their law enforcement functions. OAG 16-89

June 2, 1989

KENNETH J. BUKOWSKI, *Corporation Counsel*
Brown County

You ask two questions concerning the authority of a sheriff with respect to dispatch operations. Your first question is as follows: "Does the Sheriff have authority, either statutory and/or at common law, to enter an agreement such as the attached dispatch agreement without approval by the County Board or one of its committees?"

In my opinion, the answer is no.

In essence, the agreement would provide twenty-four hour dual dispatch service to the Oneida Tribal Public Safety Department for a one year period in return for a monthly payment of $1,600.00. That service would be provided for areas within the town of Hobart in Brown County which are outside the city of Green Bay and the village of Ashwaubenon. Where law enforcement personnel are required in connection with incidents occurring in such areas, the dispatcher in the Brown County sheriff's department would alert both Brown County sheriffs' deputies and Oneida public safety officers to respond. In addition, single dispatch services would be provided in connection with Oneida-owned facilities in the village of Ashwaubenon whereby village authorities would be notified, but only Oneida public safety officers would be alerted to respond.

As to the sheriff's power to contract, I recently stated in 77 Op. Att'y Gen. 94, 95 (1988) that "a county officer has no power to contract 'except in cases of express grant of authority, or where

it may be fairly implied from the nature of the act authorized.'" Aside from powers concerning the appointment of deputies, the principal statutory powers of the sheriff are enumerated in section 59.23, Stats. Those substantive powers do not include the authority to contract for the provision of dispatch services to outside agencies.

The only statute expressly authorizing the sheriff to enter into contracts is section 59.07, which provides in part as follows:

> The board of each county shall . . . .
>
> . . . .
>
> (47) CONTRACT WITH U.S. FOR CUSTODY OF FEDERAL PRISONERS. Empower the sheriff or superintendent of the house of correction to contract with the United States to keep in the county jail or house of correction any person legally committed under U.S. authority, but not for a term exceeding 18 months.

There is also no evidence that the power of the sheriff to enter this kind of contract may be statutorily implied. Section 59.07(141) provides as follows: "COUNTY–TRIBAL LAW ENFORCEMENT PROGRAMS. Pursuant to adoption of a resolution, a county board may enter into an agreement and seek funding under s. 165.90." Section 165.90, in turn, authorizes counties that contain federally recognized Indian tribes within their boundaries to apply to the Wisconsin Department of Justice for funding not to exceed $20,000 per fiscal year for any "cooperative county–tribal law enforcement program." Sec. 165.90(1), Stats.

Whether or not such funding could be obtained in connection with this particular agreement, these statutes indicate that the power to enter into binding reciprocal law enforcement agreements with Indian tribes rests with the county board rather than sheriff. I find no state law from which the sheriff's power to do so could be implied.

Unless a specific statute or a constitutional provision applies, the power to contract generally rests with the county board rather than individual county officers. Section 59.01(1) provides as follows:

> STATUS. Each county in this state is a body corporate, empowered to sue and be sued, to acquire and hold, lease or rent real and personal estate for public uses or purposes, including lands acquired under ch. 75, to sell, lease and convey the same, including the authority to enter into leases or contracts with the state for a period of years for the uses and purposes specified in s. 23.09(2)(d), *to make such contracts* and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it.

I find no statute removing this power from the county board under the circumstances you describe.

Although I find no express or implied statutory authority for sheriffs to enter into contractual agreements of the kind you describe, the sheriff also has certain common law powers preserved by Wisconsin Constitution article VI, section 4. That constitutional provision precludes both the Legislature and the county board from infringing upon "those immemorial principal and important duties that characterized and distinguished the office" at common law when the Wisconsin Constitution was adopted. *State ex rel. Milwaukee County v. Buech*, 171 Wis. 474, 482, 177 N.W. 781 (1920). Examples of such powers include attendance on the court and running the jail. *Professional Police Ass'n v. Dane County*, 106 Wis. 2d 303, 313, 316 N.W.2d 656 (1982); *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 414 (1870).

There was no radio dispatch when the Wisconsin Constitution was adopted. The sheriff, therefore, may be required by the Legislature or the county board to grant access to a centralized county law enforcement radio channel if the proposed use of that channel is for police and emergency purposes. *See* 76 Op. Att'y Gen. 7, 8–9 (1987).

Assuming for the sake of discussion that tribal public safety officers have lawful access to communications from your county's dispatcher and that such dispatches are made solely for the purpose of enhancing the sheriff's law enforcement functions, I am also not persuaded that the power to contract involves an important, immemorial duty of the sheriff. Even assuming that sheriffs could enter into contracts at the time the Wisconsin Constitution was adopted, that power would not have distinguished the office of the sheriff from other constitutional county officers or from the county board. The following statements by the Wisconsin Supreme Court are therefore as applicable to the sheriff's power to contract as they are to the sheriff's power to deputize:

> While at common law the sheriff possessed the power to appoint deputies, it was not a power or authority that gave character and distinction to the office. Many other officers as well as sheriffs possessed the power. It was more in the nature of a general power possessed by all officers to a more or less extent and was not peculiar to the office of sheriff. It should not be held, in our judgment, that the constitution prohibits any legislative change in the powers, duties, functions, and liabilities of a sheriff as they existed at common law. If that were true, a constitutional amendment would be necessary in order to change the duties of sheriffs in the slightest degree and, in this respect, "the state would be stretched on a bed of Procrustes."

Buech, 171 Wis. at 482.

I therefore conclude that sheriffs lack statutory or common law authority to contract to provide county dispatch services to outside entities such as tribal public safety departments.

Your second question is as follows:

> If the Sheriff cannot enter an agreement such as the one attached, without County Board approval, does the Sheriff have the authority to unilaterally institute a dispatch policy,

> either written or oral? In other words, in the absence of a written or oral contract, could the Sheriff direct his dispatchers to dispatch law enforcement personnel (including Oneida Tribal Public Safety officers) in a fashion determined by the Sheriff to be in the best interests of the County?

In my opinion, the answer is yes, provided that Oneida public safety officers have obtained lawful access to the county radio channel.

As I interpret your inquiry, in the absence of county board approval of the agreement enclosed with your request, the sheriff proposes to establish a policy whereby his dispatchers would be required to alert both tribal public safety officers and deputy sheriffs to respond to incidents in the town of Hobart and to alert tribal public safety officers to respond to incidents on Oneida property in the village of Ashwaubenon, with concomitant notification to village law enforcement authorities.

I caution that "[g]enerally, a sheriff has a duty to keep the peace and enforce state law and county ordinances throughout the county regardless of municipal boundaries, and may take such means as he deems necessary to carry out those duties." 61 Op. Att'y Gen. 256, 258 (1972). In addition, if the radio channel used to provide dispatch services in your county is similar to that described in 76 Op. Att'y Gen. 7, then access to that channel is initially controlled by the county, although that gate-keeper function may be delegated to the sheriff. 76 Op. Att'y Gen. at 8. However, since your inquiry presupposes that tribal public safety officers have lawfully obtained access to the dispatch services you describe, I will assume that to be the case.

Where the sheriff has been delegated the authority to perform dispatch duties in furtherance of his or her law enforcement functions, it is the sheriff's prerogative to instruct all deputies how those functions will be carried out. As stated in *Andreski v. Industrial Comm.*, 261 Wis. 234, 240, 52 N.W.2d 135 (1952):

> Within the field of his responsibility for the maintenance of law and order the sheriff today retains his ancient character and is accountable only to the sovereign, the voters of his county, though he may be removed by the governor for cause. No other county official supervises his work or can require a report or an accounting from him concerning his performance of his duty. He chooses his own ways and means of performing it. He divides his time according to his own judgment of what is necessary and desirable but is always subject to call and is eternally charged with maintaining the peace of the county and the apprehension of those who break it. In the performance of this duty he is detective and patrolman, as well as executive and administrator, and he is emphatically one of those who may serve though they only stand and wait.

Accord: 78 Op. Att'y Gen. 1, 4 (1989); 76 Op. Att'y Gen. at 8. As *Andreski* and these opinions indicate, it is the sole prerogative of the sheriff to direct his or her deputies in the performance of their law enforcement functions.

I therefore conclude that, while sheriffs lack statutory or common law authority to contract to provide county dispatch services to outside entities such as tribal public safety departments, sheriffs do have exclusive authority to instruct their deputies as to how such dispatch services should be performed in furtherance of their law enforcement functions.

DJH:FTC

Auditor; Civil Service; Counties; County Clerk; The civil service provisions of sections 63.01 to 63.17, Stats., are not applicable to appointments of a county auditor or deputy auditor pursuant to section 59.72(3) and (4) unless such a civil service system is mandated for such county because it contains 500,000 inhabitants or more, or such system is applicable because the county involved has exercised its option under section 63.01 to enact such a system. OAG 18–89

June 21, 1989

JEFFREY R. KOHLER, *District Attorney*
Washburn County

You inquire whether a county which creates the appointive office of county auditor under section 59.72, Stats., must create or have in place a county civil service commission under sections 63.01 to 63.17. As you indicate, the literal language of section 59.72(3) could be viewed as requiring the creation of such a commission in every county such as yours, which has not adopted county civil service but contemplates the creation of the office of county auditor. In my opinion, however, such a literal reading of the statute is not appropriate.

Prior to 1978, section 59.72 provided that counties with a population of 300,000 or more were required to have a county auditor appointed pursuant to the civil service provisions otherwise mandatory in those counties having 500,000 inhabitants or more. *See* secs. 63.01 to 63.17, Stats. (1975)[1] In all other counties the county clerk acted as auditor, unless the county board chose to appoint a county auditor, and in such counties no civil service requirement was attached to the appointment of a county auditor. By virtue of chapter 265, Laws of 1977, the statute was amended to delete reference to the distinction between

[1]Milwaukee County was the only county which fell within the mandatory provisions of sections 63.01 to 63.17. Since 1955, all other counties may voluntarily establish such a civil service system. Ch. 40, Laws of 1955.

counties having more or less than 300,000 population and simply provided that the county clerk shall act as auditor in *every* county, unless "a separate office of county auditor" is created. However, the statutory reference to sections 63.01 to 63.17 was not removed, and section 59.72(3) was merely modified in this regard as follows: "Such appointment [as county auditor] shall be made ~~pursuant to~~ *under* ss. 63.01 to 63.17 ~~of the statutes~~ and shall be subject to confirmation by the county board."[2]

Therefore, one purpose of chapter 265, Laws of 1977, was to provide every county the option to choose whether it wants an appointed county auditor to perform the audit function which is otherwise to be performed by the elected county clerk. It is apparent that the Legislature also intended to retain language which previously mandated civil service for county auditors under laws applicable to certain populous counties. However, it is at best ambiguous whether the revised statute was intended to require that all counties appointing a county auditor create a new civil service system for the selection of such officer "under" sections 63.01 to 63.17, where no such system had previously been adopted by a county "pursuant" to those statutes. Where ambiguity in statutory language is present, the intent of the Legislature must be determined from the language of the statute in relation to its scope, history, context, subject matter and the object sought to be accomplished, and one may resort to extrinsic aids to determine intent. *State v. Vonesh*, 135 Wis. 2d 477, 482–83, 401 N.W.2d 170 (Ct. App. 1986).

Sections 63.01 to 63.17 provide for the establishment of a comprehensive civil service system mandated for counties containing 500,000 inhabitants or more, under which *all* offices and positions are included, either in the classified or unclassified service. *See* sec. 63.03, Stats. All other counties may, but are not

---

[2]Section 59.72(4) was also modified to require a prior county board resolution to authorize a county auditor "*appointed under sub. (3) to* appoint a deputy auditor *under* ss. 63.01 to 63.17."

required to, establish a civil service system under either section 59.07(20) or sections 63.01 to 63.17. In my opinion, it is doubtful that the Legislature would mandate the creation of an entire new civil service system applicable to all county personnel in a county which had previously had no civil service at all merely because the county board chose to appoint a county auditor. Moreover, even where a county has previously adopted a civil service system under section 59.07(20), there appears to be no reason why the Legislature would require such county to create a new civil service system under sections 63.01 to 63.17 for the appointment of a county auditor. A literal reading of section 59.72 must be rejected when it would lead to such an unreasonable result. *See Bob Ryan Leasing v. Sampair*, 125 Wis. 2d 266, 268, 371 N.W.2d 405 (Ct. App. 1985).

The statutory reference requiring the civil service appointment of a county auditor in populous counties was first incorporated in section 59.72, by chapter 127, Laws of 1935, as part of a change in the method of appointing the county auditor and his or her deputy in counties of more than 300,000 population.[3] Previously the statute had provided for the appointment of a county auditor in such counties by the county clerk, the chairman of the county board and the county treasurer, or a majority of them, to hold office during the term of the county clerk under whom he was appointed. In counties of less than 300,000 the county clerk continued to act as auditor, unless the county board appointed a county auditor. Initially, therefore, the provisions of section 59.72 requiring the civil service appointment of county auditors in populous counties was intended to insure that auditors in counties of more than 300,000 population would be appointed in accord with a civil service system which would have been already in

---

[3]The civil service appointments were pursuant to sections 16.31 to 16.44, Stats. (1935), the predecessor statutes to present sections 63.01 to 63.17, which then only applied to counties of 200,000 inhabitants or more, and established a required civil service system in such counties.

place. Despite subsequent amendments to the statutes involved, I conclude that such continues to be the intended effect of the statutory language.

Finally, although the legislative reference library drafting file for chapter 265, Laws of 1977, contains material indicating the apparent legislative purpose of the various changes to section 59.72 enacted by that law, there is nothing to suggest that the Legislature intended to alter the statute to require the application of sections 63.01 to 63.17 to the appointment of county auditors in counties other than those in which such a civil service system is in effect. In fact, the suggestion is quite the contrary. A detailed fiscal note by the Department of Local Affairs and Development, appended to the initial draft of 1977 Assembly Bill 851, which with modification not relevant here became chapter 265, Laws of 1977, provides in part as follows:

> FISCAL NOTE: According to current law, counties having a population of 300,000 or more, are required to have a county auditor. The auditor may appoint a deputy director. In counties having a population of less than 300,000, the county clerk shall act as the county auditor, unless the county board creates a separate office of county auditor.
>
> The proposal: (1) eliminates the distinction based on population by requiring every county clerk to act as auditor unless the county board creates a separate office of county auditor; . . . (3) enables every county board to authorize the appointment of a deputy auditor; and (4) requires county board authorization for the county auditor to appoint a deputy.
>
> The proposed changes have the effect of providing the elected county officials with more control over the position of county auditor.
>
> It is not anticipated that the proposed changes would have a fiscal impact on counties, because the changes would not

require counties to change the current system regarding the county auditor.

The above fiscal note analysis suggests that the changes enacted by chapter 265, Laws of 1977, were designed to provide elected county officials with greater control over decisions concerning the county auditor system rather than to require counties to change the current system. An interpretation of present section 59.72 which would impose a comprehensive civil service system upon every county which chose to appoint a county auditor, would appear to be inconsistent with the legislative purpose underlying the statute, as expressed in the fiscal note.

Based upon the foregoing, it is my opinion that the present references in section 59.72(3) and (4) to appointment of a county auditor and deputy auditor under sections 63.01 to 63.17 are only intended to require that appointment be made under a civil service system in those counties in which such a civil service system is either mandated, because the county contains 500,000 inhabitants or more, or such system is otherwise operative because the county involved has exercised its option under section 63.01 to enact such a system.

DJH:JCM

Credit Unions; A Wisconsin credit union may invest in a credit union service corporation which sells insurance to the general public so long as the corporation was organized to primarily serve credit unions and their members. OAG 19–89

June 21, 1989

RICHARD OTTOW,

Office of the Commissioner of Credit Unions

You have asked the following question: "[I]f a credit union invests in a service corporation, can this corporation own or operate an insurance agency which deals with the general public? Or, is it intended that the agency owned by the service corporation must deal only, or primarily, with the credit union members?"

Your reference is to section 186.11(4), Stats., which authorizes Wisconsin credit unions to invest in credit union service corporations "organized primarily to provide [specified] goods and services," including insurance agency services, "to credit unions and credit union organizations." In my opinion, nothing in section 186.11(4) limits the powers of a credit union service corporation itself or (in your words) "an insurance agency" "owned" by the corporation. The powers of a credit union service corporation (and any subsidiary corporation organized to sell insurance) are governed by the general statutes regarding corporations and the articles of incorporation and bylaws of the entity. Thus, section 186.11(4) does not prohibit credit union service corporations or subsidiary insurance agencies from dealing with members of the public as long as this activity is authorized by general law and the articles and bylaws of the corporation.

Under the provisions of section 186.11(4), however, a credit union can invest only in a credit union service corporation which is organized "primarily" to provide the statutorily specified goods and services to credit union members through credit unions and

credit union organizations.[1] As a practical matter (because it is credit unions which organize credit union service corporations) the limitation on credit union investment authority operates to limit the authority of the service organization to the provision of services "primarily" to credit unions and credit union members. In my opinion, you should advise credit unions that they can offer insurance services to their members, pursuant to section 186.11(4), by organizing a credit union service corporation, the articles of incorporation and the business plan of which provide that the primary purpose of the organization is to serve credit unions and their members.

As the word "primarily" is not defined in the statute, you should consider promulgating a definition by administrative rule. The Wisconsin Supreme Court, in another context "has construed 'primarily' to mean 'fundamentally,' 'basically' or 'essentially.'" *West Bend Education Ass'n v. WERC*, 121 Wis. 2d 1, 8–9, 357 N.W.2d 534 (1984). This definition is consistent with the ordinary dictionary definitions which would be applied by the courts in construing the statute.

In considering your opinion request, you have asked me to consider section 186.012(4), which authorizes the commissioner, by rule, with the approval of the credit union review board, to exercise the powers of the federally–chartered credit union, unless the commissioner is expressly restricted by state statute from acting with respect to a specific power, right or privilege. In my opinion, investment in a credit union service corporation organized primarily to provide financial services, including the

---

[1]You assume, and I agree, that the intended beneficiaries of the goods and services mentioned in the statute are credit union members. Although the grant of investment authority is limited to corporations organized primarily to serve credit unions and credit union organizations, it is clear from the nature of the specified services that the indirect beneficiaries are credit union members. Services such as retirement counseling, estate planning, individual retirement accounts, etc., are personal financial services.

sale of insurance, to credit union members through credit unions and credit union organizations, but which also deals with the general public, is consistent with section 186.012(4)'s general grant of the powers of the federally-chartered credit union.

Section 107(7)(I) and (5)(D) of the Federal Credit Union Act (12 U.S.C. § 1757(7)(I) and (5)(D) (1980)) authorizes federal credit unions to invest in and make loans to "credit union service organizations." Under these provisions, federally-chartered credit unions can invest only in credit union service organizations "providing services which are associated with the routine operations of credit unions" and may lend only to credit union service organizations "established primarily to serve the needs of [their] member credit unions, and whose business relates to the daily operations of the credit unions they serve."

The rules of the National Credit Union Administration permit federal credit unions to invest in and/or loan to credit union service organizations "that provide" several enumerated financial services, including an "agen[cy] for sale of insurance," 12 C.F.R. § 701.27(d)(5)(ii) (1988), but the organization must "primarily serve[] credit unions and/or the membership of affiliated credit unions." *Id.* at § 701.27(d)(4). Thus, federal law parallels Wisconsin law insofar as credit unions are authorized to invest only in credit union service organizations (corporations, in Wisconsin) organized primarily to provide services to credit unions and their members. By implication, the federal rules allow service to the general public as long as credit unions and their members are the primary beneficiaries. Thus, section 186.012(4) is additional authority for you, through the promulgation of a rule, to allow credit unions to invest in credit union service corporations which serve the general public, notwithstanding that they were organized primarily to serve credit union members.[2]

---

[2]As already noted, section 186.012(4) requires the commissioner, with the approval of the credit union review board, to authorize Wisconsin credit unions to exercise the power of federally-chartered credit unions. To the extent of the

(continued...)

You have also asked me to consider section 186.115, which authorizes the commissioner to promulgate rules permitting credit unions, subject to any regulatory approval required by law, to "undertake any activity, exercise any power or offer any financially related product or service in this state that any other provider of financial products or services may undertake, exercise or provide or that the commissioner finds to be financially related." In my opinion, this statute is not germane to the question you have asked because neither state banks nor state savings and loans offer insurance services in the manner proposed for credit unions.[3]

DJH:ESM

---

[2](...continued)
authority granted in section 186.11(4), the commissioner's action is not required; the authority flows directly from the statute.

[3]Banks do sell insurance directly. Sec. 221.04(9), Stats.; Banking Letter #38, November 28, 1983 (amended December 17, 1987). You have not asked whether credit unions may also do so.

Great Lakes Protection Fund; State; The state may not contract public debt to finance its contribution to the proposed Great Lakes Protection Fund because the projects intended to be funded are not water improvements within the meaning of article VIII, section 7(2)(a)1. of the Wisconsin Constitution. OAG 20–89

July 10, 1989

JAMES R. KLAUSER, *Secretary*
Department of Administration

You have posed four questions which together ask whether the state can contract public debt to finance its contributions to the proposed Great Lakes Protection Fund (the "Fund"), a permanent endowment of $100 million to "ensure the continuous development of needed scientific information, new cleanup technologies and innovative methods of attacking pollution problems" contemplated by the governors of the Great Lakes states. Specifically, you ask the following:

1. Could public debt be constructed [sic] to fund an endowment contribution so long as earnings on the endowment were expended to acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, buildings, equipment or facilities for public purposes?

2. Could public debt be contracted to fund an endowment contribution if earnings on the endowment were returned to the state?

3. Would expenditures made by the Great Lakes Protection Fund constitute the improvement of waters for public purposes? Specifically, (a) would an improvement to *any* of the Great Lakes, whether or not adjacent to the state, be a public purpose as regards the state, and (b) would expenditures of the nature permitted to be made by the Great Lakes Protection Fund constitute the improvement of waters?

4. If some, but not all, of the permitted expenditures would qualify as the improvement of waters for public purposes, could public debt be contracted for the state's contribution to the Great Lakes Protection Fund so long as the fund agreed that earnings attributed to the state's contributions would only be spent for such improvements, even if earnings on other contributions were spent otherwise?

Because expenditures of the nature contemplated to be made by the Fund would not constitute the improvement of waters within the meaning of Wisconsin Constitution article VIII, section 7(2)(a)1., the answer to question 3(b) is no; the state cannot contract public debt to advance its contribution to the Fund. It is unnecessary, therefore, to answer your remaining questions.

In February 1988, the governors of Illinois, Michigan, Ohio and Wisconsin and the lieutenant governor of Minnesota executed a "Letter of Intent Relating to the Great Lakes Protection Fund." The letter contemplated the establishment of the Fund through the "Great Lakes Protection Fund Agreement," currently in draft form. The agreement creates the Great Lakes Protection Fund, a non-profit corporation, to:

> [A]dvance the principles, goals and objectives of the Great Lakes Toxic Substances Control Agreement and the Great Lakes Water Quality Agreement . . . by financing and supporting state and regional projects which:
>
> > Accelerate the pace of research into the economic, environmental and human health effects of contamination of the Great Lakes;
> >
> > Fund cooperative research and data collection;
> >
> > Develop improved methods of measuring water quality, and establish a firm scientific base for implementing a basin-wide system of water quality management for the Great Lakes;

> Support research to improve the science on which protection policies are based and devise new and innovative cleanup techniques for particularly complex problems of toxic contaminants;
>
> Supplement, in a stable and predictable manner, state and federal commitments to Great Lakes water quality programs; and
>
> Nurture cooperation with, between and among leaders from state legislatures, local governments, business and industry, labor, universities, environmental organizations and conservation groups.

Under the proposed Articles of Incorporation of the Fund, the Fund would provide "grants to finance projects that advance the goals of the regional Great Lakes Toxic Substances Control Agreement and the binational Great Lakes Water Quality Agreement," two other multilateral compacts aimed at preserving and protecting the Great Lakes. Each Great Lakes state would be required to contribute a sum of money, as determined in the Articles of Incorporation. In the case of Wisconsin, that amount is $12 million. Under the corporation's articles, two-thirds of the earnings from the endowment would be used to finance project grants and one-third would be returned to the contributing states.

Under the proposed agreement, each state is free to designate a source for its required contribution. In Wisconsin, the Governor proposes to fund the state's contribution from the proceeds of general obligation bonds, in three installments of $4 million per year. General obligation bonds are "public debt," within the meaning of Wisconsin Constitution article VIII. Article VIII, section 7(2)(a)1. of the Wisconsin Constitution authorizes the state to contract public debt "to acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, buildings, equipment or facilities for public purposes." If not within this grant of authority, the proposed usage of public debt would violate article VIII, section 4 of the Wisconsin

Constitution, which provides: "The state shall never contract any public debt except in the cases and manner herein provided."

The word "improve," as used in the constitutional provision before me, has not been construed by the Wisconsin Supreme Court. The court has, however, accepted an ordinary dictionary definition of the term "improvement" as its legal meaning in other contexts. In *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 386, 225 N.W.2d 454 (1975), the court stated that an improvement is: "'a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.'" *Accord United States Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 309, 313 N.W.2d 833 (1982). The court of appeals has stated that improvements can include "remodeling" or "alterations." *McQuay-Perfex, Inc. v. Wis. Tel. Co.*, 128 Wis. 2d 231, 235, 381 N.W.2d 586 (Ct. App. 1985).

As proposed, grants from the Fund would be concerned with research projects. While the goal of the Fund would be to improve the quality of the Great Lakes in the sense that water quality would be bettered, improvements within the meaning of article VIII, section 7(2)(a)1. of the Wisconsin Constitution are of a more specialized nature. Projects can entail remodeling and alterations but must accomplish more than mere repairs or, in the case of waters, restoration.

With respect to the internal improvements clause of the Wisconsin Constitution (article VIII, section 10), supreme court decisions suggest how the court would construe the term "improve" within article VIII, section 7(2)(a)1.[1] In *State ex rel.*

---

[1]The court has applied the same definition of "debt" and "indebtedness" in different constitutional provisions, because "both deal with public debt and the underlying intent is the same." *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, (continued...)

Jones v. Froehlich, 115 Wis. 32, 40, 91 N.W. 115 (1902), the court listed a number of projects which it considered to be improper internal improvements. In all cases, the projects involved public works--the construction of brick and mortar projects or, in the case of waters, the construction of dams, levies, wharves, dikes, etc. In *Rippe v. Becker*, 56 Minn. 100, 57 N.W. 331 (1894), the court, in an opinion adopted by the Wisconsin Supreme Court in *State ex rel. Owen v. Donald*, 160 Wis. 21, 79, 151 N.W. 331 (1915), said that "any structure" used by the state in the performance of a governmental function is not an internal improvement. This, of course, suggests that improvements must be physical structures.

More general authorities are in accord. In 78 Am. Jur. 2d *Waters* § 85 (1975), water improvements were defined as including "locks, dams, or levees, by the deepening of the bed or channel, or the removal of obstructions therefrom, or by straightening the channel or altering the course of the stream." This listing suggests that a water improvement must involve physical activity, not merely research projects and studies as contemplated by the proposed articles of the Fund.

While the word "improve" is not ambiguous, and so resort to the history of the provision is not appropriate, it is instructive to consider the drafting record of the constitutional amendment which gave rise to article VIII, section 7(2)(a)1. of the Wisconsin Constitution. As originally proposed, 1967 Assembly Joint Resolution 1 would have permitted the issuance of public debt for "purchase and improvement of real property, for the construction and improvement of buildings, structures, improvements, facilities and highways." An informal opinion of the attorney general, included in the above-referenced drafting

---

[1](...continued)
370-71, 338 N.W.2d 684 (1983). Since the terms "improve" and "improvements" are both contained in article VIII of the Wisconsin Constitution, I believe the court would define them the same way as well.

record, stated that this language "would not permit borrowing for such things as pollution abatement studies, salaries, planning and the like." The opinion stated that the language would allow the construction of the pollution abatement facilities themselves.[2]

The drafting records contained in the Legislative Reference Bureau contain an April 19, 1967, letter from a Wisconsin law firm advocating the addition to the proposed constitutional amendment of the word "waters" in order to allow public debt to be used to finance an entire "water pollution program, not merely the physical aspects of it." This was in explicit response to the attorney general's opinion. This might be some authority for expansively construing the term "improve" to allow borrowing for, in the words of the attorney general, "such things as pollution abatement studies, salaries, planning and the like," but in context, I believe that the law firm's concern was with being able to use public debt to finance the various non-construction aspects of a pollution abatement program, such as planning costs, etc. There is no evidence that anyone intended that research, for example, not associated with a specific public works project was within the scope of permissible borrowing. In any event, there is no evidence that the Legislature redrafted the proposed amendment because of the concerns expressed in the law firm's letter and, therefore, as legislative history, the letter is of marginal significance.

There is direct evidence that the Legislature considered the public debt provision to authorize only capital projects. At the same time the constitution was amended to permit direct state borrowing, the constitution was amended to prohibit the use of the so-called "dummy building corporations" devices which the state had utilized in order to build state office buildings,

---

[2]In *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 76, 205 N.W.2d 784 (1973), the court held that pollution abatement facilities were "improvements" within the meaning of the internal improvements clause.

university structures, etc. In 56 Op. Att'y Gen. 286, 301 (1967), it was stated: "A reading of the entire [constitutional amendment] proposal indicates that the elimination of the dummy corporation method of financing is part and parcel of the proposed state bonding program." In fact, the referendum question put to the public asked whether direct state borrowing should replace use of the dummy building corporation.[3] This suggests that the intended scope of permissible borrowing was the same as the scope of the works of the building corporations, namely building.

To summarize, the state cannot contract public debt to finance its contribution to the Fund because the projects to be supported by the Fund would not constitute the improvement of waters pursuant to article VIII, section 7(2)(a)1. of the Wisconsin Constitution.

DJH:ESM

---

[3]The referendum question stated:

> "Shall section 7 of article VIII of the constitution be amended to permit the state to contract public debt, limited in amount, in order to acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, buildings, equipment or facilities for public purposes, and eliminate reliance on the present method of financing such expenditures through leases with dummy building corporations? (NOTE: Adoption of this amendment would end the practice of borrowing through 'dummy' building corporations which, as of 12/1/67, had an outstanding indebtedness of $382,511,869. Beginning 1/1/71 borrowing through state public building corporations would be unconstitutional, and all *bonds issued for the state building program* would be backed by the full faith and credit of the state.)".

1969 Jt. Res. 3, 1969 *Laws of Wisconsin* at 1518.

Natural Resources, Department Of; Navigable Waters; The Department of Natural Resources may enforce the terms of lakebed grants under section 30.03(4)(a), Stats., as long as such enforcement does not conflict with section 30.05. OAG 21–89

July 19, 1989

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

You have asked whether section 30.03(4)(a), Stats., which authorizes the Department of Natural Resources (hereafter the department) to abate infringements of public rights in navigable waters, has any applicability to lakebed areas which have been legislatively granted to municipalities. For the reasons set forth in this opinion, I conclude that the department has authority to use section 30.03(4)(a) to investigate and, if necessary, seek abatement of infringements of public rights in navigable waters in lakebed grant areas, but that authority is specifically limited to subjects not removed from the department's regulatory authority by section 30.05.

Section 30.03(4)(a) provides a procedural mechanism for the department's investigation and resolution of violations of statutes relating to navigable waters, most of which appear in chapters 30 and 31. Significantly, section 30.03(4)(a) also empowers the department to proceed against any "possible infringement of the public rights relating to navigable waters," with remedies ranging from an administrative hearing to judicial enforcement:

> Enforcement of forfeitures; abatement of nuisances; infringement of public rights.
>
> . . . .
>
> (4)(a) If the department learns of a possible violation of the statutes relating to navigable waters or a possible infringement of the public rights relating to navigable waters, and the department determines that the public interest may not be adequately served by imposition of a

> penalty or forfeiture, the department may proceed as provided in this paragraph, either in lieu of or in addition to any other relief provided by law. The department may order a hearing under ch. 227 concerning the possible violation or infringement, and may request the hearing examiner to issue an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interests of the public in the navigable waters. If any person fails or neglects to obey an order, the department may request the attorney general to institute proceedings for the enforcement of the department's order in the name of the state. The proceedings shall be brought in the manner and with the effect of proceedings under s. 111.07(7).

Section 30.03 establishes in the broadest of terms the department's authority to administratively address and seek judicial relief against activities which may not be statutory violations but which nonetheless harm public rights in navigable waters.

Section 30.05 provides:

> Applicability of chapter to municipally-owned submerged shore lands. Nothing in this chapter relative to the establishment of bulkhead or pierhead lines or the placing of structures or deposits in navigable waters or the removal of materials from the beds of navigable waters is applicable to submerged shore lands in Lake Michigan, the title to which has been granted by the state to a municipality.

Your question, then, asks whether section 30.05 operates to remove all state responsibility for navigable waters which are "submerged shore lands" once they have been granted to a municipality. To respond, I look first to the relevant statutes and next to Wisconsin cases construing the public trust doctrine rooted in article IX, section 1 of the Wisconsin Constitution.

Section 30.05 restricts the state's authority to act in three distinct areas: the establishment of bulkhead or pierhead lines, the

placing of structures or deposits in navigable waters, and the removal of materials from beds of navigable waters. These activities are presently regulated by sections 30.11, 30.12, 30.13(3) and 30.20. On its face, then, section 30.05 specifically leaves open the potential for state regulation of lakebed grant areas under any other statutory or common law provisions which may apply. As our supreme court noted in *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 527, 271 N.W.2d 69 (1978), the Legislature has directed the department in chapters 29, 30, 31, 33 and 144 to carry out the state's affirmative obligations as trustee of its navigable waters. For example, activities not expressly withdrawn from state regulation by section 30.05 include diversions from lakes and streams, section 30.18; enlargement and protection of waterways, section 30.19; regulation of wharves, piers and swimming rafts, section 30.13; and even the chemical spraying of lake weeds, section 144.025(2)(i). *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d at 530.

Sections 30.03 and 30.05, however, only partially answer the question of what authority the state retains after the Legislature grants lakebed to a municipality. Article IX, section 1 of the Wisconsin Constitution provides that the state's navigable waters must be "common highways and forever free," a condition of statehood under the Northwest Ordinance of 1787. Article IX, section 1 of the Wisconsin Constitution has generated a wealth of case law now commonly known as the "public trust doctrine." The court in *Muench v. Public Service Comm.*, 261 Wis. 492, 501–02, 53 N.W.2d 514 (1952), explained the term as follows:

> At an early date in its history the Wisconsin court put itself on record as favoring the trust doctrine, that the state holds the beds underlying navigable waters in trust for all of its citizens, subject only to the qualification that a riparian owner on the bank of a navigable stream has a qualified title in the stream bed to the center thereof.

As trustee of lakebed lands, "[t]he state has no proprietary interest in them," *McLennan v. Prentice*, 85 Wis. 427, 444, 55 N.W. 764 (1893), and thus cannot convey complete title to them. Even though the Legislature may make a *grant* of land for public trust purposes, "the state is powerless to divest itself of its trusteeship as to the submerged lands under navigable waters . . . ." *Priewe v. Wisconsin State Land & Imp. Co.*, 103 Wis. 537, 548, 79 N.W. 780 (1899). The state "cannot abdicate its trust in relation to them, and, while it may make a grant of them for public purposes, it may not make an irrepealable one; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation." *McLennan v. Prentice*, 85 Wis. at 445. These submerged lands, as the United States Supreme Court has recognized, can never be "placed entirely beyond the direction and control of the State." *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 454 (1892).

Wisconsin cases thus make clear that the state, acting through its Legislature, may not abdicate its public trust in navigable waters, nor may it make an irrevocable grant of these waters or the lands beneath them. The state may, however, delegate some of its public trust responsibilities to units of government, as it has done through the department and local municipalities. In *Muench*, 261 Wis. 492, the court considered the "county board law," which allowed county boards to permit dam construction in the county irrespective of injury to public rights in navigable waters. The court held the statute an unconstitutional abdication of the public trust in navigable waters:

> It is a well–recognized principle of the law of trusts that a trustee charged with the duty of administering a trust cannot delegate to agents powers vested in the trustee which involve an exercise of judgment and discretion, though the trustee may delegate powers which are purely ministerial. . . . Such an attempted delegation of power [as the county board law] by the legislature, involving as it does a complete abdication of the trust, is therefore void.

Muench, 261 Wis. at 515-l-515m. Similarly, in *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d at 534, the court reasoned that the Legislature "may legitimately delegate authority to local units of government to act in matters involving the state's 'public trust' duties--provided that the delegation is in furtherance of the trust and will not block the advancement of paramount interests." Moreover, to insure that the delegation of authority is constitutionally permissible, the delegation must be bounded by clear limits and definite standards. *Menzer v. Elkhart Lake*, 51 Wis. 2d 70, 81-85, 186 N.W.2d 290 (1971); *Madison v. Tolzmann*, 7 Wis. 2d 570, 575, 97 N.W.2d 513 (1959).

Because section 30.05 lacks definite standards for the exercise of authority, it cannot be considered a "delegation" of the state's public trust responsibilities. The statute does limit the department's permitting authority for three specific activities. Section 30.05, however, does nothing to alter or undo the revocability of lakebed grants, nor does it undermine the state's paramount public trust responsibilities. Rather, section 30.05 simply removes the department's permitting authority for those activities specified. Thus, for example, DNR lacks authority to abate an infringement of public waters in a lakebed grant area that consists solely of the failure to get a section 30.12 permit. But the state still retains all of its undelegated and non-delegable powers to administer the trust, along with the duty to revoke the grant if its conditions are violated or if the grant itself authorizes uses inconsistent with the public trust doctrine. This is a duty of constitutional, not statutory, dimensions, and reaches back to the earliest cases declaring the inalienability of public trust lands.

In its creation of section 30.03(4)(a), the Legislature has insured that the state retains its paramount authority over all navigable waters, even those whose beds have been legislatively granted to municipalities. Using its investigatory and fact-finding power under section 30.03(4)(a), the department has the mechanism to determine whether the activities causing the infringement are in violation of the lakebed grant, making it

subject to revocation or reversion. The procedure established by section 30.03(4)(a) also enables the department to investigate, and a court to finally determine, whether a legislative lakebed grant authorizes activities which are in violation of the trust. The provision for judicial enforcement in section 30.03(4)(a) is particularly significant, since the judicial branch is ultimately responsible for determining whether the lakebed grant or the public trust itself has been breached. *Priewe v. Wisconsin State Land & Improvement Co.*, 93 Wis. 534, 551, 67 N.W. 918 (1896); *State v. Village of Lake Delton*, 93 Wis. 2d 78, 92, 286 N.W.2d 622 (Ct. App. 1979).

I do not reach your fourth question, whether the procedures of section 30.03 permit abatement of violations of lakebed grants on the basis that they are "statutes relating to navigable waters," because lakebed grants are not part of the general body of laws codified as "The Wisconsin Statutes." Instead, they are published only as "session laws," which include legislative acts of special, private or local effect. *See* Preface to the 1987–88 Wisconsin Statutes, p. iii; sections 35.15 and 35.18.

In conclusion, then, section 30.03(4)(a) applies to lakebed grant areas except for activities specifically removed from state authority by section 30.05. Because of its non–delegable public trust responsibilities, the state acting through the department retains authority to abate the infringement of public rights in navigable waters when those activities are not authorized by the legislative grant. When activities which infringe public rights in navigable waters are authorized by the grant, the department may investigate, and a court may determine, whether the grant itself violates the public trust doctrine.

DJH:MS

Insurance; Insurance, Commissioner Of; Marketing And Trade Practices; Wisconsin law authorizes but does not require the commissioner of insurance to demand periodic reports from an insurer relating to rustproofing warranties it insures. The commissioner has authority to require an insurer to increase the amount of insurance backing a rustproofer's warranties in Wisconsin. Section 100.205, Stats., was not intended to negate the application of general insurance law to rustproofing warranties. OAG 22–89

July 31, 1989

ROBERT D. HAASE, *Commissioner of Insurance*
Office of the Commissioner of Insurance

You have requested my opinion concerning several issues relating to the regulation of rustproofing warranties by your office.

You state that a foreign business corporation has operated an automobile rustproofing business in Wisconsin and issued warranties in connection therewith. Pursuant to the requirements of section 100.205, Stats., which requires a warrantor to purchase a policy of insurance covering the financial integrity of its warranties, the corporation in 1986 procured a policy of insurance in the form of a surety bond to cover warranties issued to Wisconsin residents. It is assumed that the bond was solicited, issued and delivered in the state of domicile of the corporation. The extent of the negotiations and calculations by the rustproofing company and by the surety in determining whether the amount of the bond would be adequate to comply with section 100.205 is unknown. The rustproofing company is now in bankruptcy and the bond in question appears to be inadequate to pay contractual obligations assumed under warranties issued to Wisconsin residents.

You ask for my opinion regarding three questions. The first question is whether, under present law, the commissioner of insurance has the authority and responsibility to annually, or on

some other periodic basis, demand a filing by a rustproofing company of all warranty contracts and financial, actuarial, engineering and other reports as may be necessary to make a determination that the amount of insurance purchased by that company is in compliance with section 100.205? The second question is whether, in the event of the insolvency of the rustproofing company issuing rustproofing warranties, the commissioner of insurance has the authority and responsibility to initiate court action under section 601.64 to force the insurer of such warranties to reform its insurance contract so as to provide coverage limited only by the maximum amount of claims determined in the bankruptcy proceedings? Because your first two questions are interrelated, they will be considered together.

Section 100.205(6) states as follows:

> (6) Every warrantor shall purchase a policy of insurance covering the financial integrity of its warranties. The policy of insurance shall be on a form approved by the commissioner of insurance under s. 631.20 and shall have the following minimum provisions:
>
> (a) The insurer shall be licensed to do business in this state or shall be an unauthorized foreign insurer, as defined in s. 600.03(27), accepted by the office of the commissioner of insurance for surplus lines insurance in this state.
>
> (b) Each warranty issued in this state shall be covered by a policy of insurance.
>
> (c) In case of insolvency or bankruptcy of the warrantor, a warranted party may file a claim directly with the insurer.
>
> (d) In case of insolvency or bankruptcy of the warrantor, the insurer, upon receipt of a claim, shall cause a warranted party's vehicle to be inspected at the insurer's expense.
>
> (e) The termination provision shall state that the insurance provided shall continue with respect to all warranties issued before the date of termination.

Section 100.205(9)(b) provides a private right of action against the warrantor *or its insurer* or both to recover damages for a breach of a contract for rustproofing.

Several provisions of the insurance statutes also relate to rustproofing warranties. Section 618.41(6m), which is applicable to surplus lines insurance, and section 631.01(4m), which is applicable to Wisconsin insurers and to foreign insurers authorized to do business in Wisconsin, each states as follows:

> RUSTPROOFING WARRANTIES INSURANCE. An insurer issuing a policy of insurance to cover a warranty, as defined in s. 100.205(1)(g), shall comply with s. 632.18 and the policy shall be on a form approved by the commissioner under s. 631.20.

Section 632.18 states:

> Rustproofing warranties insurance. A policy of insurance to cover a warranty, as defined in s. 100.205(1)(g), shall fully cover the financial integrity of the warranty.

The statutory provisions referred to above require each rustproofing warranty to be covered by a policy of insurance which shall fully cover the financial integrity of the warranty, require an insurer to issue a policy which will provide such coverage and allow a warranty holder to file a claim directly with the insurer in the event of insolvency or bankruptcy.

If the meaning of a statute is clear on its face, a court will not look beyond the statute in applying it. If the statutory language is ambiguous, a court attempts to ascertain the Legislature's intent by the scope, history, context, subject matter and object of the statute. *In Interest of P.A.K.*, 119 Wis. 2d 871–79, 350 N.W.2d 677 (1984). I conclude that the provisions of Wisconsin's rustproofing warranties law, section 100.205, together with sections 618.41(6m), 631.01(4m) and 632.18 unambiguously require that insurers issuing policies of insurance to cover rustproofing warranties must issue policies which fully cover any claims filed under the warranties in the event of insolvency or

bankruptcy of the rustproofing warrantor. However, even if these statutes were determined to be ambiguous, I believe that the legislative history, subject matter and object of the statutes support the same conclusion.

Section 100.205 was enacted on May 9, 1984, as 1983 Wisconsin Act 428. It became effective on November 1, 1984. One of the purposes of this legislation was to protect consumers against rustproofing companies which issued warranties that were not honored because the firm went out of business or declared bankruptcy. The law was revised by the 1985–86 biennial budget bill, 1985 Assembly Bill 85, which was enacted as 1985 Wisconsin Act 29, effective July 20, 1985. The policy of insurance which is the subject of this opinion was issued after these revisions became effective.

Section 100.205(6) of the original law required the commissioner of insurance to determine annually the amount of the policy of insurance which must be purchased to cover warranties of a rustproofer. 1985 Wisconsin Act 29 deleted the requirement for the commissioner to make this determination. Under section 100.205(6)(b) of the original law, the policy of insurance for each warranty issued in the state had to cover the full amount of any claim payable under the warranty. The amendment also deleted this requirement. In place of these deletions, 1985 Wisconsin Act 29 created sections 618.41(6m), 631.01(4m) and 632.18. The effect of these amendments was to require that each rustproofing warranty be covered by insurance and that any insurer issuing a policy of insurance to cover a rustproofing warranty under section 100.205 must issue one which will "fully cover the financial integrity of the warranty."

The amendments to the original law discussed above were requested by the Office of the Commissioner of Insurance. The drafting file of the Legislative Reference Bureau for the amendments contain a summary sheet submitted by the Office of the Commissioner of Insurance requesting the amendments. The sheet specifies that the purpose of the proposed statutory changes

was to make the act more workable for the commissioner of insurance. It states that "[t]he proposed legislation will remove the requirement that this office approve the amount, or coverage limits, of insurance policies issued to ensure payment of rustproofing warranty claims. Instead the proposed legislation would require the warrantor and insurer to contract for a policy which would cover the 'financial integrity of the warranties.'" Under the heading "JUSTIFICATION AND ANALYSIS OF NEED," the summary sheet states "[t]he office does not have the expertise nor is it in the traditional realm of the office's responsibilities to 'determine' amounts for insurance policies. The proposed legislation places that responsibility on the warrantors and insurers. Those parties have the data and expertise to make that judgment." The response by the Office of the Commissioner of Insurance to a drafter's note contained in the Legislative Reference Bureau drafting file suggests that the deletion of the language "full amount of any claim payable" in section 100.205(6)(b) was designed to allow the use of actuarial computations of exposure to loss in arriving at a policy amount. I interpret this to mean that an insurer and rustproofer can use actuarial calculations to estimate the number and amount of claims which will be received if the rustproofer becomes insolvent rather than being required to assume that there will be claims on each warranty issued. However, I find no evidence that the Legislature intended that insurers and rustproofers will no longer be responsible for providing insurance adequate to cover all claims actually received if they underestimate claims. Thus, it appears that the purpose of the amendment was to shift the responsibility of determining the amount of insurance necessary from the insurance commissioner's office to the warrantor and the insurer while still requiring that the amount of insurance be sufficient to cover all actual losses.

Sections 100.205(6), 631.01(4m), 618.41(6m) and 632.18, like other statutes requiring bonds or insurance to protect against loss, are remedial statutes which should be liberally construed to

suppress the mischief and advance the remedy which the statutes were intended to afford. *Baumann v. West Allis*, 187 Wis. 506, 526, 204 N.W. 907 (1925). These laws should be construed so as to ensure that the insurance policy obtained by the rustproofer will be sufficient to protect Wisconsin holders of those rustproofing warranties issued by the rustproofer.

You ask whether the commissioner of insurance has authority and responsibility to demand and inspect records of the rustproofer on a periodic basis to determine that the amount of insurance purchased is sufficient to comply with section 100.205. It is my opinion that the commissioner has the authority to require such records from the insurer to determine compliance with chapters 600 to 647, which it enforces. The law requires that an insurer issuing a policy of insurance to cover a warranty shall comply with section 632.18 which states that "[a] policy of insurance to cover a warranty, as defined in s. 100.205(1)(g), shall fully cover the financial integrity of the warranty." Thus, a policy of insurance that does not fully cover the financial integrity of the warranties issued by the rustproofer is unlawful. Section 601.41(1) states that it is the duty of the commissioner to administer and enforce chapters 600 to 647, and section 601.41(2) gives the commissioner "all powers specifically granted to the commissioner, or reasonably implied in order to enable the commissioner to perform the duties imposed by sub. (1)." Section 601.42(1g) gives the commissioner authority to require from any person subject to regulation under chapters 600 to 647 reports and other information. These statutory provisions provide authority to the commissioner to obtain information about the potential exposure to loss from the insurer which should have access to records of the rustproofer.

It is my opinion that the commissioner has the responsibility to enforce the provisions of law requiring insurance to cover rustproofing warranties so that adequate insurance is available to pay claims in the event of insolvency of the rustproofer. I do not believe that the commissioner is required to demand periodic

reports in light of the purpose of the statutory amendments to put the burden on the rustproofing warrantor and the insurer to determine the proper amount of insurance. However, it may be advisable to use such a reporting system to more closely monitor the amount of insurance required.

You have also asked whether, in the event of insolvency of the rustproofing company, the commissioner can force the insurer of rustproofing warranties to modify its insurance contracts so as to provide coverage limited only by the maximum amount of claims determined in the bankruptcy proceeding of a rustproofing company. It is my opinion that the commissioner does have the authority to order that the amount of insurance be increased to cover the liability of the warrantor if the current insurance policy is not sufficient to do so.[1] Section 601.41(4)(a) states that the commissioner shall issue such prohibitory, mandatory and other orders as are necessary to secure compliance with the law. If the insurer refuses to comply with such an order, the commissioner can seek an injunction under section 601.64(1) or forfeitures under other provisions of that statute to enforce compliance.

To allow the insurer and the rustproofing warrantor to agree on an insurance policy limit without any authority by the commissioner of insurance to ensure that the policy of insurance fully covers the financial integrity of the warranties as section 632.18 requires would lead to an absurd and unreasonable result. Statutes should be construed so as to avoid such results. *DeMars v. LaPour*, 123 Wis. 2d 366, 366 N.W.2d 891 (1985). Wisconsin courts have traditionally construed bonds and other insurance policies so as to ensure compliance with state law regardless of the terms actually contained therein. In *City of Merrill v. Wenzel*

---

[1]Depending on the agreement between the rustproofing company and the insurer, the insurer may have a claim in the bankruptcy proceeding for additional compensation from the rustproofer because of the increase in insurance coverage which is required.

Brothers, Inc., 88 Wis. 2d 676, 277 N.W.2d 799 (1979), a statute required a bid bond to contain a liquidated damages provision. A city used a bid bond form that did not include such a provision. The Wisconsin Supreme Court read a liquidated damages provision into the bid bond. It noted that statutory bonds are construed in the light of the statute creating the obligation secured and the purposes for which the bond is required, as expressed in the statute. It stated that a city could not waive the statutory requirement by use of a bond that did not comply with the statute and could not limit its liability by deviating from the statutory requirements. *City of Merrill*, 88 Wis. 2d at 695–96.

You state that it might be necessary to require the insurer to write an unlimited coverage policy in order to avoid a detailed financial analysis of the rustproofing corporation. You express concern that any insurer that would write any such unlimited coverage would be in the posture of seriously endangering its solvency. I am advised, however, that your office has accepted policies providing unlimited coverage for rustproofers. In addition, if a rustproofer seeks to obtain insurance from an insurance company to cover its warranties, the company can charge a premium commensurate with the amount of risk assumed or can refuse to issue a policy at all.[2]

Your third question is whether section 100.205 authorizes the issuance of rustproofing warranties which, in the absence of section 100.205, would be considered to be the transaction of insurance subject to chapters 600 to 647. You specifically mention section 610.11, which provides no person may do any insurance business on his own account in this state except as an authorized insurer operating within the limits of its certificate of

---

[2]As previously stated, once the insurer does insure the rustproofer's warranties, however, the insurer must comply with the provisions of Wisconsin law which require the insurance to fully cover the claims under those warranties if the amount of insurance originally purchased proves to be insufficient.

authority. It is my opinion that section 100.205 does not negate insurance regulatory law such as section 610.11. In reviewing the legislative history of the rustproofing law, I can see no evidence that the Legislature was aware that the insurance commissioner's office might consider certain rustproofing warranties to be insurance. Nor were the companies selling rustproofing traditional insurance companies. Therefore, section 100.205(6) required *the purchase* of an insurance policy by the rustproofer to back its warranty. I do not believe any exception to the insurance laws was intended for the selling of rustproofing warranties which constitute insurance.

DJH:WCW

Indians; Law Enforcement; Winnebago Tribe; Words And Phrases; Discussion of state, county and tribal jurisdiction to regulate traffic on streets in housing projects that have been built and are maintained by the Winnebago Tribe on tribal lands. OAG 23–89

August 2, 1989

JOHN F. TRUBY, *District Attorney*
Sauk County

You have asked for guidance with respect to state, county and tribal authority to regulate traffic in housing projects that have been built and are maintained by the Winnebago Tribe. I assume that these housing projects are located on land within Sauk County that was purchased by the federal government in trust for the Winnebago Tribe. In 71 Op. Att'y Gen. 82, 85 (1982), it is noted that land held in trust for Indians by the federal government has the same legal status as reservation lands. Thus, any federal and state laws that are applicable to reservation lands are applicable to the same extent to Winnebago trust lands.

You have asked specifically: 1) whether the streets located within these housing projects are "highways" within the meaning of section 340.01(22), Stats., over which state and county traffic regulations can be enforced; 2) if so, whether non–tribal law enforcement officers can enforce such laws on streets within the housing projects; 3) whether the Winnebago Tribe has authority to enact traffic laws applicable to streets within the housing projects; and 4) if so, whether non–tribal law enforcement officers can enforce such tribal laws on streets within the housing projects. While you do not indicate any specific provisions of the traffic code in which you are particularly interested, I assume that your primary focus is on chapter 346, the "rules of the road." I address each of your questions in turn.

1. Are the streets located within the tribal housing projects "highways" over which state and county traffic regulations can be enforced?

Under the state's traffic code, state and local authorities have the duty to enforce chapter 346 only on "highways." Sec. 346.02(1), Stats. Section 340.01(22) defines "highway" as "all public ways and thoroughfares." Section 340.01(22) expressly excludes "private roads or driveways" from the definition of "highway." Section 340.01(46) defines "private road or driveway" as "every way or place in private ownership and used for vehicular travel only by the owner and those having express or implied permission from the owner . . . ." Under this definition, the streets located within the housing projects are not "private roads or driveways" because they are not "in private ownership." Public authorities (either the United States government, the Winnebago Tribe, or both) hold title to the property on which the roads are located. The streets, therefore, must be considered "highways" within the meaning of section 340.01(22).

This conclusion does not necessarily mean, however, that state and county traffic regulations are enforceable on these streets. The United States Supreme Court has recognized that Indian tribes have sovereignty over their territory and, therefore, as a general matter, states may not exercise jurisdiction in Indian country. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). States may, however, exercise jurisdiction in Indian country where expressly authorized by Congress, *Cabazon*, 480 U.S. at 207, or where federal law does not preempt state jurisdiction. *Id.* at 216.

It is, therefore, necessary first to inquire whether Congress has expressly authorized the state to enforce its traffic regulations on the trust land. In Pub. L. 280 (67 Stat. 588, 18 U.S.C.A. § 1162 (1984)) (hereafter "Pub. L. 280"), Congress expressly authorized Wisconsin, among other states, to assume criminal law jurisdiction over all Indian country within the state to the same

extent as elsewhere within the state.[1] Public Law 280, therefore, authorizes the state to enforce chapter 346 on highways within the trust land to the extent any given provision is "criminal" in nature.[2] Section 939.12 of the state statutes defines a "crime" as "conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime." If a law is not considered a crime under state law, Public Law 280 does not authorize its application to Indian country. *State v. St. Germaine*, 150 Wis. 2d 171 (Ct. App. 1989).

Examination of the provisions of chapter 346 reveals that most of its provisions are not "criminal" within the meaning of section 939.12 because the conduct regulated is punishable only by forfeitures rather than fines or imprisonment. The only criminal provisions contained in chapter 346 relate to fleeing a traffic officer (sections 346.04(3) and 346.17(3)); reckless and drunken driving (section 346.65); and the duties incumbent upon the operator of a vehicle involved in an accident (section 346.74).

However, a state's characterization of laws as "criminal" is not necessarily conclusive as to the laws' status for purposes of analysis under Public Law 280's grant of criminal jurisdiction.

---

[1]The land held in trust in Sauk County for the Winnebago Tribe is "Indian country" within the meaning of 18 U.S.C.A. § 1151 (1984). *See* 71 Op. Att'y Gen. at 83–88.

[2]Public Law 280 also provides that Wisconsin shall have the authority to exercise jurisdiction over "civil causes of action between Indians or to which Indians are parties . . . to the same extent that [the] State has jurisdiction over other civil causes of action . . . ." 25 U.S.C.A. § 1322(a) (1983). While one might argue that this provision gives Wisconsin the authority to enforce traffic laws in Indian country, the United States Supreme Court has interpreted the provision to authorize jurisdiction only over "private civil litigation." *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373 (1976). Enforcement of state traffic laws cannot be considered "private civil litigation" in the sense intended by the Supreme Court. If Public Law 280 is to apply to the situation analyzed here, the state therefore must derive its authority from Public Law 280's grant of criminal jurisdiction.

Cabazon, 480 U.S. at 211. In *Cabazon*, the Court drew a distinction between state laws that are "criminal/prohibitory" in nature and those that are "civil/regulatory" in nature. *Id.* at 209–10. The Court stated that "if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation." *Id.* at 209. The shorthand test is whether the conduct at issue violates the state's public policy.

The Wisconsin Court of Appeals has recently applied this test in *St. Germaine*, when it considered whether Wisconsin has been given authority under Public Law 280 to enforce in Indian country state laws governing operation of a vehicle after revocation and operation of a vehicle while intoxicated. The court stated:

> Driving after revocation is defined as criminal not only by Wisconsin statutes but also by the state policy and purpose behind the prohibition. Driving after revocation is not conduct permitted subject to regulation; it is absolutely prohibited. This prohibition reflects the state's public policy that certain individuals are dangerous drivers who must be prohibited from operating a motor vehicle to protect the health and safety of citizens.
>
> Under the *Cabazon* test, operating while intoxicated is equally a criminal law for purposes of Pub. L. 280. The legislature has expressly stated that operating a motor vehicle while intoxicated is against Wisconsin's public policy. . . .

Id. at 175–76.

Under the reasoning of *St. Germaine*, I therefore conclude that Wisconsin's laws governing fleeing a traffic officer (sections 346.04(3) and 346.17(3)), reckless and drunken driving (sections

346.61–346.64), and duties upon striking a person or vehicle (section 346.67) are "criminal laws" within the meaning of *Cabazon*.[3] The intent of the Legislature in enacting these laws was obviously not to permit the activity, subject to regulation, but to prohibit certain conduct entirely in the interests of protecting public health and safety. Under Public Law 280, the county also may enforce these provisions on the streets in the housing projects because the state utilizes law enforcement officers of all units of government to enforce chapter 346. Sec. 349.02, Stats.[4]

Having determined that Congress has authorized state enforcement on Indian land of the statutory provisions discussed above, it is next necessary to inquire whether, under federal preemption analysis, the remaining provisions of chapter 346 may likewise be enforced. In preemption analysis, courts engage in an inquiry into the nature of the state, federal and tribal interests involved in deciding whether a state may assert jurisdiction over

---

[3]A United States district court in an unpublished decision addressed an issue similar to the one here under consideration. *See Confederated Tribes of the Colville Reservation v. Washington*, No. C-88-394-JLQ (E.D. Wash. 1988). The district court decided that the State of Washington had the authority under Public Law 280 to enforce speeding laws on a reservation because Washington's policy was to completely prohibit speeding. The court stated that while driving itself is not against public policy, activities like reckless driving and speeding are against public policy because of the dangers which those activities pose to the public. *Id.* at 21.

[4]It is important to note, however, that Public Law 280 does not authorize the county to enforce on the streets in the housing projects any *county ordinances* that have been enacted under the authority of chapter 349. Public Law 280 expressly provides that the criminal laws of the state "shall have the same force and effect within . . . Indian country *as they have elsewhere within the State or Territory*." 18 U.S.C.A. § 1162(a) (1984) (emphasis added). Because county ordinances are not of statewide application, Public Law 280's grant of criminal jurisdiction does not authorize their enforcement in Indian country. *Cf. Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 659-64 (9th Cir. 1975) (deciding that Public Law 280's grant of *civil* jurisdiction did not authorize counties to extend their ordinances to Indian country).

Indian country in the absence of express congressional authorization. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). The inquiry is designed to determine whether the exercise of state authority would interfere with or be incompatible with federal and tribal interests. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); *State v. Big John*, 140 Wis. 2d 322, 327, 409 N.W.2d 455 (Ct. App. 1987). The inquiry proceeds in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including the goal of encouraging tribal self-sufficiency and economic development. *Cabazon*, 480 U.S. at 216.

While courts have assigned some importance to tribal self-government as an independent barrier to the assertion of state regulatory authority over reservations, *Bracker*, 448 U.S. at 142, recent United States Supreme Court cases demonstrate a trend away from utilizing the idea of inherent tribal sovereignty as an independent bar to state jurisdiction. *Three Affil. Tribes of Ft. Berthold v. Wold Engine.*, 476 U.S. 877, 884 (1986); *State v. Webster*, 114 Wis. 2d 418, 432, 338 N.W.2d 474 (1983). Recent cases rely more on principles of federal preemption. *Wold Engine.*, 476 U.S. at 884. Nevertheless, traditions of Indian sovereignty continue to provide an important "'backdrop against which [any] applicable treaties and federal statutes must be read'" in any preemption analysis. *Rice v. Rehner*, 463 U.S. 713, 719 (1983).

It is my opinion that while Public Law 280 does not authorize the state to apply many of the provisions of chapter 346 to the streets in question, the state may apply these other provisions on the basis of federal common law. I infer from some of the questions that you have raised that the Winnebago Tribe has not enacted a tribal traffic code and does not have an effective traffic enforcement mechanism. Given this, I believe that the state's interests in enforcing chapter 346 on the streets in question outweigh any tribal and federal interests. The state's interests in

protecting public health and safety on the streets in question by enforcing chapter 346 are apparent. The technological advance in the design of vehicles that has resulted, for example, in a great increase in the speeds of vehicles and the accompanying increase in the number of traffic accidents and fatalities demonstrates the extent of the threat posed to the safety and welfare of the public by unsafe drivers.

The Wisconsin Supreme Court has provided some guidance in this area. In *County of Vilas v. Chapman*, 122 Wis. 2d 211, 361 N.W.2d 699 (1985), the court decided that the state's legitimate interests in regulating the use of public highways outweighs the interests of a tribe and the federal government where the tribe lacks a tradition of self-government in the area of traffic regulation. *Id.* at 215-17. Because the Winnebago Tribe apparently has no motor vehicle code, the county thus has the authority to enforce the remaining provisions of chapter 346 on the streets in the housing project. However, if the tribe should enact its own motor vehicle code and provide for effective enforcement, the state's authority to enforce chapter 346 on the trust land would probably be preempted by federal law. *See State v. Webster*, 114 Wis. 2d 418, 338 N.W.2d 474 (1983).

2. Given that chapter 346 applies to streets within the housing projects, do non-tribal law enforcement officers have the authority to enforce the laws on the trust land?

As noted above, Public Law 280 provides that the criminal laws of the state shall have the same force and effect within Indian country as they have elsewhere within the state. This reference to state laws having the "same force and effect" within Indian country as elsewhere implies that state and county law enforcement officers have the authority to enforce chapter 346 on the streets in question. If the state's designated law enforcement officers could not enforce chapter 346 on the trust land, it is not clear whether the laws would have the same force and effect within Indian country as they have outside it.

Additionally, the legislative history of Public Law 280 gives explicit support to the conclusion that non-tribal law enforcement officers have the authority to enforce chapter 346 on these streets. The legislative history demonstrates that the primary concern of Congress in enacting Public Law 280 was to combat the problem of lawlessness on some Indian reservations. *Bryan*, 426 U.S. at 379. The House Report of the bill which became Public Law 280 stated that:

> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.

H.R. Rep. No. 848, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 2409, 2411-12. Clearly, Public Law 280's grant of criminal jurisdiction to the states conferred on them the authority not only to extend their criminal laws to Indian country, but also to enforce those laws with their own personnel.

The same logic applies to extension of state laws to Indian country under principles of federal common law. The Wisconsin Supreme Court's decision in *Chapman* demonstrates that one of the main considerations in determining whether a state law may apply to Indian country is whether the relevant tribe is adequately organized to perform law enforcement functions. Where the tribe is not adequately organized for such functions, courts have not only allowed the state law to extend to Indian country, but have also allowed the state's personnel to enforce the law. Any other result would contradict one of the basic purposes of the federal common law.

3. Does the Winnebago Tribe have the authority to enact traffic laws applicable to streets within the housing projects?

Indian tribes have long been recognized as sovereign entities "'possessing attributes of sovereignty over both their members and their territory . . . .'" *United States v. Wheeler*, 435 U.S. 313, 323 (1978). As sovereign entities, Indian tribes have the power to regulate their internal and social relations, to make their own substantive laws in internal matters, and to enforce that law in their own forums. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978). The Winnebago Tribe thus has the authority to enact a tribal traffic ordinance that applies to members of the tribe on the streets within the housing projects.

Whether the tribe has the authority to enact a tribal traffic ordinance that applies to non–members of the tribe is a more difficult question. Under existing law, tribes may in some circumstances assert *civil* jurisdiction over non–members, *Montana v. United States*, 450 U.S. 544 (1981), but they may not assert *criminal* jurisdiction over non–members, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

As the United States Supreme Court stated in *Montana*:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non–Indians on their reservations . . . . A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non–Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565–66 (citations omitted). Because traffic offenses are matters that arguably have a direct effect on the health or welfare of the tribe, the Winnebago Tribe probably thus has the authority to enforce "civil" regulations over non–members operating vehicles within the housing projects. *Cf. Brendale v. Confederated Tribes & Bands of Yakima*, __U.S.__, 109 S.Ct. 2994 (1989).

The tribe does not, however, have the authority to impose criminal sanctions against non–members. *Oliphant*, 435 U.S. at 210–12.

The legality of any attempt by the tribe to govern the conduct of non–members operating vehicles within the housing projects thus depends on the nature of the specific rules which the tribe might enact.

4. Assuming that the Winnebago Tribe has the authority to adopt traffic ordinances applicable within the housing projects, do county law enforcement officers have the authority under state law to enforce such laws on streets within the housing projects?

The authority of county law enforcement officers to enforce tribal traffic laws within the housing projects depends upon the nature of the authority given to the county by the state. A county is totally a creation of the Legislature, and its powers must be exercised within the scope of authority ceded to it by the state. *State ex rel. Conway v. Elvod*, 70 Wis. 2d 448, 450, 234 N.W.2d 354 (1975). The question whether county law enforcement officers can enforce tribal traffic laws thus depends upon the authority conferred by the Legislature.

Under section 59.07(141), the Legislature explicitly authorized county boards to enter into agreements governing county–tribal law enforcement, pursuant to the adoption of a county resolution authorizing such an agreement. Section 59.07(141) also provides that a county board may seek funding for a county–tribal law enforcement agreement under section 165.90. Under section

165.90, a county and tribe must develop and submit a "joint program plan" to the Wisconsin Department of Justice for approval. The plan must identify, among other things, the program's policies regarding deputization. Sec. 165.90(2)(g), Stats. The reference to "deputization" demonstrates that under section 165.90 the Legislature intended to grant county law enforcement officers the authority to enforce tribal laws, but only after the county and tribe reached an accord on operation of the cooperative law enforcement agreement. Thus, county law enforcement officers may not enforce tribal traffic laws within the housing projects unless the Winnebago Tribe and the county enter into an agreement in accordance with section 59.07(141).

DJH:JDN

Administrative Code; Prisons And Prisoners; Public Defenders; The state public defender may be denied access to jail inmates who have not requested counsel, and jail authorities need only provide over the telephone that information necessary for the public defender to assess the need to make an indigency determination in person under section 977.07(1), Stats., for an inmate who has requested counsel and claims indigency. OAG 24–89

August 15, 1989

ERIC JOHNSON, *District Attorney*
St. Croix County

Your predecessor requested my opinion on two questions relating to the authority of the state public defender to obtain access to inmates in the county jail who have neither made an initial appearance in court nor requested the assistance of counsel. You specifically ask the following:

(1) Once the jail inmate has been informed of his right to counsel under section 967.06, Stats., but has not yet asked for the assistance of counsel, is the public defender entitled to interview him in the jail?

(2) What information must jail personnel provide to the public defender, pursuant to section 967.06, beyond the identities of inmates who have not yet requested the assistance of counsel?

It is my opinion that the state public defender may be denied access to inmates who have not requested the assistance of counsel. It is further my opinion that jail authorities need only provide over the telephone that information necessary for the public defender to assess the need for an in–person indigency determination under section 977.07(1) for an inmate requesting counsel and claiming indigency.

The authority of the state public defender to act on behalf of an individual is solely a statutory authority under section 977.05(4)(g), (h), and (m). It is not triggered unless there is a

referral or a request for legal assistance. *See State v. Hanson*, 136 Wis. 2d 195, 207, 401 N.W.2d 771 (1987).

Under section 977.05(4)(h), the public defender is authorized to accept *requests* for legal services from indigent persons who are entitled to counsel under section 967.06, or who are otherwise entitled to counsel under the Constitution or laws of the United States or of the State of Wisconsin. The public defender is further authorized to provide "such persons" legal services when, in the determination of the public defender, such provision of legal services is "appropriate." Also, under section 977.05(4)(g), the public defender is authorized to accept referrals for legal services.

Individuals are not constitutionally entitled to representation by counsel, unless (a) they are subject to custodial interrogation, *Hanson*, 136 Wis. 2d at 208; *see Miranda v. Arizona*, 384 U.S. 436 (1966); or (b) formal criminal charges have been instituted against the individual, *Hanson*, 136 Wis. 2d at 210; *see Moran v. Burbine*, 475 U.S. 412 (1986). Individuals must be advised of their constitutional right to counsel prior to custodial interrogation or after the institution of formal criminal proceedings, whichever occurs first. *Hanson*, 136 Wis. 2d at 208, 210. Absent a request for counsel, police have no obligation under the federal constitution to permit an attorney access to a suspect under interrogation. *Burbine*, 475 U.S. at 428–29.

Absent a request for representation under section 977.05(4)(h), or a referral under section 977.05(4)(g), the public defender has no statutory authority to act except as provided in section 967.06. That section requires that a defendant be advised of the right to counsel "[a]s soon as practicable" after detention or arrest in connection with any offense punishable by incarceration. Under this section, persons who indicate to law enforcement authorities that they wish to be represented by a lawyer, and who claim that they are unable to pay for a lawyer's services, "shall immediately be permitted to contact the authority for indigency determinations specified under s. 977.07(1)." *Id.*

Consistent with section 967.06, the public defender is authorized by section 977.07(1) to make a determination of indigency for persons entitled to counsel as soon as possible and in accord with rules promulgated by the State Public Defender Board under section 977.02(3).

As your letter indicates, representatives of the public defender in your county demand interviews with all inmates "for purposes of indigency determination" under section 977.07(1). Presumably, they claim authority to do so under the administrative rules promulgated by the State Public Defender Board under section 977.02(3). *See* sec. 977.07(1)(a), Stats. Those administrative rules are extremely broad and do authorize the virtually unlimited access to jail inmates discussed in your letter. Wis. Admin. Code § SPD 2.03(1), (3), (5) (1984). For instance, Wisconsin Administrative Code § SPD 2.03(3) provides:

> The state public defender or county designee shall have immediate access in person or by phone to any individual held in custody, including but not limited to city or county jails, detention facilities, or mental health facilitaties [sic], upon request by the state public defender or county designee, to advise the person of the right to a free determination of indigency and for the purpose of determining indigency.

Also, Wisconsin Administrative Code § SPD 2.03(5) provides:

> The state public defender or county designee shall advise all persons charged with a crime, detained for purposes of juvenile or involuntary civil commitment proceedings, or otherwise facing a legal proceding [sic] which is within the scope of representation provided by the state public defender, prior to their initial court appearance, that they have a right to be represented by an attorney in the proceeding without charge if found indigent or for a partial charge if found partially indigent. The state public defender or county designee shall also advise all persons prior to their

initial appearance that they have a right to a free determination of their eligibility for those legal services.

These administrative rules permit the sort of unlimited access your letter discusses. These administrative rules also far exceed the bounds of section 967.06.

The public defender's administrative rules allow for "immediate access in person *or* by phone" to any jail inmate for the purpose of advising him of the right to a determination of indigency as well as for the actual determination of indigency. Wis. Admin. Code § SPD 2.03(3). Section 967.06, on the other hand, limits access by the public defender for the purpose of indigency determinations under section 977.07(1) to only those jail inmates "who indicate at any time that they wish to be represented by a lawyer, and who claim that they are not able to pay in full for a lawyer's services." The only access the public defender is allowed prior to a request by the inmate for legal representation and a claim of indigency by the inmate is the "daily telephone access" to jail personnel for purposes of identifying all persons being held in the jail. Sec. 967.06, Stats.

The state public defender's administrative rules permit the public defender to "advise all persons charged with a crime . . . or otherwise facing a legal proceding [sic] which is within the scope of representation provided by the state public defender" of their right to counsel and the right to a free indigency determination. Wis. Admin. Code § SPD 2.03(5). Section 967.06, on the other hand, only requires that law enforcement personnel advise an inmate "[a]s soon as practicable after" arrest or detention of the right to counsel. There is no statutory authority for the public defender to take it upon itself to daily enter the jails and advise each new inmate of his or her right to counsel and right to an indigency determination. As discussed above, the public defender is guaranteed telephone access to jail personnel followed by personal interviews with only those inmates who, after being advised of the right to counsel, request the assistance of counsel and claim full or partial indigency. The administrative

rules go well beyond the bounds of the public defender's statutory authority. They create a right of access to jail inmates not granted expressly or implicitly by any statute.

The public defender may argue that section 967.06 does not expressly prohibit personal access to inmates who have neither requested the assistance of counsel nor claimed indigency. But what section 967.06 expressly provides speaks volumes as to what it does not provide. Section 967.06 expressly limits public defender access to telephone contact with jail personnel unless and until there is a request by an inmate for representation by counsel and a claim of indigency. Only at that point does section 967.06 contemplate personal access by the public defender to the inmate for purposes of making an indigency determination under section 977.07(1) and for determining whether, assuming indigency, counsel should be appointed under section 977.08(1). By so expressly limiting public defender access to jail inmates, section 967.06 by necessary implication excludes any other personal contact between the public defender and jail inmates. *See generally Fred Rueping Leather Co. v. City of Fond du Lac*, 99 Wis. 2d 1, 5, 298 N.W.2d 227 (Ct. App. 1980).

I conclude, therefore, that portions of the public defender's administrative rules, Wisconsin Administrative Code § SPD 2.03(3) and (5), are in direct conflict with portions of section 967.06. The provisions of section 967.06 govern for several reasons. First of all, if there is a conflict between two statutes, or between a statute and an administrative rule enacted pursuant to another statute, the specific law controls the general one. *State ex rel. S.M.O.*, 110 Wis. 2d 447, 453, 329 N.W.2d 275 (Ct. App. 1982); *Fred Rueping Leather Co.*, 99 Wis. 2d at 5. The conflict here is directly between section 967.06 and the public defender's administrative rules. In actuality, however, the conflict is between section 967.06 and the statute authorizing the public defender to promulgate administrative rules for purposes of determining indigency, section 977.02(3). *See* sec. 977.07(1)(a), Stats. When one compares section 967.06 with section 977.02(3), it becomes

readily apparent that section 967.06 represents the specific statute, while section 977.02(3) is the general one. Section 977.02(3) simply stands for the general proposition that the State Public Defender Board has the authority to promulgate rules concerning the determination of indigency for those persons entitled to be represented by counsel. Section 967.06, on the other hand, specifically limits the public defender's right of access to jail inmates who are not yet represented by counsel. Since the specific section restricts public defender access only to telephone contact with jail personnel unless and until an inmate requests counsel and claims indigency, at which point personal access is permitted to make the indigency determination, it controls the general statute authorizing the public defender to promulgate rules "regarding the determination of indigency," section 977.02(3), and, by necessary implication, any administrative rules promulgated pursuant to that more general statute. Consequently, public defender access is limited as provided in section 967.06 regardless of any broader right of access created by its own administrative rules.

By enacting such a broad right of access under its administrative rules, the State Public Defender Board has exceeded its statutory authority.

> An agency or board created by the legislature has only those powers which are expressly conferred or which are necessarily implied from the statutes under which it operates. *Racine Fire and Police Comm. v. Stanfield*, 70 Wis.2d 395, 234 N.W.2d 307 (1975); *Wisconsin's Environmental Decade, Inc. v. PSC*, 69 Wis.2d 1, 230 N.W.2d 243 (1975). "[A]ny reasonable doubt of the existence of an implied power of an administrative agency should be resolved against the exercise of such authority." *State (Dept. of Admin.) v. ILHR Dept.*, 77 Wis.2d 126, 136, 252 N.W.2d 353, 357–58 (1977), citing *State ex rel. Farrell v. Schubert*, 52 Wis.2d 351, 358, 190 N.W.2d 529, 532–33

(1971), *reh. den.* 409 U.S. 898 (1972), *vacated* 408 U.S. 915 (1972).

Elroy-Kendall-Wilton Schs. v. Coop. Educ. Serv., 102 Wis. 2d 274, 278, 306 N.W.2d 89 (Ct. App. 1981). *See* sec. 227.11(2)(a), Stats.

"An administrative rule, even of long duration, may not stand at variance with an unambiguous statute." *Basic Products Corp. v. Department of Taxation*, 19 Wis. 2d 183, 186, 120 N.W.2d 161 (1963).

There is a reasonable doubt as to whether the State Public Defender Board had the authority to enact such sweeping administrative regulations permitting virtually unlimited access to jail inmates. That doubt must be resolved against the exercise of such authority because the administrative rules stand at variance with the unambiguous language of section 967.06 which restricts the public defender's personal access to only those jail inmates who request legal representation and claim indigency. Any reasonable doubt as to the exercise of broader implied powers must also be resolved against the state public defender by virtue of section 977.05(4)(g) and (h) which limits the authority of the public defender to act unless and until there is a *referral* or a *request* for legal assistance by the individual. The administrative rules interject the public defender into the process (and into the jails) without either a referral or a request. The rules purport to create powers that the statutes do not confer. *See Hanson*, 136 Wis. 2d at 207.

One might argue that section 977.05(4)(m) gives the public defender broader authority. On the surface, this section appears to be an open-ended provision limited only by the discretion of the state public defender. It provides that the state public defender shall: "Perform all other duties necessary or incidental to the performance of any duty enumerated in this chapter [chapter 977]." It would, however, be straining this admittedly broad authority to include within it access to all jail inmates including those who have not requested counsel on the ground

that such access might be "necessary or incidental to" effective representation of the inmate if he or she should later request the assistance of counsel. Furthermore, it appears that this discretion comes into play only after there is a request for counsel or a referral. *See Hanson*, 136 Wis. 2d at 207. A reasonable reading of this provision would be that, once a referral or request for counsel is made, the state public defender has broad authority to perform all duties "necessary or incidental to" the effective representation of that client.

Finally, even if the public defender's broad authority under section 977.05(4)(m) is not so limited, it is difficult to understand why immediate access to all jail inmates for purposes of making indigency determinations is "necessary or incidental to" the possible representation of that individual in the future should he or she ultimately request counsel. The inmate's rights are already adequately protected by section 967.06 which requires law enforcement personnel to advise the inmate of the right to counsel "[a]s soon as practicable" after arrest or detention, and requires public defender access to the inmate for purposes of making an indigency determination once he or she requests the assistance of counsel and claims indigency. Therefore, with respect to your first question, it is my opinion that the public defender has no right of access to jail inmates unless and until they request counsel and claim indigency. Until that point, the public defender has only the limited right of daily telephone access to jail personnel. Sec. 967.06, Stats.

This brings us to your second question regarding the information which jail personnel must provide on a daily basis to the public defender over the telephone. Section 967.06 provides, in part:

> The authority for indigency determination in each county shall have daily telephone access to the county jail in order to identify all persons who are being held in the jail. The jail personnel shall provide by phone information requested by the authority.

These sentences seem somewhat inconsistent. The first sentence only requires jail authorities to "identify all persons" held in the jail. The second, however, requires jail authorities to provide "information requested by" the public defender. The question then becomes: What "information" must jail personnel provide to the public defender?

A narrow construction of the two sentences would limit the "information" to simply the identities of the inmates being held. If that were so, however, the second sentence becomes totally superfluous.

A broad construction, on the other hand, could lead to absurd results. If it is left entirely to the discretion of the public defender to decide what "information" should be requested, situations might arise where the public defender seeks information regarding the circumstances of the inmate's arrest, witnesses to the crime, statements already made by the individual to police, personal information about the individual, and the like. In a heavily populated county jail, personnel could spend a large portion of their day on the telephone with the public defender providing "information" which has no relevance to the inmate's desire for legal representation. Statutes are not to be construed in such a way as to lead to absurd results. *See Hanson*, 136 Wis. 2d at 218. They are to be construed reasonably.

A reasonable construction of this portion of section 967.06 would limit the "information" which jail personnel shall provide to that which is necessary for the public defender to decide whether an indigency determination and appointment of counsel need to be made. *See* secs. 977.07(1) and 977.08(1), Stats. Such information would include not only the inmate's identity but, also, whether the inmate has requested legal assistance, whether the inmate claims to be indigent, whether the inmate is in fact charged with an offense "which is punishable by incarceration," or whether the inmate has refused counsel or has retained counsel. This interpretation directly ties in with that portion of section 967.06 which permits inmate contact with the public

defender for purposes of an indigency determination only after the individual requests legal representation and claims indigency. This information, and this information only, would be directly relevant to those issues. If jail authorities know that an inmate has requested counsel, and know or believe that the inmate is indigent, it only makes sense that they pass that information on to the public defender over the telephone so that an indigency determination can be made in person. Jail personnel are not required to provide any information which is irrelevant to the questions whether a request for counsel and a claim of indigency have been made by an identified inmate.

In conclusion, it is my opinion that the state public defender has no authority to contact jail inmates who have not requested counsel and have not claimed indigency. The public defender is entitled under section 967.06 to only that "information" from jail personnel over the telephone which will enable the public defender to ascertain whether an indigency determination needs to be made for an inmate who has already requested counsel. Any administrative rule promulgated by the state public defender which expands the right of personal access to jail inmates who have not yet requested counsel or who have not claimed indigency, or both, is an unwarranted expansion of the public defender's statutory authority under the unambiguous provisions of section 977.05(4), and directly conflicts with the unambiguous and limited right of access set forth at section 967.06. This opinion, of course, does not limit the discretion of jail personnel to permit greater public defender access to inmates if they deem it appropriate.

DJH:DJO

Clerk Of Courts; County Treasurer; A county board of supervisors may not require a clerk of court to turn over funds held by him or her to the county treasurer on Friday of each week. OAG 25–89

August 30, 1989

JAMES H. FASSBENDER, *Assistant District Attorney*
Waupaca County

You advise that Waupaca County is considering the adoption of a resolution which would require all department heads to turn over to the county treasurer general county funds held by them on a weekly basis so that the treasurer can proceed to deposit the same. However, questions have apparently arisen as to whether the clerk of court could be required to comply with this provision in light of certain statutory provisions regarding the handling of funds within that office. You specifically inquire as follows: "Can the county board of supervisors properly require a clerk of court to turn over funds held by him or her to the county treasurer on Friday of each week?"

You point out that there are a number of statutory provisions which either direct that certain funds handled by the clerk of courts be turned over to the county treasurer on a monthly basis or earmark funds for a particular mode of handling or distribution by the clerk of courts. These funds are not susceptible to any treatment by the county board which is at variance with the statutory mandate. On the basis of those statutes and interpretations contained in previous attorney general opinions, I conclude that the county board may not direct the clerk of courts to turn over funds weekly.[1]

---

[1]The long-standing attorney general opinions cited hereafter are entitled to considerable weight. *See State ex rel. North v. Goetz*, 116 Wis. 2d 239, 244–45, 342 N.W.2d 747 (Ct. App. 1983) and *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 693, 307 N.W.2d 227 (1981).

Under section 59.20(1), Stats., the Legislature directs that the county treasurer shall "[r]eceive all moneys from all sources belonging to the county, and all other moneys which by statute or county ordinance are directed to be paid to him . . . ." In regard to such fees as may be collected by county officers, section 59.15 further provides in part as follows:

> Compensation, fees, salaries and traveling expenses of officials and employes. (1) ELECTIVE OFFICIALS. . . .
>
> . . . .
>
> (b) . . . Any officer on a salary basis or part fees and part salary shall collect all fees authorized by law appertaining to his office and *shall remit all fees* not specifically reserved to him by enumeration in the compensation established by the board pursuant to par. (a) *to the treasurer at the end of each month unless a shorter period for remittance is otherwise provided.*
>
> . . . .
>
> (4) INTERPRETATION. In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail.

Further, section 59.73, directs as follows:

> Receipts and deposits of money; accounts. *Every county officer* and employe and every board, commission or other body *that collects or receives moneys for or in behalf of the county, shall*:
>
> . . . .
>
> (3) *Pay all such moneys into the county treasury at such time as is prescribed by law, or if not so prescribed daily or at such intervals as are prescribed by the county board.*

As recognized in 41 Op. Att'y Gen. 160 (1952), the provisions of section 59.15(1)(b) are controlling over those contained in section 59.73(3), and the clerk would, therefore, be required to make payments into the treasury only at the end of each month.

Under the 1952 opinion, a county ordinance would not change this result, since the statutory phrase "by law" ordinarily does not encompass county ordinances. 66 Op. Att'y Gen. 149, 153 (1977); 63 Op. Att'y Gen. 108, 112 (1974).

The phrase "by law," however, was deleted from section 59.15(1)(b) when county powers were expanded in chapter 651, Laws of 1955. *See* ch. 651, sec. 13, Laws of 1955. The question remains, therefore, whether the change from "otherwise provided by law" to "otherwise provided," would cause a modification of the 1952 opinion. In other words, the question is whether "otherwise provided" can apply to action by the county board or just to statutes.

Past attorney general opinions reveal that the words "otherwise provided" in the statutes refer to other statutes. *See* 27 Op. Att'y Gen. 309 (1938) and 12 Op. Att'y Gen. 24 (1923). Therefore, it is my opinion that section 59.15(1)(b) does not give the county board authority to shorten the time period specified in that statute.

DJH:DDS

Law Enforcement; Police; Prisons And Prisoners; Section 165.85(4)(b)2., Stats., does not preclude the temporary assignment of uncertified persons to fill in as jail officers when necessary as a result of sickness, vacations or scheduling conflicts. OAG 26–89

September 14, 1989

PATRICK J. FARAGHER, *Corporation Counsel*
Washington County

You have requested my opinion concerning the use of uncertified personnel as temporary jail officers.

You state that in Washington County there are "routine staff shortages in . . . [the] jail because of vacations, sickness and scheduling conflicts," and that "on an occasional basis, perhaps once or twice a week," certified jail officers are not available to fill those shifts. You further state that it is the plan of the sheriff's department to fill those shifts with patrol officers who, while certified as law enforcement officers, have not been certified as jail officers. You ask my opinion as to whether or not such a plan is precluded by the requirements of section 165.85(4)(b)2., Stats.

Section 165.85(4)(b)2. provides:

> No person may be appointed as a jail officer, except on a temporary or probationary basis, unless the person has satisfactorily completed a preparatory program of jail officer training approved by the board and has been certified by the board as being qualified to be a jail officer. . . . The period of temporary or probationary employment established at the time of initial employment shall not be extended by more than one year for an officer lacking the training qualifications required by the board.

It is my opinion that section 165.85(4)(b)2. does not preclude a county from utilizing persons not certified as jail officers to fill in when certified jail officers are unavailable and when there are

staff shortages due to vacation, sickness or scheduling conflicts. I reach that conclusion for two reasons.

First, the statute addresses itself only to persons "appointed" as jail officers. There is no suggestion here that the county intends to appoint the patrol officers who are assigned to fill in at the jail as jail officers, nor is there any suggestion that the patrol officers so assigned would consider themselves as having been appointed to a new job. On the contrary, your request indicates clearly that the intention is otherwise. Indeed, it is my view that the appointing authority could not appoint a patrol officer or anyone else as a jail officer unless there was a vacant position. Sickness, vacations and scheduling conflicts do not create vacancies. Such positions are still filled by the person who is ill, on vacation or precluded from working a particular shift because of a scheduling conflict.

Second, even if such assignments could be construed as appointments, the statute clearly permits temporary appointments of uncertified jail officers. Temporary is defined as "lasting for a limited time" or "one serving for a limited time." Websters Ninth New Collegiate Dictionary 1214 (1984). The legal definition is no different, being "[t]hat which is to last for a limited time only, as distinguished from that which is perpetual, or indefinite, in its duration." Black's Law Dictionary 1312 (5th ed. 1979).

The suggestion by some that staff shortages which are routine, perhaps as often as "once or twice a week," are obviously not temporary does not change my opinion. Frequency of an occurrence is not part of the definition of temporary. Furthermore, frequency refers to the problem faced by the county. It does not change the fact that each individual assignment of a patrol officer to the jail is for a limited time only and therefore temporary and permitted by the statute.

It is, therefore, my opinion that section 165.85(4)(b)2. does not preclude assignment of uncertified persons as jail officers to fill shortages caused by sickness, vacations or scheduling conflicts.

DJH:CRL

Legislature; Public Officials; Salaries And Wages; Section 13.625, Stats., does not prohibit the Milwaukee Metropolitan Sewerage District from paying normal expenses and salaries to commissioners who are legislators and does not prohibit those legislators from accepting those payments. OAG 27–89

September 15, 1989

DOUGLAS LA FOLLETTE, *Secretary of State*

You have asked for an opinion regarding a possible conflict between sections 13.625 and 66.884(6), Stats. Section 13.625(2) and (3) are part of the laws regulating lobbying and are enforced by your office. Those subsections provide that no lobbyist or principal, an organization which employs a lobbyist, may furnish anything of pecuniary value to an elective state official. The law contains some exceptions which are not pertinent to this opinion.

Section 66.884(6) is part of the statutes creating the Milwaukee Metropolitan Sewerage District (hereinafter "sewerage district"). That sewerage district is governed by a commission composed of eleven members. Sec. 66.882(2), Stats. Seven of the members are appointed by the mayor of Milwaukee. Section 66.882(2)(a) provides: "Three of the commissioners appointed under this paragraph shall be elected officials." Section 66.884(6) provides in pertinent part: "Each commissioner, *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 underlined portion of the statute was added by 1987 Wisconsin Act 417.

Neither section 13.625 nor section 66.884(6), standing alone, is ambiguous, and there is no apparent conflict between the two statutes. A conflict arises, however, because the sewerage district has been a registered principal since 1979 and in May of 1988 the mayor of Milwaukee appointed two state legislators to serve as commissioners. Although one has since resigned as a

commissioner, one state legislator continues to serve as a commissioner for the sewerage district. Under section 13.625, that legislator is prohibited from accepting anything of pecuniary value from a principal, including the sewerage district. Section 66.884(6), on the other hand, states that the legislator shall receive expenses and shall receive a salary.

The purpose of any statutory construction is to ascertain and give effect to the intent of the Legislature. *State v. Pham*, 137 Wis. 2d 31, 403 N.W.2d 35 (1987). If a statute is unambiguous, the statute must be given its plain meaning. If the statute is ambiguous, however, matters outside of the statutory language should be considered in order to determine the meaning intended by the Legislature.

The interaction between two statutes can create ambiguity. *In re custody of D.M.M.*, 137 Wis. 2d 375, 404 N.W.2d 530 (1987). In that case, extrinsic sources, including the statutes' legislative history, may be used to determine legislative intent. *In Matter of Estate of Habelman*, 145 Wis. 2d 228, 426 N.W.2d 363 (Ct. App. 1988). If possible, apparently conflicting provisions of law should be construed so as to harmonize them and thus give effect to the leading idea behind the law. *State v. Schaller*, 70 Wis. 2d 107, 233 N.W.2d 416 (1975).

You provided the following facts with your request for an opinion. In May of 1988 your office learned that two legislators had been appointed as commissioners for the sewerage district. You were advised that the sewerage district paid a salary of $7,500 per year plus expenses. Because the sewerage district was registered as a principal, you informed the sewerage district's legal counsel that such an arrangement violated section 13.625. This was the case even though section 66.882(2)(a)4. specifically included state legislators as "elected officials" whom the mayor could appoint, because the legislator/commissioner could serve as commissioner without compensation.

Very soon after your office provided this informal opinion, Assembly Bill 1028 was introduced and eventually enacted as

1987 Wisconsin Act 417 which, as noted above, requires that each commissioner, including any commissioner who serves as a member of the Legislature, shall receive a salary and expenses. 1987 Wisconsin Act 417 became effective on June 17, 1988.

When the Legislature enacts a statute it is presumed to do so with the full knowledge and awareness of existing statutes. *State ex rel. McDonald v. Douglas Cty. Cir. Ct.*, 100 Wis. 2d 569, 302 N.W.2d 462 (1981). The history of the amendment of section 66.884(6) leads to the ineluctable conclusion that the Legislature intended there to be an exception from the general prohibition under section 13.625 for those legislators who are appointed commissioners under section 66.882.

The law presumes that when there is a conflict a more specific statute should control over a more general statute, particularly when the specific statute is enacted subsequent to the more general statute. *Contempt In Interest of J.S.*, 137 Wis. 2d 217, 404 N.W.2d 79 (Ct. App. 1987), *rev. denied sub nom., C.S. v. Racine County*, 137 Wis. 2d 651, 411 N.W.2d 140 (1987). Section 66.884(6) is more specific than the general prohibition in section 13.625 and was enacted subsequent to any legislative action on section 13.625. The statute's unambiguous language requires the district to pay a salary to commissioners who are legislators. Neither the district nor the commission itself determines who will be a commissioner; that choice is reserved to the mayor. Therefore, neither the district nor the other commissioners have it in their power to avoid having legislators appointed as commissioners.

One could suggest that the sewerage district could stop paying someone to lobby, would therefore cease being a principal, and would therefore not fall under the strictures of section 13.625. There is nothing in the statute's history, however, to suggest that the Legislature was requiring the sewerage district to stop lobbying or even suggesting that course of action. On the contrary, the only explanation for the amendment to section 66.884(6) is that the Legislature knew the sewerage district was

a principal, knew that legislators were appointed as commissioners and wanted to make sure that commissioners who were also legislators would receive compensation equal to the other commissioners. That clear intent would be frustrated by applying section 13.625 to those legislators who are serving as sewerage commissioners. I must conclude, therefore, that section 13.625 does not prohibit legislators who are serving as commissioners of the sewerage district from receiving a salary and expenses from the district.

DJH:AL

Banks And Banking; Corporations; A chapter 180 corporation cannot offer general trust services to the public, notwithstanding compliance with section 223.105, Stats. OAG 28–89

September 19, 1989

FRED A. RISSER, *State Senator*

You have requested my opinion on two questions:

1. May a Chapter 180 corporation which complies with the requirements of Wis. Stats. 223.105 offer general trust services to the public?
2. If the answer to No. 1 is yes, who is responsible for the regulation of such corporation activities.

The answer to your first question is no; a business corporation organized under chapter 180, Stats., cannot offer general trust services to the public regardless of its compliance with section 223.105. Since the answer to this question is no, it is unnecessary to answer your second question.

The Legislature has provided for the organization and operation of trust companies in Wisconsin in chapter 223, entitled "Trust Company Banks." Chapter 223 requires the organization and regulation of trust companies in generally the same manner as state banks. Minimum capital requirements are established and an indemnity fund, to be deposited with the state treasurer, is required. Corporate powers are specifically enumerated as are detailed rules for the maintenance of trust funds and general business operations. Sec. 223.01, Stats., *et seq.*

It would be absurd to conclude that the Legislature intended to comprehensively regulate the operation of financial institutions charged with the public interest as trust companies in a specific chapter of the statutes (chapter 223) and yet allow a general business corporation, organized under chapter 180, to effectively operate a trust company free of all this regulation.

Section 180.03 provides: "Corporations may be organized under this chapter for any lawful business or purpose whatever,

except banking, insurance and building or operating public railroads, *but subject always to provisions elsewhere in the statutes relating to the organization of specified kinds or classes of corporations.*" Obviously, chapter 223 relates to the organization of a specified kind of corporation, namely trust companies. Consequently, section 180.03 is no authority for the incorporation of a chapter 180 corporation to perform trust company services. *Accord* 18 C.J.S. *Corporations* § 47c (1939) (General enabling legislation does not authorize "the conduct of any business for the incorporation of which the legislature has otherwise specifically provided").

Trust companies "owe their existence to legislative acts, and can obtain the capacity and power to transact business only through compliance with the applicable state statutes relating to their incorporation and organization." 9 C.J.S. *Banks and Banking* § 1046 (1938). "Where express provision is made for the incorporation of . . . trust . . . companies they cannot be organized under the general corporation laws of the state . . . ." *Id.* at § 1046.

The case law uniformly precludes general business corporations from operating trust company businesses if not chartered under specific trust company legislation. Thus in *Rosenthal v. Lawyers County Trust Co.*, 156 Misc. 910, 282 N.Y.S. 868 (Mun. Ct. 1935), the court stated: "The ordinary business corporation cannot act as a trustee. Only corporations chartered as trust companies, and expressly authorized to act in such capacity, can serve as trustees." *Accord* 90 C.J.S. *Trusts* § 207 (1955). Likewise, general business corporations presuming to function as trust companies while not in compliance with specific state statutory requirements such as chapter 223 have been enjoined. *Marion Mortgage Co. v. State*, 145 So. 222 (Fla. 1932); *Hayden Plan Co. v. Wood*, 97 Cal. App. 1, 275 P. 248 (1929); *Fellows v. First Nat. Bank*, 159 N.W. 335 (Mich. 1916).

In *Marion Mortgage Co.*, the defendant relied upon general corporation statutes to justify its trust company business. The

company's contention was rejected. "If defendant's contention is sound reasoning, then any corporation of this state can act as trustee and avoid the commands of the statute, and the statute becomes 'as sounding brass or a tinkling cymbal.'" *Marion Mortgage Co.*, 145 So. at 224.

In *Fellows*, 159 N.W. at 338, the court stated:

> A corporation may exercise only those powers conferred upon it by its charter under the law of its organization. In authorizing certain corporations organized under the act in question to execute trusts and administer estates, the Legislature imposed very stringent conditions. It fixed a minimum capitalization, required the investment of a certain percentage of the capital in specified securities, and compelled the making of a fixed deposit with the state treasurer for the purpose of securing depositors and creditors; it fixed the number and qualifications of directors and imposed penalties for fraud and embezzlement; it regulated investments of the corporation, and provided for complete supervision by the state banking department. Many of the regulations imposed could not be complied with by a national bank.
>
> We cannot agree with the contention of counsel for respondent that relators must point to a specific prohibitory law—a law absolutely forbidding national banks to engage in the activity specified in section 11(k). We believe that the Legislature, in the enactment of this so-called trust, deposit, and security statute, and clothing corporations organized thereunder with the powers therein defined, by unavoidable inference excluded all other corporations within the state from the exercise of those powers.

One might rely on section 223.105 as authority for offering general trust services to the public. Such reliance is misplaced.

This statute requires an organization (including "any corporation") which acts as a trustee or in a fiduciary capacity to

comply with the rules and regulations of the Office of the Commissioner of Banking and to subject itself to periodic examination by the Commissioner or another state financial regulator. This section does not itself empower any organization to act as a trustee or a fiduciary; it merely prescribes certain obligations upon an organization "which holds itself out" as providing such services. Sec. 223.105(2), Stats. The power to act as a trustee or fiduciary must be found elsewhere, such as in section 223.12, empowering foreign trust companies to serve as trustees in Wisconsin and in section 221.04(6), authorizing state banks to exercise trust powers. Section 223.105 cannot be read to generally empower all corporations to act as trust companies for such an interpretation would wholly nullify the comprehensive regulation prescribed by chapter 223.[1]

Having concluded that chapter 180 corporations cannot be trust companies, it should be noted, as section 223.105 itself recognizes, that under certain circumstances corporations can act in a fiduciary capacity, including as a trustee, and otherwise engage in activities related to trusts.

Section 223.025 provides for lower capitalization requirements for chapter 223 trust companies controlled by chapter 180 holding companies. Obviously, then, while a chapter 180 corporation cannot be a trust company it can be a holding

---

[1]The Legislative Reference Bureau's Analysis of 1975 Senate Bill 83, which became section 223.105, Stats., states "this bill permits any state corporation to act in [a fiduciary] capacity." But even if the drafter intended the statute to create power, rather than merely to regulate its exercise, as I have concluded section 223.105 to do, the extent of the power arguably created is to act as a fiduciary or a trustee on an *ad hoc* basis, such as pursuant to the issuance of letters by a court or probate registrar. Nothing in the legislative history supports the contention that this section--containing none of the capitalization, indemnification and regulatory protections of chapter 223--is an invitation to business corporations to hold themselves out as trust companies.

company for a trust company.[2] Section 180.04(14) empowers a general business corporation "to be a promoter, partner, member, associate or manager of any . . . trust." Finally, a corporation has incidental powers such as are necessary or convenient to effect its corporate purposes. Sec. 180.04(17), Stats. Thus, under appropriate circumstances, general business corporations are permitted to hold property in trust. This is not the same thing, however, as saying that they can be organized to and generally engage in the business of offering trust services to the public. That activity is reserved to trust company banks organized pursuant to chapter 223.

DJH:ESM

[2]A chapter 180 corporation's power to be interested in a trust company is reflected in section 180.04(6) which provides that corporations may own stock in state trust companies.

Counties; County Board; County Human Services Board; A county human services board may not delegate the duties described in section 51.437(9)(am), (b), (e) and (g), Stats., to the long-term support planning committee created by section 46.27(4). OAG 29-89

September 28, 1989

DEBRA L. WOJTOWSKI, *Corporation Counsel*
Pierce County

You ask whether a county human services board may delegate the duties described in section 51.437(9)(am), (b), (e) and (g), Stats., to the county long-term support planning committee created by section 46.27(4).

In my opinion, the answer is no.

The duties of the long-term support planning committee are specified in section 46.27(4), which provides as follows:

> PLANNING COMMITTEE. (a) The county board of supervisors shall select the county long-term support planning committee, which shall include at a minimum the following members:
>
> 1. At least 5 persons receiving long-term community support services, each of whom represents one of the following groups:
>
> a. Elderly persons;
>
> b. Physically disabled persons;
>
> c. Developmentally disabled persons;
>
> d. Chronically mentally ill persons;
>
> e. Chemically dependent persons;
>
> 2. Two elected county officials;
>
> 3. One county health representative;
>
> 4. One representative of the county department under s. 46.215 or 46.22;

5. One representative of the county department under s. 51.42 or 51.437; and

6. One representative of the county commission on aging.

(c) The planning committee shall develop a community options plan for participation in the program. The plan shall include:

1. A description of the county's proposed program, including the estimated numbers of persons to be assessed and the procedures to be used in performing assessments.

2. A description of the services available and the services to be developed or expanded as alternatives to institutional care under this program.

3. A description of the procedures to be used to coordinate the program with other county agencies, hospitals, nursing homes and providers of community support services.

4. A description of the method to be used to coordinate the use of funds received under this program with the use of other funds allocated to the county under ss. 46.80(5), 46.85(3m)(b)1 and 2 and 49.52(1)(d) and to county departments under s. 51.423.

5. A description of the method to be used by the committee to monitor the implementation of the program.

6. A description of outreach procedures to be used to ensure that significant numbers of people from each group listed in sub. (3)(e) will be served by the program.

7. A description of services and programs to be provided to meet the needs of persons with Alzheimer's disease.

In 77 Op. Att'y Gen. 120, 124 (1988), I indicated that within certain statutory limitations, section 59.06(1) permits a county board to delegate certain powers to its constituent committees. In that same opinion, however, I concluded that the provisions of

section 59.06(1) could not be utilized "[s]ince the museum board and the zoological board consist primarily of citizen members and are not county board committees . . . ." As section 46.27(4)(a) plainly indicates, the long–term support planning committee also consists primarily of citizen members and is not a committee of the county board. It is therefore unnecessary for me to determine whether the provisions of section 59.06(1) may be utilized under the facts presented by your inquiry.

Although not expressly stated in 77 Op. Att'y Gen. 120, the discussion contained in that opinion at 124 indicates that express statutory authority is ordinarily required in order for a delegation of powers by a county board, a county board committee or a county committee or board containing citizen members to be permissible. Since your county has a human services department, by operation of section 46.23(3)(b)1.c., the following powers relating to developmental disabilities which form the subject of your inquiry reside with your county's human services board:

> (am) Prepare a local plan which includes an inventory of all existing resources, identifies needed new resources and services and contains a plan for meeting the needs of developmentally disabled individuals based upon the services designated under sub. (1). The plan shall also include the establishment of long–range goals and intermediate–range plans, detailing priorities and estimated costs and providing for coordination of local services and continuity of care.
>
> (b) Assist in arranging cooperative working agreements with other health, educational, vocational and welfare services, public or private, and with other related agencies.
>
> . . . .
>
> (e) Appoint committees consisting of residents of the county to advise the county developmental disabilities services board as it deems necessary.

. . . .

(g) Determine, subject to the approval of the county board of supervisors in a county with a single–county department of developmental disabilities services or the county boards of supervisors in counties with a multicounty department of developmental disabilities services and with the advice of county developmental disabilities services director appointed under par. (a), whether services are to be provided directly by the county department of developmental disabilities services or contracted for with other providers and make such contracts. The county board of supervisors in a county with a single–county department of developmental disabilities services or the county boards of supervisors in counties with a multicounty department of developmental disabilities services may elect to require the approval of any such contract by the county board of supervisors in a county with a single–county department of developmental disabilities services or the county boards of supervisors in counties with a multicounty department of developmental disabilities services.

Sec. 51.437(9), Stats.

The powers of a county human services board in a county without a county executive or a county administrator are listed in section 46.23(5). That list is lengthy and does include the power to "appoint advisory committees for the purpose of receiving community, professional or technical information concerning particular policy considerations." Sec. 46.23(5)(g), Stats. The establishment of such an advisory committee could conceivably address some of the concerns raised by your inquiry.

The power to delegate, however, is mentioned only in section 46.23(5), which refers to delegation of certain policy decisions by the secretary of the state department of health and social services to the county human services board. Nowhere in section 46.23(5) did the Legislature grant statutory authority to county human services boards to delegate their powers to statutory advisory

committees such as the long-term support planning committee. Since express statutory authority to do so is not present, I therefore conclude that a county human services board may not delegate the duties described in section 51.437(9)(am), (b), (e) and (g) to the long-term support planning committee created by section 46.27(4).

DJH:FTC

Libraries; Municipal libraries may not charge a fee for lending video cassettes which are part of a reasonable permanent collection but may charge for lending additional copies. Municipal libraries may not charge a fee for online searching of bibliographic or informational databases. OAG 30–89

October 11, 1989

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

You have asked for my opinion on the following two questions: (1) "[M]ay libraries impose fees for the lending of video cassettes?" and (2) "[M]ay libraries charge for online searching of remote commercial bibliographic and information databases?"

You have referred to an earlier opinion published at 73 Op. Att'y Gen. 86 (1984). That opinion concluded that "only the following may be imposed: charges for use of framed pictures, projectors, screens, audio cassette players, AM/FM radios and meeting and lecture rooms." 73 Op. Att'y Gen. at 89. The prior opinion therefore answers your first question, and libraries may not impose fees for lending video cassettes. However, if the library "acquires a reasonable number of copies [of video cassettes] (the number it would normally acquire for its permanent collection) and allows these copies to circulate free of charge, then it can justifiably collect [a] fee for lending any additional copies it purchases." 73 Op. Att'y Gen. at 89. In that regard, the library, in conjunction with your department, must determine a reasonable number of free copies of video cassettes which would be considered part of its permanent collection.

Your second question requires me to determine, under the reasoning in 73 Op. Att'y Gen. 86, whether providing online searching of remote commercial bibliographic and information databases is a part of the "informational materials traditionally associated with a library." In the prior opinion, I relied upon the definition of "library services" appearing at 20 U.S.C.

§§ 351–364 and an opinion of the attorney general of California. I find no new developments in this area, and thus I apply the test enunciated in that opinion:

> If the transaction involves the satisfaction, with library resources, of a patron's request for information . . . such transaction is a "library service." . . . Perhaps the essential distinction . . . is between those services which are reflective of a library's inherent information providing function and those ancillary services which are not unique to libraries and which can be just as effectively provided in non–library settings.

61 Op. Att'y Gen. 512 (Cal. 1978); 73 Op. Att'y Gen. at 88.

Applying this test, it is my opinion that charging for online searching of remote commercial bibliographic and information databases is prohibited by section 43.52(2), Stats.

In my view, searching bibliographic and information databases is the electronic equivalent of manually searching books containing bibliographic compilations such as The Reader's Guide to Periodical Literature, The Social Science Index, The Humanities Index, *The Bibliotech Nationale*, Library of Congress catalogs and British Museum catalogs. These compilations are, in my view, informational materials traditionally associated with a library.

While it can be argued that online searching using library personnel is not a traditional function performed by library personnel, providing access to bibliographic material is a service "which [is] reflective of a library's inherent information providing function." 61 Op. Att'y Gen. 512; 73 Op. Att'y Gen. at 88. It is my further understanding that large, printed, bibliographic materials are no longer updated or will not be in the near future. Thus, the electronic bibliographic database is totally replacing printed bibliographic materials. A library patron may not, under these conditions, search the material on his or her own. Therefore, the patron does not have the choice of searching

printed bibliographic material for free or paying for the library's resources to conduct the search.

While I realize this result may place an increased demand on limited public library resources, such a concern is more properly addressed to the Legislature by way of repeal or amendment of section 43.52(2).

In summary, it is my opinion that public libraries may not charge fees for renting video cassettes or for online searching of remote commercial bibliographic and information databases. The library may charge a fee for video cassettes which are in addition to a reasonable number of permanent collection cassettes.

DJH:WDW

District Attorney; District attorney's obligation to prosecute town forfeiture actions at the request of a town chairman under section 778.12, Stats., discussed. OAG 31–89

October 11, 1989

DARWIN L. ZWIEG, *District Attorney*
Clark County

You ask two questions related to your duties under section 778.12, Stats. One of your questions may be broadly restated as follows: What is the extent of a district attorney's obligation to prosecute town forfeiture actions at the request of a town chairman under section 778.12?

It is my opinion that, while a district attorney is statutorily required to exercise his or her discretion upon receipt of such a request in a manner that comports with the purpose of the statute, a district attorney retains limited prosecutorial discretion under section 778.12.

Section 778.12 provides as follows:

> Duty of district attorney. The town chairman shall forthwith notify the district attorney of the county of every forfeiture which he or she knows, has reason to believe or which he or she has been so informed has been incurred in the town, which cannot be recovered before a municipal court, who shall forthwith cause an action to be commenced for the recovery thereof as well as for the recovery of every forfeiture which he or she otherwise knows or has reason to believe has been incurred; and the district attorney shall attend to and conduct any action so commenced by the chairman, when requested by him or her so to do.

A district attorney's obligations under section 778.12 are briefly summarized in 57 Op. Att'y Gen. 198 (1968) and 20 Op. Att'y Gen. 256 (1931). Those duties are "limited to an attempt to collect the forfeiture" in circumstances where an action to collect a forfeiture cannot be prosecuted in a municipal court somewhere

within the county. 57 Op. Att'y Gen. at 199. *See* section 755.05 which provides that "[e]very [municipal] judge has countywide jurisdiction." There is no statutory requirement that a district attorney engage in post-judgment collection activity after a judgment for a municipal forfeiture is obtained.

Absent any legislation, the scope of a district attorney's prosecutorial discretion is described in *Thompson v. State*, 61 Wis. 2d 325, 328–32, 212 N.W.2d 109 (1973). In the criminal context, that discretion has been summarized in the following fashion:

> It is clear that in his functions as a prosecutor he has great discretion in determining whether or not to prosecute. There is no obligation or duty upon a district attorney to prosecute all complaints that may be filed with him. While it is his duty to prosecute criminals, it is obvious that a great portion of the power of the state has been placed in his hands for him to use in the furtherance of justice, and this does not per se require prosecution in all cases where there appears to be a violation of the law no matter how trivial. In general, the district attorney is not answerable to any other officer of the state in respect to the manner in which he exercises those powers.

State ex rel. Kurkierewicz v. Cannon, 42 Wis. 2d 368, 378, 166 N.W.2d 255 (1969). But *Kurkierewicz*, 42 Wis. 2d at 380, also indicates that "it is equally clear that the legislature may, if it desires, spell out the limits of the district attorney's discretion and can define the situations that will compel him to act in the performance of his legislatively prescribed duties."

The exercise of prosecutorial discretion was not discussed in 57 Op. Att'y Gen. 198, 20 Op. Att'y Gen. 256 or any other prior opinion mentioning the statute. The statutory language must be examined in order to ascertain the extent to which the Legislature has limited the exercise of prosecutorial discretion. The factors to be considered in examining the statutory language are as follows:

> "'In determining whether a statutory provision is mandatory or directory in character, we have previously said that a number of factors must be examined. These include the objectives sought to be accomplished by the statute, its history, the consequences which would follow from the alternative interpretations, and whether a penalty is imposed for its violation. . . . We have also stated that directory statutes are those having requirements "which are not of the substance of things provided for." . . .'"

Cross, 94 Wis. 2d at 340–41 (citations omitted).

57 Op. Att'y Gen. at 199 does indicate that the purpose of section 778.12 is to impose an obligation on a district attorney "to commence and conduct actions for recovery of a forfeiture imposed by a town . . . ordinance when requested by the town chairman[.]" But the use of the word "shall" is not conclusive in circumstances where no penalty for non-compliance has been prescribed by the Legislature. *Warner v. Department of Transp.*, 102 Wis. 2d 232, 234–35, 306 N.W.2d 266 (Ct. App. 1981); *Cross v. Soderbeck*, 94 Wis. 2d 331, 340–41, 288 N.W.2d 779 (1980). The language of section 778.12 also explicitly limits the exercise of prosecutorial discretion in two respects. First, it removes a district attorney's discretion to refuse to prosecute forfeiture actions solely on the basis that the request to prosecute has been made by a town and that the forfeiture proceeds would accrue to a town. *Compare* 64 Op. Att'y Gen. 157, 160–61 (1975). Second, the phrase "shall forthwith cause an action to be commenced" imports a requirement of promptness. It does not mean immediately, but rather "at the earliest opportunity." *See State v. Garton*, 2 Kan. App. 2d 709, 586 P.2d 1386, 1388 (1978). Thus, a potential defendant could not obtain dismissal solely on the grounds that the action was not commenced immediately, *compare Karow v. Milwaukee County Civil Serv. Comm.*, 82 Wis. 2d 565, 263 N.W.2d 214 (1978), but it is conceivable that a town chairman might be able to seek mandamus if the delay in commencing the action were so long

as to be prejudicial to the town. *Garton*, 586 P.2d at 1388. However, in any case where the district attorney could demonstrate the existence of substantial legal questions concerning the validity of a town's forfeiture ordinance, it would be extremely difficult for the town chairman to establish prejudice. *See Karow*, 82 Wis. 2d at 572 n.7, *quoting State ex rel. Cothren v. Lean*, 9 Wis. 254 [*279], 266 [*292] (1859); *State v. Industrial Comm.*, 233 Wis. 461, 466, 289 N.W. 769 (1940).

On balance, with the two exceptions noted, I conclude that a district attorney retains limited discretion as to whether and how to prosecute a forfeiture action at the request of a town chairman, but that such discretion must be exercised reasonably and in a manner consistent with the purpose of the statute so as not to result in a "wholesale refusal to comply with a statutory duty." *See* 64 Op. Att'y Gen. at 159.

You also request my opinion concerning the validity and application to preexisting Amish burial grounds of a town ordinance regulating cemeteries.

In an opinion to Acting Milwaukee County Corporation Counsel George E. Rice, I recently said:

> In 76 Op. Att'y Gen. 60, 64 (1987), I declined to decide whether a town's ordinance violated state law because "such a judgment would require a factual analysis as to how the town's ordinance operates in actual practice." More recently, I indicated that "[t]he attorney general has no authority to decide questions of fact, nor can his judgment be substituted for the discretion vested in another state officer. 40 Op. Att'y Gen. 3, 4 (1951)." 77 Op. Att'y Gen. 36, 40 (1988). *See also* 68 Op. Att'y Gen. 416, 421 (1979). Although the meaning of a county ordinance presents a question of law rather than a question of fact, *the facts and documents necessary to ascertain the meaning of any municipal ordinance are or should be readily available to that municipality's attorney. And, as a public officer, it is the*

> *function of the municipal attorney to provide legal advice concerning the meaning of the ordinances enacted by that municipality.*
>
> For the policy reasons expressed in 77 Op. Att'y Gen. at 40 and in 76 Op. Att'y Gen. at 64, I decline to offer any opinion concerning the meaning or intent of the quoted ordinances. *I am also taking this opportunity to advise state and local officials that, except in extraordinary circumstances, the attorney general will not issue opinions concerning the meaning or intent of municipal ordinances.*

77 Op. Att'y Gen. 120, 123 (1988) (emphasis supplied; footnote omitted).

I have followed the policy considerations articulated in 77 Op. Att'y Gen. 120 even in connection with opinion requests from the Legislature. *See* OAG 58-88 (October 12, 1988) (unpublished). I see no reason to depart from them merely because a town is unwilling to establish a municipal court. However, in light of my answer to your previous question, I perceive no abuse of prosecutorial discretion in this instance in requesting a detailed legal opinion from reputable counsel retained by the town before commencing the prosecution of any action for a forfeiture under the town's ordinance.

DJH:FTC

Collection Of Accounts; District Attorney; Fees; Industry, Labor And Human Relations, Department Of; Liens; District attorneys may exercise discretion in collecting wages referred by the Department of Industry, Labor and Human Relations, but such discretion must be exercised reasonably. Specific questions concerning collection of wages are discussed including methods of collection, settlements, payment of costs and fees, and enforcement of the statutory lien. OAG 32–89

October 20, 1989

DARWIN L. ZWIEG, *District Attorney*
Clark County

You ask a number of questions concerning the role of a district attorney in collecting wage claims which are referred by the Department of Industry, Labor and Human Relations under section 109.09, Stats. Section 109.09(1) provides in pertinent part:

> The department shall investigate and attempt equitably to adjust controversies between employers and employes as to alleged wage claims. . . . In pursuance of this duty, it may take an assignment in trust for the assigning employe of any wage claim it deems to be valid . . ., such assignment to run to the department. The department may sue the employer on any wage claim . . . so assigned . . . . The department may refer such an action to the district attorney of the county in which the violation occurs for prosecution and collection and the district attorney shall commence an action in the circuit court having appropriate jurisdiction. . . . In such cases the taxable costs recovered shall be paid into the general fund.

Your first question is whether the district attorney has any discretion in disposing of a wage claim referred by the department when the statute provides that the district attorney "shall commence an action." In my opinion, the district attorney may exercise discretion whether to prosecute and collect a

particular wage claim, but this discretion does not grant authority to act arbitrarily. 64 Op. Att'y Gen. 157, 159 (1975).

The general rule is that when the word "shall" is used in a statute, it is presumed to be mandatory unless a different construction is necessary to carry out the clear intent of the Legislature. *Rubi v. Paige*, 139 Wis. 2d 300, 310, 407 N.W.2d 323 (Ct. App. 1987). This is particularly true where, as in section 109.09(1), the words "shall" and "may" are used in the same section of the statute. *Id.* One can infer that the Legislature was aware of the different denotations and intended the words to have their precise meanings. *Id.*

On the other hand, a district attorney is a constitutional officer and is endowed with great prosecutorial discretion. *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 378–80, 166 N.W.2d 255 (1969). Such discretion, however, is limited by the general rule that where the Legislature has directed the performance of particular duties, the district attorney is obligated to comply with the legislative mandate. *Id.* at 379–80; *State v. Coubal*, 248 Wis. 247, 255–59, 21 N.W.2d 381 (1946). Thus, on balance, I conclude that the district attorney retains limited discretion whether to prosecute and collect a particular wage claim, but such discretion must be exercised reasonably and cannot result in a "wholesale refusal to comply with a statutory duty." 64 Op. Att'y Gen. at 159.

Your second question is whether the district attorney is required to go to trial in order to obtain a judgment and whether, once having obtained a judgment, the district attorney must attempt to execute on the judgment, become involved in supplementary examinations to determine assets or income and garnishee the employer's wages. In my opinion, such actions all are properly part of the duty imposed on district attorneys under section 109.09(1) to prosecute and collect wage claims. Nonetheless, the district attorney does have discretion to determine whether any particular action is justified with respect to a particular wage claim, and the statute requires no more than

a reasonable, good-faith effort to prosecute and collect wage claims.

Your third question is whether the district attorney may reach a settlement for less than the full amount of the wage claim, including the increased liability set forth in section 109.11(2) for delayed payment of wages, where the wage claimant wishes to pursue the wage claim to trial (regardless of the merits of the case); and, if so, whether the department must be consulted. The answer to this question requires recognition that under section 109.09(1), when the department takes an assignment of a wage claim in trust for the assigning employe, it is the department which may sue the employer on the wage claim and it is the department that the district attorney represents in prosecuting and collecting the wage claim. As trustee, the department must act in the best interest of the assigning employe, and such interest may well include compromise of the wage claim. *Cf.* 66 Op. Att'y Gen. 28, 30 (1977). Thus, it is my opinion that the district attorney may reach a settlement for less than the full amount of the wage claim, subject to the overall direction and supervision of the department. *Cf.* secs. 101.02(5)(f) and 165.08, Stats. If the wage claimant insists on pursuing the claim to trial, regardless of the merits of the case and contrary to the professional judgment of the district attorney, the claimant is free to revoke the assignment of the wage claim and proceed without the department's assistance.

Your fourth question is whether the claimant may be required to pay sheriff's fees for service of process in the action to collect the claimant's wages. You note that the department now advises claimants that they may be required to pay filing fees. The answer to this question requires recognition that under section 109.09(1) any taxable costs recovered in an action to collect wages must be paid into the general fund. Based in part on this statutory provision, at least as between the district attorney and the department, the expense of prosecuting and collecting a wage claim rests with the department. 22 Op. Att'y Gen. 591, 592

(1933). As between the wage claimant and the department, it may be within the department's authority to require a wage claimant to advance the expenses involved in prosecuting and collecting the wage claims, section 101.02(1), perhaps on the theory that free public legal services are being provided to the claimant, but this may be inequitable since any taxable costs recovered go to the general fund rather than to the claimant. In any event, it is my opinion that the district attorney may require the department to pay the expenses of litigation and, if so required, the department may (preferably by a rule or regulation) require the claimant to advance such payments to the department.

Your fifth question is whether the department's lien on the employer's property under section 109.09(2), for the full amount of the wage claim, must be filed and, if so, where and in what manner must the lien be filed. The answer to this question requires analysis of the language in section 109.09(2) that the department's lien "may be enforced in the manner provided in ss. 409.501 to 409.507 and 779.09 to 779.12, insofar as such provisions are applicable." Sections 409.501 to 409.507 concern the procedure for collecting on a security agreement when the debtor is in default. Sections 779.09 to 779.12 concern the procedure for foreclosure of liens. None of these sections provides any guidance as to whether and in what manner a lien under section 109.09(2) must be filed.

Perhaps of greater significance is the fact that section 109.09(2) does not incorporate the filing provisions of sections 409.401 to 409.410 or sections 779.06 to 779.07. In addition, I note that 1979 Senate Bill 137, which would have required the department's lien to be filed with the clerk of circuit court and with the secretary of state, failed to pass. Thus, although it is not free from doubt, in my opinion the department's lien under section 109.09(2) does not need to be filed.

Your sixth question is whether the department's lien under section 109.09(2) may be enforced regardless of whether a judgment has been obtained under section 109.09(1). In my

opinion, since there presently is no provision for filing of the department's lien, the lien may not be enforced until it is included in a judgment obtained under section 109.09(1) and the judgment is docketed. *Cf. United States v. Vermont*, 377 U.S. 351 (1964).

Your seventh question is whether the district attorney is required to commence a proceeding to foreclose a lien obtained via judgment. In my opinion, commencing proceedings to foreclose the lien is part of the duty imposed on district attorneys under section 109.09 to prosecute and collect wages. In the exercise of your prosecutorial discretion, you may choose not to foreclose if you believe that doing so will not further the goal of collecting wages.

Your eighth and final question is whether section 109.09(2) is constitutional insofar as it purports to "take precedence over all other debts, judgments, decrees, liens or mortgages against the employer." There are no binding Wisconsin appellate court decisions which interpret section 109.09(2). All laws are, however, presumed to be constitutional; and one attacking a statute must, to overcome this presumption, prove the statute unconstitutional beyond a reasonable doubt. *State ex rel. Cannon v. Moran*, 111 Wis. 2d 544, 552–53, 331 N.W.2d 369 (1983).

Federal district courts have in two instances construed section 109.09(2) in the context of federal bankruptcy laws. Such courts, however, avoided ruling on the constitutionality of the statute and simply held that the legislative history indicates that the section was not intended to apply to insolvent employers. *Matter of Napco Graphic Arts, Inc.*, 51 Bankr. 757, 762 (Bkrptcy. E.D. Wis. 1985), *aff'd in part and rev'd in part*, 83 Bankr. 558, 564 (E.D. Wis. 1988), *Matter of Kubly*, 65 Bankr. 845, 848–49 (W.D. Wis. 1986), *rev'd on other grounds*, 818 F.2d 643 (7th Cir. 1987).

One Wisconsin circuit court decision has interpreted 109.09(2). In *Farmers and Merchants Bank v. Terminal Electric Co.*, No. 80–CV–1801, slip op. (Waukesha Cir. Ct., Oct. 23, 1981), the court determined that a section 109.09(2) wage lien did not

take precedence over a security interest which was perfected before the last date on which services were performed and for which wages were due and owing. *Cf. Matter of Kubly*, 65 Bankr. at 847–48. In addition, the court determined that section 109.09(2) was unconstitutional insofar as the statute purports to give precedence to the department's lien over any security interest which is perfected before the department's lien is perfected.

Although circuit court decisions may be considered for their reasoning, they have no binding precedential effect and are not citable as authority. *Servomation Corp. v. Department of Revenue*, 106 Wis. 2d 616, 620 n.3, 317 N.W.2d 464 (1982). Consequently, the circuit court's decision in *Farmers and Merchants Bank* concerning the constitutionality of section 109.09(2) is not dispositive of the issue. Moreover, in my view, the court failed to balance adequately the factors identified in *State ex rel. Cannon*, 111 Wis. 2d at 560, for determining whether a state has properly exercised its police power where a private contract is impaired.

Nonetheless, I respectfully decline to express my opinion concerning the constitutionality of section 109.09(2). Normally, opinions on constitutional questions will be furnished only to the Governor or to either branch of the Legislature. 62 Op. Att'y Gen. Preface (1973). In addition, given the required balancing test, it is my view that the constitutionality of section 109.09(2) should be determined by a court, based upon a specific fact situation, rather than by my opinion, based upon assumed facts.

DJH:DCR

Arrest; Criminal Law; Law Enforcement; Police; A warrantless arrest and detention for bail jumping, section 946.49, Stats., is authorized if probable cause exists that the arrestee violated the contact prohibition in section 968.075(5)(a)1. after being released under chapter 969. OAG 34–89

October 27, 1989

THOMAS A. STARR, *District Attorney*
Chippewa County

You have inquired whether a person arrested pursuant to section 968.075, Stats., who has posted bond and who then has contact with the victim in violation of section 968.075(5)(a) can be arrested without a warrant and detained. I believe the answer to your question is yes.

Section 968.075(5)(a)1. requires that for the first twenty–four hours after a person is arrested for a domestic abuse incident he or she may have no contact with the alleged victim. Section 968.075(5)(e) provides: "Notwithstanding s. 968.07, a law enforcement officer shall arrest and take a person into custody if the officer has reasonable grounds to believe that the person has violated par. (a)." Thus, the Legislature has created a mandatory arrest provision for a violation of the no–contact provision.

The question arises for what offense should the person violating the no–contact provision be arrested. A violation of the no–contact provision is a substantive offense in and of itself under section 968.075(5)(a)2., which provides: "An arrested person who intentionally violates this paragraph shall be required to forfeit not more than $1,000." A violation under this section is thus a state forfeiture action, not a criminal offense. *See* sec. 778.01, Stats.

A state forfeiture action must be commenced by a summons and complaint under sections 799.05 and 799.06. *See* 77 Op. Att'y Gen. 270 (1988). To initiate the summons and complaint process, it would be necessary for the investigating officer to forward the incident report to the district attorney or county

corporation counsel who could then issue a summons and complaint if appropriate. In light of the fact that a summons and complaint must be used to commence the state forfeiture under section 968.075(5)(a)2., could an officer still make a custodial arrest for that offense as required by section 968.075(5)(e)? I believe the answer is no.

No procedures for arrest or the officer's duty after arrest in this state forfeiture action appear in chapter 778; one, therefore, next looks to chapter 799. Again, no such procedures are set forth; therefore, one must look to chapters 801 to 847. *See also* 77 Op. Att'y Gen. 270 (1988). Chapter 818 is entitled "Arrest and Bail." This chapter sets forth the procedure for arrest and bail in civil actions.

Section 818.01 provides that "[n]o person may be arrested in a civil action except as prescribed by this chapter." Section 818.02(1)(b) provides that an arrest of a defendant may be made in an action for fine or penalty. An action under section 968.075(5)(a)2. would be an action for a penalty. Section 818.03, however, provides that such an order for arrest must be obtained from the court and, pursuant to section 818.04, may only be ordered where it is shown by affidavit that a cause of action exists and that it is one of the type mentioned in section 818.02.

If section 968.075(5)(e) mandates an arrest for a forfeiture violation under section 968.075(5)(a)2., then it is in direct conflict with chapter 818 since section 818.03 requires an order of arrest from the court in civil actions. Additionally, if such arrest is made for a violation under section 968.075(5)(a)2., the officer could not bring the defendant before a court or issue a court date since the court only obtains personal jurisdiction in state forfeiture actions with a summons and complaint.

The officer also could not utilize the bail provisions of chapter 818 since the bail authorized to be taken under that chapter is the amount specified by the court in the order for arrest. Sec. 818.06, Stats. Since there is no judicial order for arrest under section 968.075(5)(e), there is no bail amount set. Additionally, the

Legislature has made no other provisions for bail. Clearly, an officer cannot just hold an individual indefinitely without bail or a court appearance.

"The legislature is presumed to intend to achieve a consistent body of law. In accord with this principle subsequent legislation is not presumed to repeal the existing law in the absence of expressed intent." 1A Singer, *Sutherland Statutory Construction* § 23.09 (Sands 4th ed. 1985) (footnotes omitted). Consistent with this principle, if an interpretation of the two conflicting provisions can be made so as to avoid the conflict, such construction should apply. As stated in *State v. Struzik*, 113 Wis. 2d 245, 248, 335 N.W.2d 432 (Ct. App. 1983): "Conflicts between statutes are not favored, and we will not hold that a conflict exists if the statutes may otherwise be reasonably construed. [Citation omitted.] We also do not favor an implied repeal of [one section] by the later enactment of [another section]."

Although section 968.075(5)(e) mandates an arrest if the officer has probable cause to believe the subject has violated section 968.075(5)(a), that does not say that the arrest must be for a charge under section 968.075(5)(a)2. In fact, it is clear from the above discussion that requiring an arrest for the civil forfeiture violation would be in direct conflict with chapter 818 which requires that all arrests in civil actions must be pursuant to that chapter.

One must, therefore, determine if the custodial arrest mandated could be for a charge other than section 968.075(5)(a)2. I believe the suspect could be arrested, consistent with the mandates of section 968.075(5)(e), for a violation of bail jumping under section 946.49. That statute provides in part:

> (1) Whoever, having been released from custody under ch. 969, intentionally fails to comply with the terms of his or her bond is:

(a) If the offense with which the person is charged is a misdemeanor, guilty of a Class A misdemeanor.

(b) If the offense with which the person is charged is a felony, guilty of a Class D felony.

The scenario you describe is that the suspect was initially arrested for a crime under the provisions of section 968.075, posted bond and was released. The suspect subsequently had contact with the victim in violation of section 968.075(5)(a)1. The release of the defendant for the original arrest was a release pursuant to chapter 969 since the officer's authority to release comes through section 969.07. Section 968.075(6) provides that a person may be released after an arrest for a domestic abuse incident only if the person agrees to comply with certain conditions. One of those conditions of release is that the individual comply with the no-contact provisions of section 968.075(5)(a)1. Since under your scenario the suspect has now violated the conditions of that release, which was made under chapter 969, I believe that he has violated not only section 968.075(5)(a)2., but also section 946.49.

I conclude, therefore, that if an officer has probable cause to believe the suspect has violated the no-contact provision of section 968.075(5)(a)1., after being released under chapter 969, the arrest should be for the criminal charge of section 946.49. The general procedures for criminal arrests and release would then apply. This would avoid an interpretation of section 969.075(5)(e) which would directly conflict with the dictates of chapter 818.

Of course, the district attorney would then have the discretion to proceed on the criminal charge or issue a summons for the civil forfeiture action under section 968.075(5)(a)2.

A second question raised in your letter is whether an officer may enter the suspect's home to effect the arrest required by section 968.075(5)(e). The answer will depend on the particular circumstances of each case. Generally, a suspect may not be

arrested in his own home without an arrest warrant unless consent to enter is obtained from one authorized to give consent or unless exigent circumstances and probable cause to believe he is in the home exist. Both exceptions assume that the officer has probable cause to believe the suspect has committed the offense. *See Payton v. New York*, 445 U.S. 573, 589 (1980); *State v. Rodgers*, 119 Wis. 2d 102, 349 N.W.2d 453 (1984); *State v. Drogsvold*, 104 Wis. 2d 247, 311 N.W.2d 243 (Ct. App. 1981).

DJH:RB

Funeral Directors and Embalmers; Insurance; Funeral service persons may be involved in the sale of life insurance if such insurance is not linked in any way to funeral or burial services. OAG 35–89

October 27, 1989

FRED A. RISSER, *Chairperson*
Senate Organization Committee

You have requested a formal opinion of the attorney general concerning two questions:

1) May a licensed Wisconsin funeral director, operator of a licensed funeral establishment or his/her employee (hereafter referred to as funeral service persons) receive compensation for distribution of, or making available for distribution, promotional materials for a life insurance policy which has no link, directly or indirectly, to funeral or burial services?

2) May a funeral service person receive commissions from sales of a life insurance policy which has no link to funeral or burial services, directly or indirectly, assuming such funeral service person has obtained a valid license to sell life insurance in Wisconsin?

My answer to both questions is a guarded yes.

Section 632.41(2), Stats., provides: "No contract in which the insurer agrees to pay for any of the incidents of burial or other disposition of the body of a deceased may provide that the benefits are payable to a funeral director or any other person doing business related to burials." Section 630.15 provides:

> No life insurer may invest directly in or, except as a loan secured by a mortgage on real estate or as a policy loan, lend money to a funeral director or cemetery or any association of funeral directors or cemeteries. No funeral director or cemetery or association of funeral directors or cemeteries may control a life insurer.

The purpose of these provisions is to prevent anti-competitive "tie-in" arrangements between insurers and persons in the funeral business. 630.15 W.S.A. Committee Comments (1979) and 632.41 W.S.A. Committee Comments (1975). Neither set of facts hypothesized in your questions seems to violate the letter of either of the above-quoted statutes or their anti-competitive spirit. Nevertheless, caution should be exercised by anyone contemplating a relationship between "funeral service persons," as you refer to them, and the solicitation or sale of life insurance. Such arrangements are scrutinized by the Office of the Commissioner of Insurance and the Funeral Directors and Embalmers Examining Board, both of which agencies have reported to me their concern over various "pre-need" insurance arrangements. Two such plans were reviewed by this office in recent years.

In 71 Op. Att'y Gen. 7, 8 (1982), it was concluded that section 632.41(2) did not prohibit the writing of a life insurance policy designating "a funeral director or funeral home as beneficiary . . . in conjunction with a separate agreement, between the insured and the funeral director or funeral home, to use the proceeds for funeral and burial expenses." In 76 Op. Att'y Gen. 291 (1987), it was stated that a "pre-need funeral insurance package" did violate the statute as a "thinly concealed attempt" to tie insurance and funeral services. The package was described as:

> (1) a policy of life insurance, issued by the life insurance company for which the funeral service person is acting as agent, with the purchaser as the insured, and the funeral service person, or the funeral establishment with which he or she is associated, as the beneficiary, and (2) a "separate" agreement between the insured and the funeral director or funeral establishment to use the proceeds of the insurance policy for funeral and burial expenses.

Id. at 292. Despite the form of the arrangement, the funeral director or establishment received life insurance proceeds for the

incidents of burial or other disposition of the body of the insured.*

Your questions are general in nature and are posed in such a way as to disclaim any linkage between life insurance and funeral or burial services. The questions state that a life insurance "policy" has no link to funeral or burial services. I do not know whether the policy contemplates making a "funeral service person" a beneficiary of the policy. Moreover, the fact that a policy has no link to funeral or burial services does not necessarily mean that there is no relationship between the insurer and the funeral service person. Thus, responding to your questions, I cannot state categorically that section 630.15, prohibiting tie–in arrangements, would not be violated.

Therefore, I reiterate my earlier statement in this opinion that the questions presented can only receive a guarded affirmative answer. Any promoter of a relationship between the sale of life insurance and the provision of funeral or burial services should carefully consider the statutes discussed in this opinion as well as the two previous attorney general's opinions and, in addition, may wish to seek the advice of the Office of the Commissioner of Insurance and the Funeral Directors and Embalmers Examining Board prior to the commencement of operations.

DJH:ESM

*It was this necessary linkage that was absent from the facts reviewed in the earlier attorney general's opinion. In other words, the "separateness" which allowed the arrangement reviewed in 1982 was absent in the "package" reviewed in 1987.

Fire Department; Police; Villages; Village public safety officers are not entitled to the section 891.45, Stats., presumption unless they are designated as primarily firefighters by the village or they have duties as a firefighter during a five-year period for two-thirds of their working hours. OAG 36-89

October 31, 1989

ROBERT G. OTT, *Corporation Counsel*
Milwaukee County

You request my opinion on several questions relating to section 61.66, Stats., which authorizes certain villages to establish combined police and fire services.

Section 61.66 states in material part:

> Combined protective services. (1) Notwithstanding s. 61.65(1)(a), (2)(a) and (3g) (d) 2, any village with a population of less than 20,000 may provide police and fire protection services by any of the following:
>
> (a) A department which is neither a police department under s. 61.65(1)(a) nor a fire department under s. 61.65(2)(a), which was created prior to January 1, 1987, and in which the same person may be required to perform police protection and fire protection duties without being required to perform police protection duties for more than 8 hours in each 24 hours except in emergency situations, as specified under s. 62.13(7n).
>
> (b) Persons in a police department or fire department who, alone or in combination with persons designated as police officers or fire fighters, may be required to perform police protection and fire protection duties without being required to perform police protection duties for more than 8 hours in each 24 hours except in emergency situations, as specified under s. 62.13(7n), if those persons were required to perform those duties prior to January 1, 1987.

(2) The governing body of a village acting under sub. (1) may designate any person required to perform police protection and fire protection duties under sub. (1) as primarily a police officer or fire fighter for purposes of s. 891.45.

Villages with a population greater than 20,000 and villages not having combined services prior to January 1, 1987, may not have combined police–fire services. *Local Union No. 487 v. Eau Claire*, 147 Wis. 2d 519, 433 N.W.2d 578 (1989).

Section 891.45, referred to in section 61.66(2), states:

Presumption of employment connected disease. In any proceeding involving the application by a municipal fire fighter or his or her beneficiary for disability or death benefits under s. 66.191, 1981 stats., or s. 40.65(2) or any pension or retirement system applicable to fire fighters, where at the time of death or filing of application for disability benefits the deceased or disabled fire fighter had served a total of 5 years as a fire fighter and a qualifying medical examination given prior to the time of his or her joining the department showed no evidence of heart or respiratory impairment or disease, and where the disability or death is found to be caused by heart or respiratory impairment or disease, such finding shall be presumptive evidence that such impairment or disease was caused by such employment. *In this section, "municipal fire fighter" includes any person designated as primarily a fire fighter under s. 61.66(2) and any person under s. 61.66 whose duties as a fire fighter during the 5–year qualifying period took up at least two–thirds of his or her working hours.*

Your questions relate to section 891.45 coverage for public safety officers of the Department of Public Safety of the Village of Bayside, which department you describe as follows:

The Department is a public safety department with dual responsibilities of fire fighter and police officer. They are

obligated to respond to all fire calls as well as police calls for service. Additionally, they have enhanced mutual aid which requires them to respond to all Village of Fox Point business district fires and further contractual obligations with the entire North Shore for fire protection.

First you ask:

Under the current law, are the public safety officers of the Village of Bayside protected and guaranteed the benefits of Sec. 891.45 Wis. Stats.?

It is my opinion that in order for a public safety officer to be eligible for the presumption of section 891.45, he or she must be either "designated as primarily a fire fighter under s. 61.66(2)" or be one "whose duties as a fire fighter during the 5-year qualifying period took up at least two-thirds of his or her working hours."

Only firefighters are granted the benefit of the section 891.45 presumption. Police officers and public safety officers are not included in that group. However, specific language of section 891.45 includes in the firefighter designation public safety officers who are designated by the village as primarily fire-fighters and public safety officers whose duties as firefighters took up two-thirds of their working hours during a five-year period. Those public safety officers of the Village of Bayside that meet this criteria are included under section 891.45.

Next you ask:

If the public safety officers are not guaranteed such benefits, will those officers employed prior to the enactment of Sec. 61.66(2) on May 13, 1988 be covered or grandfathered?

The section 891.45 coverage basis is the same, for public safety officers so employed, prior to and after enactment of section 61.66(2). In either case the officer is a "municipal fire fighter" for section 891.45 purposes if (1) designated "primarily a fire fighter" by the village or (2) his or her duties as a

firefighter during a five-year period took up at least two-thirds of working hours. No additional grandfathering is provided.

We need not consider any question as to potential vested rights prior to enactment of section 61.66. Prior to that time a village lacked the authority to provide police and fire protection by using dual fire-police officers. *Local Union No. 487*, 147 Wis. 2d at 530. Pre-61.66 public safety officers were not municipal firefighters under section 891.45.

Finally you ask:

> On what basis can the Village of Bayside make a decision as to the use of Sec. 61.66(2)? If the Village decides the officers are primarily police officers, can they be required to fight fires when they do not receive the benefits that firefighters receive under Sec. 891.45 Wis. Stats.?

The village has the authority under section 61.66(2) to designate "any person required to perform police protection and fire protection duties . . . as primarily a police officer or fire fighter for the purposes of s. 891.45." No specific criteria have been established by the Legislature to guide the village in this decision. Section 891.45 does provide a guideline to be used in cases where the village has not designated the individual as a "municipal fire fighter." Any public safety officer, under section 61.66, is eligible for the section 891.45 presumption if his or her "duties as a fire fighter during the 5-year qualifying period took up at least two-thirds of his or her working hours." Finally, whether police officers, who are not eligible for the presumption of section 891.45, can be required to fight fires is a question of policy for determination by the village board.

DJH:WMS

Investment Board, Wisconsin; State; Words And Phrases; The State of Wisconsin Investment Board lacks the authority to borrow money and secure that debt utilizing real estate owned by it as an asset of the fixed retirement trust. Such board does have the authority to acquire encumbered real estate where the debt is assumed without recourse. OAG 37–89

November 1, 1989

KEITH JOHNSON, *Acting General Counsel*
State of Wisconsin Investment Board

You ask two questions relating to the authority of the State of Wisconsin Investment Board (SWIB) to use nonrecourse debt in making real estate investments for the fixed retirement investment trust (fixed trust) of the Wisconsin Retirement System. In connection with your questions, you have advised that use of a partnership is not in issue in that section 620.22, Stats., incorporated in the SWIB grant of investment authority at section 25.17(3)(a), allows investment "as a participant in a partnership." This opinion thus does not treat or concern whether, or the extent to which, a partnership is used to engage in the nonrecourse investment.

First, you ask whether the SWIB may incur nonrecourse debt:

> By taking out a non–recourse loan secured by real estate owned by the Board in its name alone, or owned by a partnership in which the Board is a general or limited partner.

It is my opinion that the SWIB lacks the statutory authority to borrow money and secure that debt utilizing real estate that is owned by it as an investment of the fixed trust.

Administrative agencies, created by the Legislature, such as the SWIB, have only those powers expressly conferred or necessarily implied by the statutes under which they operate. Any reasonable doubt as to the existence of implied power should be resolved against the exercise of such power. *Kimberly–Clark Corp. v. Public Service Comm.*, 110 Wis. 2d 455, 461–62, 329 N.W.2d

143 (1983); *State (Dept. of Admin.) v. ILHR Dept.*, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977).

The statutory authority granted to the SWIB to deal with fixed trust monies is to *invest* those monies in stated *investments*. Sections 25.17(2)(a), (3)(a), (b), (bh), (dg) and (dm) and 25.18(1) authorize investing in or managing specifically stated areas of investments. Section 25.17 also authorizes investments in certain general categories in the words:

Powers and duties of board. . . . The board shall:

. . . .

(3)(a) Invest any of the following funds: 1. fixed retirement investment trust; 2. state life fund; 3. veterans trust fund, in loans, securities and any other investments authorized by s. 620.22, and in bonds or other evidences of indebtedness or preferred stock of companies engaged in the finance business whether as direct lenders or as holding companies owning subsidiaries engaged in the finance business. Investments permitted by sub. (4) are permitted investments under this subsection.

. . . .

(4) Invest the funds of the fixed retirement investment trust in loans, securities or investments in addition to those permitted by any other statute including investments in corporations which are in the venture capital stage. The aggregate of the loans, securities and investments made under this subsection shall not exceed 15% of the admitted assets of that trust. Investments in corporations which are in the venture capital stage shall not exceed 2% of the admitted assets of that trust.

Section 620.22 (permitted investments for insurance companies), referred to in section 25.17(3)(a), specifically sets forth classes of investments but concludes at subsections (8) and (9) with the language:

(8) Such other investments as the commissioner authorizes by rule; and

(9) Investments not otherwise permitted by this section, and not specifically prohibited by statute, to the extent of not more than 5% of the first $500,000,000 of the insurer's assets plus 10% of the insurer's assets exceeding $500,000,000.

The duty and grant of authority is consistently described as "invest" or acquire "investments." In construing a statute, the first rule to apply is "that the primary source of construction is the language of the statute." *Kimberly-Clark Corp.*, 110 Wis. 2d at 462. "The ordinary and accepted meaning of a word can be established by reference to a recognized dictionary . . . ." *DNR v. Wisconsin Power & Light Co.*, 108 Wis. 2d 403, 408, 321 N.W.2d 286 (1982).

Webster's Ninth New Collegiate Dictionary 636, 637 (1984) defines the words "invest" and "investment" in part as follows:

invest . . . to commit (money) in order to earn a financial return.

investment . . . the outlay of money usually for income or profit: capital outlay; also: the sum invested or the property purchased.

What is consistent in the statutes concerned and the dictionary definition is the commitment or outlay of money. I see nothing to indicate any intent in the statute to authorize the SWIB to borrow money for investment purposes. That is not to say that the authority to borrow money to maintain and repair owned real estate may not be subsumed in the authority granted under section 25.18(1)(f). That question is not, however, within the intent of the question you have asked. The placing of debt on real estate in the situation presented, is not for repair or maintenance but for leveraging purposes, "to improve returns on an existing investment." *See* March 30, 1989 Memorandum from Keith Johnson to Paul Fanfera at 3.

While I make no judgment on, and do not disparage, the borrowing of money by the SWIB as a technique to increase the rate of return on owned real estate, I find no such authority granted in the statutes. Where the term "loan" is used in section 25.17 or 620.22, the context indicates that that capital outlay is intended rather than the borrowing of money to leverage investments.

Nor do I find a basis for necessary implication of authority to borrow money for leverage purposes, given the wide range of investment vehicles available under the existing specific and general authorities of sections 25.17 and 620.22. It is, therefore, my opinion that the SWIB lacks the authority to borrow money for leverage purposes and secure such loan utilizing owned real estate.

Your second question asks whether the SWIB may incur nonrecourse debt:

> By acquiring, either in the Board's name or in the name of a partnership in which the Board is a general or limited partner, real estate which is subject to nonrecourse debt.

It is my opinion that the SWIB may acquire real estate subject to nonrecourse debt in investing the fixed trust under the broad authority of sections 25.17(4) and 620.22(9). The types of investments under these two subsections is limited only by the prudent expert rule, section 25.15(2).

As the Wisconsin Legislative Council staff stated in Staff Brief 82–6 at 12:

> These statutes also grant the Investment Board unlimited discretion to invest a portion of the fixed retirement investment trust funds, within the constraints of the prudent person rule. Subsections (3) and (4) of s. 25.17, Stats., provide that funds may be invested in loans, securities or investments *in addition to those permitted by any other section of the statutes*, in an amount not to exceed 15% of the admitted assets of the trust. This section of the statutes,

as of April 30, 1982, allows the Board to invest approximately $790 million without restriction. Section 620.22(9), Stats., authorizes the Board to place funds in investments not otherwise permitted under s. 620.22, Stats., and not specifically prohibited by any other statute, to the extent of not more than 5% of the first $500 million of the fund plus 10% of the fund's assets exceeding $500 million. This section, as of April 30, 1982, authorizes the Board to invest approximately $500 million without restriction. Sections 25.17(3) and (4) and 620.22(9), Stats., appear to be cumulative and together authorize the investment of approximately $1.3 billion without specific restraints.

The SWIB thus has the authority to acquire encumbered real estate under sections 25.17(4) and 620.22(9), where the debt is assumed without recourse. Having found such statutory authority, I must now determine whether it is limited or precluded by the Wisconsin Constitution.

Article VIII, section 3 of the Wisconsin Constitution provides that "the credit of the state shall never be given, or loaned, in aid of any individual, association or corporation." Similarly, article VIII, section 4 of the Wisconsin Constitution states that "[t]he state shall never contract any public debt except in the cases and manner herein provided." In interpreting these sections, the Wisconsin Supreme Court has held "that no state debt or pledge of state credit exists unless there is an obligation which is legally enforceable against the state." *Wisconsin Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 482, 235 N.W.2d 648 (1975). Since the existing debt assumed by the SWIB would be without recourse, there is no state debt or pledge of state credit created.

Article VIII, section 10 of the Wisconsin Constitution states in part that "[t]he state shall never contract any debt for works of internal improvement, or be a party in carrying on such works" (except in the areas of public highways, forests, airports, veterans housing and port facilities specifically allowed by such section). The construction of housing has been determined to be an

internal improvement. *Development Dept. v. Bldg. Comm'n*, 139 Wis. 2d 1, 7, 406 N.W.2d 728 (1987). It therefore appears that the courts would also consider commercial buildings to be internal improvements. Purchase of real estate subject to nonrecourse debt does not violate the prohibition against contracting debt for works of internal improvement since the state has not guaranteed payment in the event of a default. *Development Dept.*, 139 Wis. 2d at 12. We therefore need concern ourselves only with the determination as to whether the SWIB is (1) "the state" and (2) "a party in carrying on such works."

As the supreme court stated in *Development Dept.*, 139 Wis. 2d at 12–13:

> The use of the conjunction "or" in the phrase, "The State shall never contract any debt for works of internal improvement *or* be a party in carrying on such works," shows that the phrase "be a party in carrying on such works" has a vitality of its own. The antipathy of the state's founders against the state entering the quagmire of "internal improvements" extended to prohibiting the state from even being a party to such works whether or not any debt was contracted. The *Department of Development, a state agency*, using the state machinery to issue bonds, being involved in planning or approving plans for housing and eligibility for loans and then lending the money and collecting it, bringing whatever legal action might be necessary to collect from borrowers who default to pay bond holders *when the whole purpose is to see to it that housing is built* is clearly being "a party in carrying on such works." *Here it is plain the State is a very important, if not indispensable party in bringing about these "works of internal improvement."* This is true even though the benefits accrue to the private borrowers who continue to be the owners of these "works of internal improvement." It is not necessary that the State be

> or become the actual owner of the housing in order to "be a party in carrying on such works," i.e., housing.

(Emphasis supplied.)

The Legislature can establish a corporate body independent of the state to do works of internal improvement that are prohibited to the state.

> Wisconsin has long recognized the doctrine that where an entity other than the state carries on the work of the state, the entity is independent and thus saves the state from a violation of the internal improvement prohibition.
>
> There is no doubt here that the *Solid Waste Recycling Authority is an independent authority from the state, that it is neither an arm nor an agent of the state*, and that its activities are to be undertaken as an independent entity, free to carry on its operations without being bound by the prohibition of art. VIII, sec. 10, Wisconsin Constitution, barring state participation in works of internal improvement.

Wisconsin Solid Waste Recycling Auth., 70 Wis. 2d at 491 (emphasis supplied). *See also State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 424–25, 208 N.W.2d 780 (1973) (Wisconsin Housing and Economic Development Authority).

It appears that the SWIB is a state agency similar to the Department of Development rather than an independent authority such as the Solid Waste Recycling Authority. The SWIB is created by section 15.76, part of subchapter III of chapter 15, entitled Independent Agencies. Section 15.01 defines "Board" and "independent agency" as follows:

> 15.01 Definitions. In this chapter:
>
> (1) "Board" means a part–time body functioning as the policy–making unit for a department *or independent agency* or a part–time body with policy–making or quasi–judicial powers and includes the state emergency response commission.
>
> . . . .

(9) "Independent agency" means *an administrative agency within the executive branch* created under subch. III.

Since the Legislature has specifically defined the SWIB to be an "administrative agency within the executive branch," there is no basis to consider such agency an independent authority, separate from the state. Actions taken by the SWIB are actions of the state for article VIII, section 10 of the Wisconsin Constitution purposes.

I do not, however, consider the SWIB to be a party in carrying on works of internal improvement since the purpose is investment of the fixed trust rather than the construction of buildings.

> If a law is predominately public in its aim, it will not be held to violate the internal improvements provision, in spite of the fact that the state carries on internal improvements incident to the main public purpose of the law. This was recognized in *Appeal of Van Dyke*, where a taxpayer had challenged the validity of an unemployment relief income tax, which partially reimbursed counties and cities for the labor cost of public works. The taxpayer argued that such a state tax was unconstitutional, since it made the state a party to works of internal improvement. But the court did not agree:
>
> ". . . the primary purpose of the state was not to become a party to carrying on works of internal improvement, but to reimburse the counties and cities which had made work simply for the purpose of providing employment to the unemployed."
>
> The primary or dominant purpose approach of *Van Dyke* was relied upon by this court in the more recent case of *State ex rel. La Follette v. Reuter*. In that case the court stated that prohibited works of internal improvement did not include those works which had the dominant purpose of preserving public health.

Wisconsin Solid Waste Recycling Auth., 70 Wis. 2d at 492 (footnotes omitted).

The state can have a limited role in a work of internal improvement pursuant to a proper governmental function and not violate article VIII, section 10 of the Wisconsin Constitution. *Development Dept.*, 139 Wis. 2d at 18. Building construction resulting from mortgage investments or purchases by the SWIB are only incidental to the proper governmental function of investing the fixed trust and does not violate article VIII, section 10 of the Wisconsin Constitution.

DJH:WMS

Trust Funds; Wisconsin Retirement System; Validity of possible statutory modifications to the Fixed Retirement Trust of the Wisconsin Retirement System discussed. OAG 38–89

November 2, 1989

FRED A. RISSER, *Chairperson*
Senate Organization Committee

The Committee on Senate Organization has requested my opinion on a number of questions relating to the various accounts of the Fixed Retirement Trust of the Wisconsin Retirement System (WRS).

Your first question asks:

1. Is there any constitutional or contractual rights bar which would prevent the Legislature from directing that an amount equal to the WRS unfunded liability be deducted from the Transaction Amortization Account (TAA) established under s. 40.04 (3) and credited to the employer accumulation reserve under s. 40.04 (5) to eliminate the WRS unfunded liability?

It is my opinion that such a statutory change could cause a violation of contract rights of some members of the WRS. Since the contractual rights of the various WRS participants (actives and annuitants) are not uniform, a general statement as to the rights of all participants is inappropriate in answering your questions. No specific legislation has been provided and the potential or actual monetary effect of such legislation on individual participants is not available to me.

The WRS unfunded actuarial liability as of the end of 1988 was $1,374,297,000. *See* Wisconsin Department of Employe Trust Funds 1985–87 Biennial Report Summary dated March 1989 at 5. This unfunded actuarial liability results primarily from legislated system benefit increases which are not paid for at the time enacted and from unfunded prior service liability of participating employers who do not pay costs of prior service on

the date of initial participation. *See* Joint Survey Committee on Retirement Systems Report on 1983 Senate Bill 568 at 4 (ACTUARIAL EFFECT) and section 40.05(2)(b), Stats.

The Transaction Amortization Account (TAA) was established to record all gains, losses, premiums, discounts, forfeitures and penalties in the WRS fixed retirement trust. *See* 1988 State of Wisconsin Investment Board Annual Report, 36, Note H. Section 25.17(14)(f) (as amended by 1989 Wisconsin Act 13) states regarding valuation of WRS securities invested by the Investment Board that:

> [T]he amount of any . . . gain or loss at time of sale or other disposition, premium on call or redemption, commitment or standby fee, profit or loss on residual value, scrap value, fire or casualty award, condemnation award, adjustment in book value, or other gains or losses shall be transferred to the transaction amortization account of the fixed retirement investment trust under s. 40.04 (3).

As of March 31, 1989, the TAA had a positive balance of $2,624,978,325.61. (*See* April 20, 1989, Investment Board report on Transaction Amortization Account.)

Your question is based on hypothetical legislation which would deduct the amount of the unfunded actuarial liability from the TAA and credit that amount to the employer accumulation reserve. This would be contrary to the present statutory procedure whereby distributions from the TAA are divided among the employe accumulation reserve, employer accumulation reserve and annuity reserve. Sec. 40.04(3)(a), (4), (5) and (6), Stats. The potential effect of such hypothetical legislation on active members and annuitants of the WRS could be as follows:

> a. Annuitants would not benefit from the transfer but such lessening of the TAA balance would tend to substantially lower or eliminate surplus dividends to annuitants now available under the statutes.

b. Certain active employes would sustain a potential lessening of the value of the purchase money annuity option at retirement since their employe accumulation reserve accounts would not be credited with a portion of the TAA by way of the current income account as occurs under the present statutes.

c. Active employes could sustain an increased danger of higher employe contributions because of a lessening of the transaction amortization balance to a point where unfavorable market experience would completely deplete such account and cause trust fund shortages that would have to be replaced by increased employe and employer contributions.

Additional bases for objection based on unconstitutionality can also arise from the specific legislation drafted.

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 . . . ." "All laws are presumed to be constitutional. In order to overcome this presumption [one attacking a statute] . . . must prove . . . [it] unconstitutional beyond a reasonable doubt." *State ex rel. Cannon v. Moran*, 111 Wis. 2d 544, 552–53, 331 N.W.2d 369 (1983).

As the court stated in *Cannon*, 111 Wis. 2d at 554, "[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 Association v. Blaisdell*, 290 U.S. 398, 431 (1934).

Section 40.04 which controls the distribution of earnings, profits or losses of the fixed retirement investment trust provides in part (as amended by 1989 Wisconsin Act 13):

(3) A fixed retirement investment trust and a variable retirement investment trust shall be maintained within the fund under the jurisdiction and management of the investment board for the purpose of managing the investments of the retirement reserve accounts and of any other accounts of the fund as determined by the board, including the accounts of separate retirement systems. *Within the fixed retirement investment trust there shall be maintained a transaction amortization account and a current income account*, and any other accounts as are established by the board or the investment board. . . .

(a) *All earnings, profits or losses of the fixed retirement investment trust* and the net gain or loss of the variable retirement investment trust *shall be distributed annually on December 31 to each participating account in the same ratio as each account's average daily balance within the respective trust bears to the total average daily balance of all participating accounts in that trust. For the fixed retirement investment trust the amount to be distributed shall be the then balance of the current income account plus 20% of the then balance of the transaction amortization account*. . . .

. . . .

(4)(a) *An employe accumulation reserve, within which a separate account shall be maintained for each participant, shall be maintained within the fund and*:

1. Credited with all employe contributions made under s. 40.05 (1) and all employer additional contributions made under s. 40.05 (2) (g) and all contribution accumulations reestablished under s. 40.26 or 40.63 (10).

2. *Credited as of each December 31 with interest on the prior year's closing balance at the effective rate* on all employe required contribution accumulations in the variable annuity division, *on all employe required contributions in the fixed annuity division on December 31, 1984, on all employe required contributions in the fixed annuity division of participants who are not participating employes after December 31, 1984*, and on all employe and employer additional contribution accumulations *and with interest on the prior year's closing balance at the assumed benefit rate on all employe required contribution accumulations in the fixed annuity division for participants who are participating employes after December 31, 1984.*

(5) *An employer accumulation reserve* shall be maintained within the fund to which, without regard to the identity of the individual employer, shall be:

(a) Credited all employer required contributions.

(b) *Credited, as of each December 31, all fixed annuity division interest not credited to other accounts and reserves under this section.*

(6) *An annuity reserve* shall be maintained within the fund to which shall be transferred amounts equal to the present value as of the date of commencement of annuities granted under this chapter. *The reserve shall be increased by investment earnings at the effective rate* and shall be reduced by the aggregate amount of annuity payments and death benefits paid with respect to the annuities and by the present value at the date of termination of annuities terminated in accordance with s. 40.08 (3), 40.26 or 40.63 (9) (c).

"Effective rate" is defined at section 40.02(23)(a) in part as:

For the fixed annuity division, the rate, . . . determined by dividing the remaining fixed annuity division investment earnings for the calendar year or part of the calendar year, after making provision for any necessary reserves and after

deducting prorated interest and the administrative costs of the fixed annuity division for the year, by the fixed annuity division balance at the beginning of the calendar year as adjusted for benefit payments and refunds paid during the year excluding prorated interest.

"Assumed benefit rate" as used in section 40.04(4)(a)2. is defined at section 40.02(6) as follows:

"Assumed benefit rate" means a rate of 5%. The assumed benefit rate shall be used for calculating reserve transfers at the time of retirement, making actuarial valuations of annuities in force, determining the amount of lump-sum death benefits payable from the portion of an annuity based on additional deposits and crediting interest to employe required contribution accumulations.

Fixed annuity reserve surpluses are distributed under the authority of section 40.27(2) which provides:

(2) FIXED ANNUITY RESERVE SURPLUS DISTRIBUTIONS. Surpluses in the fixed annuity reserve established under s. 40.04(6) and (7) shall be distributed by the board if the distribution will result in at least a 2% increase in the amount of annuities in force, on recommendation of the actuary, as follows:

(a) The distributions shall be expressed as percentage increases in the amount of the monthly annuity in force, including prior distributions of surpluses but not including any amount paid from funds other than the fixed annuity reserve fund, preceding the effective date of the distribution. For purposes of this subsection, annuities in force include any disability annuity suspended because the earnings limitation had been exceeded by that annuitant in that year.

(b) Different percentages may be applied to annuities with different effective dates as may be determined to be equitable but no other distinction may be made among the

various types of annuities payable from the fixed annuity reserve.

(c) The distributions shall not be offset against any other benefit being received but shall be paid in full, nor shall any other benefit being received be reduced by the distributions. The annuity reserve surplus distributions authorized under this subsection may be revoked by the board in part or in total as to future payments upon recommendation of the actuary if a deficit occurs in the fixed annuity reserves.

Under the hypothetical legislation, the amount of the unfunded actuarial liability is deducted from the TAA and credited to the employer reserve. This conflicts with contractual rights granted under the present statutes requiring division of any TAA distribution between the employer, employe and annuity reserves. Sec. 40.04(3)(a), Stats. Rights of those annuitants who retired before the effective date of such legislation would be impaired to the extent that no portion of those TAA monies would be available to increase annuities. A secondary detrimental effect occurs in that less money would be available in the future to fund the annuity increases provided by section 40.27(2). Annuitants have a contractual right, based on service already performed, in the existing benefit improvement mechanism set forth in section 40.27(2) which would be infringed by the hypothetical legislation. Active WRS participants have similar contractual rights during employment.

An active or retired WRS participant has, under case law, no vested right to retirement benefits "[i]n the absence of contractual relations or a specific declaration by the legislative body creating a vested right." *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). No later Wisconsin case negates the concept that vested rights are set at retirement unless affected by a statute providing greater or lesser rights. Such greater rights are granted by section 40.19(1).

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

> 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.

One of the "benefits accrued to an employe under this chapter for service rendered," denominated as a contractual right, is the section 40.27(2) right to fixed annuity reserve surplus distributions caused by augmented TAA transfers. Similar statutory contractual guarantees are provided to participants who participated prior to specific dates. *See* sec. 40.19(2), (2m) and (3), Stats. It, therefore, appears that various WRS participants have vested rights to annuity improvement, through use of TAA monies, that would be infringed by crediting a substantial portion of those monies solely to the employer accumulation reserve to eliminate the unfunded actuarial liability. Since various degrees of impairment would exist, I now consider whether such impairments are unconstitutional.

As stated in *Cannon*, 111 Wis. 2d at 558:

> The degree of impairment determines the level of scrutiny to which the legislation in question will be subjected. In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. at 244–45, the court stated:
>
> "[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." (Footnotes omitted.)
>
> In finding that an impairment was severe, the *Spannaus* court relied upon those "factors that reflect the high value the Framers placed on the protection of private contracts." *Id.* at 245. In particular, the court noted that the legislation in question nullified an express term of the contract which was bargained for and reasonably relied upon by the parties, resulting in a completely unexpected liability to the plaintiff.

The magnitude of the transfer itself indicates that the impairment is substantial. While there are no facts stated in your letter, relating to the actual potential effect on annuitants, I can roughly interpolate such effect from my opinion to Gary I. Gates, Secretary of the Department of Employe Trust Funds, relating to the pre–1974 retiree supplemental benefit payments from the annuity reserve. 76 Op. Att'y Gen. 299 (1987). Pursuant to that opinion request, I was advised that a $230 million transfer from the TAA to the employe, employer and annuity reserves would cause an approximate two percent increase in existing annuities. 76 Op. Att'y Gen. at 308. The transfer which is the subject of this question is in the amount of $1.47 billion, more than six times the amount in that opinion. The resulting potential effect on existing annuities, in the nature of more than twelve percent, appears to be a substantial impairment.

I have no actuarial studies or facts of any other nature upon which to base a determination of the degree of potential contract impairment resulting from the lessening of the value of the purchase money annuity option to active employes. Nor do I have any basis upon which to determine the likelihood of higher employe contributions as a result of the TAA transfer to pay the unfunded liability. It is clear, however, that 1989 Wisconsin Act 13 at section 18 makes employe contributions responsible for any increase in contributions required because of benefit improvements in that act. For any future contribution rate increases required by the system, not caused by 1989 Wisconsin Act 13, employe contribution increases must provide half. *See* section 40.05(2n) as created by section 18 of 1989 Wisconsin Act 13. While the magnitude of the effect on the money purchase option and employe contributions is not available to me, it appears that the effect of the impairment in these two areas could also be substantial. Since I find a substantial impairment, it is necessary to next inquire into the nature and scope of the legislation to determine if it is proscribed by the contract clause. *Cannon*, 111 Wis. 2d at 558.

As further stated in *Cannon*, 111 Wis. 2d at 559–60:

> As noted earlier, the contract clause does not proscribe every impairment of contract. A state may be entitled to exercise its police power for the general welfare of the public even though a private contract is impaired. *Wipperfurth v. U–Haul Co. of Western Wis., Inc.*, 101 Wis. 2d 586, 592, 304 N.W.2d 767 (1981). "If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. at 242. (Emphasis in original.)
>
> In *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. at 434, the United States Supreme Court upheld a Minnesota

mortgage moratorium statute which was designed to reduce the number of foreclosures during the economic depression of the 1930's. This statute impaired the contract rights of lenders. Nevertheless, the court balanced the language of the contract clause against the purpose of the statute and held that the state had authority "to safeguard the vital interests of its people" through such legislation. In reaching this conclusion, the court found five factors to be significant. In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. at 242 (citations omitted), the court succinctly set forth these five factors as follows:

"First, the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed. Second, the state law was enacted to protect a basic societal interest, not a favored group. Third, the relief was appropriately tailored to the emergency that it was designed to meet. Fourth, the imposed conditions were reasonable. And, finally, the legislation was limited to the duration of the emergency."

Blaisdell indicates that to survive the contract clause a statute which impairs contracts must have a significant and legitimate public purpose, "such as the remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 51 U.S.L.W. 4106, 4109 (U.S. Jan. 25, 1983) (No. 81-1370); *State ex rel. Building Owners v. Adamany*, 64 Wis. 2d at 303. Since *Blaisdell*, however, the standard has been modified so that the public purpose need no longer involve an emergency or temporary situation. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, *supra* at 4109.

State ex rel. Bldg. Owners v. Adamany, 64 Wis. 2d 280, 300, 219 N.W.2d 274 (1974), *cited in Cannon*, stated that legislation impairing the right of contract must show that it "is necessary for the vital interests of the people of the state." Those vital interests must be shown by the legislation itself. *State ex rel. Bldg.*

Owners v. Adamany, 64 Wis. 2d at 300–01. Is the existence of the present level of WRS unfunded actuarial accrued liabilities a "general social or economic problem" that requires a remedy "necessary for the vital interests of the people of the state," which remedy involves infringement of contractual rights? Such a problem, if it exists, is not apparent.

Gabriel, Roeder, Smith & Company, the WRS actuary, stated as follows in a September 22, 1988, letter to Gary I. Gates, Executive Secretary of the WRS:

> If "actuarial accrued liabilities" at any time exceed the system's accrued assets, the difference is "*unfunded actuarial accrued liabilities*". This is the common condition. If the plan's assets equalled the plan's "actuarial accrued liabilities", the plan would be termed "fully funded". This is an unusual condition.
>
> . . . .
>
> The existence of unfunded actuarial accrued liabilities is not bad, but the changes from year to year in amount of unfunded actuarial accrued liabilities are important – – – "bad" or "good" or somewhere in between.
>
> Nor are unfunded actuarial accrued liabilities a bill payable immediately, but it is important that policy-makers prevent the amount from becoming unreasonably high and it is vital for a plan to have a sound financial plan for making payments toward them so that they are controlled. *WRS has such a financial plan in place and is in excellent condition in accordance with its fundamental financial objective of paying for promised benefits by means of level percent of payroll contributions.*

No facts are provided in or with your opinion request that indicate exigent circumstances that compel use of the TAA to pay the unfunded actuarial accrued liabilities.

> A statute that seeks to modify, by the invocation of the police power, a constitutionally guaranteed right, such as the

> right of contract, should be carefully drawn to show that the use of such power is necessary and exigent and serves a vital purpose of government. While courts are willing to indulge any reasonable presumption to sustain police-power-type legislation, they ought not be asked to speculate or conjure up possible explanations to support a legislative act.

State ex rel. Bldg. Owners v. Adamany, 64 Wis. 2d at 303. It is, therefore, my opinion that lacking any showing of exigent circumstances that require a remedy necessary to protect the vital interests of the state, the TAA transfer suggested in your first question would be violative of the contract clauses of the United States and Wisconsin Constitutions.

Your next question is:

> 2. Same as Question (1) except the amount transferred would be used to reduce the present employer-required current service contribution rate?

It is my opinion that a similar violation of contract rights would occur if the amount transferred from the TAA were transferred to reduce required employer current service contributions required by section 40.05(2).

Section 40.05(2) states in part (as amended by 1989 Wisconsin Act 13):

> (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.

This hypothetical legislation would transfer approximately $1,374,297,000 (the amount of the unfunded actuarial liability) to the employer accumulation reserve to reduce the present employer-required current service contribution rate. The projected employer contributions for year 1988, the most recent available, is in the amount of $380,052,738. *See* Wisconsin Department of Employe Trust Funds 1985-87 Biennial Report Summary dated March 1989 at 3. It appears that by virtue of the required-computation language of section 40.05(2)(am), the crediting of the amount of the unfunded actuarial liability to the employer accumulation reserve would fully fund the employer contribution for more than three and one-half years. The period would exceed three and one-half years since the $380,052,738 includes prior service liabilities and your question relates only to payment of "current service contributions." During that period of time all employer contributions would be paid by this TAA transfer.

Since your question does not propose payment from the TAA of unfunded prior service liability, I need not consider the question of constitutionality of unequal treatment between participating employers who have prepaid their prior service costs and those who have elected to amortize prior service costs into the future. Sec. 40.05(2)(b), (bg), (bm) and (br), Stats. My

opinion regarding the constitutionality of a proposed statute, as described in your second question, is, therefore, based on the effects on contractual rights of annuitants and active employes similar to those discussed in answering your first question.

A transfer of TAA monies in the amount of the unfunded actuarial liability would have the same effect on active employes and annuitants regardless of whether it is credited to the unfunded actuarial liability or to the employer annuity reserve (with the purpose of reducing employer–required current service contributions). Annuitants would not benefit from the transfer but would sustain substantially lower potential for annuity increases from favorable investment experience. Active employes would sustain a reduced value of the purchase money annuity option at retirement and an increased danger of higher employe contributions.

Similar to question one, these potential violations of contractual rights appear to be substantial and not based upon a showing by the Legislature of exigent circumstances that require this remedy to protect the vital interests of the state. The proposed legislation described by your second question would, therefore, appear to violate the contract clauses of the United States and Wisconsin Constitutions.

Your next four questions are interrelated to the extent that they are properly answered together. Those questions state as follows:

3. If you conclude that the actions suggested under Questions (1) and (2) are not possible, is there any constitutional or contractual right bar which would prevent the Legislature from directing that the full balance in the TAA be distributed in the same manner as the current annual distribution of investment earnings to the employer, employe and the annuity reserves under s. 40.04 (4), (5) and (6) with the amount credited to the employer accumulation reserve being used to reduce the WRS unfunded liability?

4. Same as Question (3) except the amount credited to the employer accumulation reserve would be used to reduce the present employer–required current service contribution rate.
5. Same as Question (4) plus using the amounts credited to the employe accumulation reserve to reduce the employe–required contribution rate.
6. Same as Question (5) plus directing that the amounts credited to the annuity reserve be placed in a contingency reserve to offset any future adverse actuarial experience with a simultaneous temporary increase in the assumed benefit rate to 10%. The change in the required reserve amount due to the new assumed benefit rate would also be placed in the contingency reserve. The assumed benefit rate would revert to 5% when and if the contingency reserve had been reduced to the level that would leave no surplus at the 5% rate. I understand that the effect of the change in the assumed benefit rate would be a significant reduction in future required transfers from the employer reserve to the annuity reserve and therefore a reduction in employer costs (plus much smaller "dividends" increasing annuities under s. 40.27).

Distribution of the entire TAA to the employer accumulation, employe accumulation and annuity reserves would obviate the potential violations of constitutional rights discussed under questions 1 and 2. Since the TAA monies would be divided between the three accounts in proportion to each account balance (section 40.04(3)(a)) employers, employes and annuitants would benefit from the TAA transfer. Annuitants would potentially receive increased annuities from the transfer and the additional monies in the employe accumulation reserve would provide the potential for an increased money purchase option value and lessen the potential for increased employe contributions. This result would occur regardless of whether the TAA portion

credited to the employer accumulation reserve is used to reduce the WRS unfunded actuarial liability (question 3) or the employer–required current service contribution rate (question 4).

Inasmuch as the proposed statutes described under questions 3 and 4 would not impair the contractual rights of WRS participants, they would be constitutional. Any such proposed legislation which affects a change in the employer or employe contribution rate, however, would have to mesh with newly enacted section 40.05(2n), which requires that any increase or decrease in contribution rates be split between employer contributions and employe benefit adjustment contributions. 1989 Wisconsin Act 13, section 18.

Legislation mandating use of the TAA portion credited to the employe accumulation reserve to reduce the employe–required contribution rate (question 5) could be subject to objection on constitutional grounds since an active WRS participant could potentially be negatively affected.

A separate account is maintained within the employe accumulation reserve for each employe, which account is credited with all employe contributions (whether made by the employe or by the employer on the employe's behalf), plus interest from investment earnings. Sec. 40.04(4)(a), Stats. Employe–required contributions that are paid by the employer on the employe's behalf are the property of the employe. As stated at section 40.05(1)(b):

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

Using the accelerated TAA distribution pass–through to the employe accumulation reserve as the basis to reduce employe–required contributions would lessen the value of employe

accounts. In most cases, the collective bargaining agreements, personnel policies or section 40.05(1)(b) have committed the employer to pay employe contributions. The TAA monies thus used to lower employe contributions do not increase the various employe accounts since those contributions are already employer obligations. Loss of the benefit of increased interest crediting, which presently occurs if the TAA distribution is credited to the current income account (section 40.04(3)(a)), would lower the value of the purchase money option and separation benefit (for post–January 1, 1982, WRS participants). While it appears that the present level of employer–paid employe contributions can be changed without violating contractual rights, it does not follow that the TAA can be used for that purpose.

Using the TAA–generated increase to lower employe contributions, rather than crediting the individual accounts with interest from those monies, would thus potentially impair contract rights. Sec. 40.19(1), Stats. Whether the impairment is substantial enough to constitute a violation of constitutional prohibitions cannot be determined without facts indicating the magnitude of the effect on individual employes. Moreover, the section 40.19(1) grant of contract rights allows the state to require "forfeiture of specific rights and benefits as a condition for receiving subsequently enacted rights and benefits of equal or greater value to the participant." Legislation using TAA monies to reduce employe contributions could contain other benefits ameliorating any potential contract infringement. The facts provided are, therefore, insufficient to enable me to determine whether proposed legislation described in question 5 would or would not violate the contract clauses of the United States and Wisconsin Constitutions.

Then you ask (question 6) whether there is any constitutional problem if legislation were enacted which provided that the TAA monies credited to the annuity reserve were placed in a newly–created contingency reserve (maintained to offset any future negative investment experience) and not paid out as increased

annuities under the present section 40.27(2) surplus distribution procedure. In addition, this legislation would raise the "assumed benefit rate," (for determining the present value of the transfer from the employe and employer accumulation reserves to the annuity reserve on commencement of an annuity) from five percent to ten percent. The employer accumulation account present value transfer would, however, be based upon the five percent rate with the difference also going into the newly-created contingency reserve. This contingency reserve would fund possible annual losses in the annuity reserve resulting from unfavorable investment experience and costs resulting from lower than expected mortality. When and if this contingency reserve were reduced by unfavorable investment and mortality experience, from ten percent to the level that would leave no surplus at a five percent assumed benefit rate, that rate would revert to five percent.

When a WRS participant applies for a retirement annuity, there is transferred to the annuity reserve "amounts equal to the present value [of the annuity] as of the date of commencement." Sec. 40.04(6), Stats. The "assumed benefit rate" (assumed rate of return on investment) used to determine such present value is statutorily established at five percent. Sec. 40.02(6), Stats. Whatever balance the annuitant has in the employe accumulation reserve is credited to the annuity reserve. Sec. 40.04(4)(a)3., Stats. The remaining balance necessary to fund the present value after deducting the annuitant's employe accumulations reserve account is transferred from the employer accumulation reserve. Sec. 40.04(5)(c), Stats. Thus, raising the interest assumption to ten percent would cause a significant reduction in the amount of the transfer from the employer accumulation reserve and of future employer costs as suggested in question 6. This effect would not occur under the described legislation, however, since you specify that "[t]he change in the required reserve amount due to the new assumed benefit rate would also be placed in the contingency reserve." There would be no saving to the employer accumulation

reserve, from raising the assumed benefit rate, since the difference in present value would still be transferred to the contingency reserve of the annuity reserve.

You also suggest (question 6) that creation of the contingency reserve would cause "much smaller 'dividends' increasing annuities under s. 40.27." Whether the hypothetical legislation would have this effect would depend on the wording of the legislation. Section 40.27(2) in its present form provides that "[s]urpluses in the fixed annuity reserve shall be distributed by the board if the distribution will result in at least a two percent increase in the amount of annuities in force, on recommendation of the actuary." A contingency fund has thus been statutorily created to the extent of up to two percent of the amount of annuities in force. Question 6 does not specify the point at which the newly-created contingency reserve would be used. Therefore, all that can be said with any degree of certainty is that placing the transferred TAA monies into the newly-created contingency reserve would (if the existing statute was so amended to provide) prevent those amounts from being passed on to annuitants as dividends. This contingency reserve buffer could potentially cause a reduction in future annuity increases if the twenty percent TAA transfer to current income (section 40.04(3)(a) as amended by 1989 Wisconsin Act 13) is by legislation prevented from reaching the annuitant. If the effect of the hypothetical statute is to phase out the TAA without increasing surplus distributions to annuitants, the validity of constitutional objections on contract infringement grounds would be based on the effect on individual annuitants weighed against whether the newly-created contingency fund is "useful in achieving the fund's purposes, or necessary to protect the interests of the participants or the future solvency of the fund." Sec. 40.04(1), Stats. The Legislature has in section 40.04(1) granted this account-creating authority to the Department of Employe Trust Funds and thus presumably could exercise similar authority on its own.

There are insufficient facts to provide me with the basis to render an opinion on the constitutionality of the hypothetical legislation described in question 6. All laws are presumed constitutional and one attacking a statute must prove that statute unconstitutional beyond a reasonable doubt. *Cannon*, 111 Wis. 2d at 552–53. Section 40.19(1) provides, however, that "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 section 40.27(2) fixed annuity reserve surplus distribution appears to be a benefit accrued by annuitants. Minimal alteration of contract rights does not constitute a constitutional impairment nor would an impairment which results from a necessity to protect the interests of the participants or future solvency of the fund. These factors cannot be sufficiently analyzed as the basis for an opinion without the specific details of the proposed statute.

Next you ask:

7. Would s. 40.19 (1) present a constitutional bar to the Legislature limiting future interest credits to participant accounts and the annuity reserve to the present assumed rate (7–1/2%) and the present assumed benefit rate (5%), respectively?

It is my opinion that section 40.19(1) does not preclude the Legislature from prospectively limiting future interest crediting for that portion of a participant's account contributed after enactment of the limiting statute. Such statutory section does preclude the Legislature from limiting interest crediting for contributions made prior to the enactment of the limiting statute.

Section 40.19(1) provides vested contract rights "for service rendered" during employment. One of the contractual rights accrued "for service rendered" by WRS participants is the right to fixed annuity reserve surplus distributions. Section 40.19(1) was enacted effective January 1, 1982. Ch. 96, Laws of 1981. Participants who retired since that date probably have a contractual right to annuity increases based on distribution of

fixed annuity surpluses. Participants employed by WRS participating employers after January 1, 1982, and not yet retired, may also have a contractual right to future annuity increases based on "benefits accrued . . . for service rendered." That contractual right would continue until prospectively abrogated by the hypothetical legislation.

While section 40.19(1) authorizes "forfeiture of specific rights and benefits" that have vested, such forfeiture must under that statute be based upon the participant "receiving subsequently enacted rights and benefits of equal or greater value." Your question contains no *quid pro quo* for those WRS participants who are affected by the interest credit limitation, so this method of requiring forfeiture of vested rights appears inapplicable.

Section 40.19(2m) also specifically guarantees to a WRS participant, who was a participating employe during the period January 1, 1982 to March 9, 1984, the right to have his or her retirement benefit determined under the statutes in effect on his or her termination. Such section states as follows:

> Any person who is a participant in the Wisconsin retirement system *before March 9, 1984*, and who is not subsequently a participating employe in the Wisconsin retirement system shall continue to have the amount of, and eligibility for, the person's benefits determined in accordance with the statutes in effect on the date the person terminated as a participating employe.

Fixed annuity reserve distribution as mandated in section 40.27(2) is an element of "benefits determined in accordance with the statutes in effect on the date the person terminated as a participating employe." Section 40.19(1) precludes abrogation of that contractual right "by any subsequent legislative act."

Even those WRS participants who were not participating employes after January 1, 1982, and thus not covered by the vesting language of section 40.19(1), may be held to have vested rights abrogated by the interest limitation. Section 40.19(3),

applying to WRS participants who were not participating employes after January 1, 1982 (the date of merger of the retirement systems), limits the benefit vesting to "the statutes in effect on the date the person terminated." Such section states:

> Any person who is a participant in the Wisconsin retirement fund or a member of either the state teachers retirement system or the Milwaukee teachers retirement fund *prior to January 1, 1982*, and who does not subsequently become a participating employe in the Wisconsin retirement system, shall continue . . . to have the amount of and eligibility for the person's benefits determined in accord with the statutes in effect on the date the person terminated as a participating employe.

The statutory benefits which vested on termination of employment prior to January 1, 1982, also included annuity improvements from distribution of annuity reserve surpluses. *See* secs. 41.20(1)(a) and 42.357(5), Stats. (1979). Statutes in effect prior to January 1, 1982, further provided that annuity reserve surplus distributions "shall not be offset against any other benefit received but shall be paid in full, nor shall any other benefit being received be reduced by any such distribution." *See* sec. 40.70(3), Stats. (1979). It, therefore, appears that pre–1982 annuitants may have vested rights to annuity increases from annuity reserve surpluses that would be infringed by the subject interest limitation.

The degree of impairment determines the level of scrutiny by the courts. If there is substantial impairment, the courts will carefully examine the nature and purpose of the legislation. Whether there is a substantial impairment is not limited to the amount of money involved but takes into consideration whether "the legislation in question nullified an express term of the contract which was bargained for and reasonably relied upon by the parties." *Cannon*, 111 Wis. 2d at 558. Active employes and annuitants are and were employed during times when the statutes vest in them the right to unlimited annuity improvements based

on surpluses in the annuity reserve. It was not unreasonable for participants to expect such unlimited interest crediting to annuity reserve accounts to continue for past service. While the severity of the impairment is not indicated, I assume that it would be severe if the hypothetical statutes were enacted in this session given the accelerated pass through by 1989 Wisconsin Act 13 at sections 9 and 47(2).

It, therefore, appears that the impairment is severe and proscribed by the United States and Wisconsin Constitutions unless there "exist[s] a significant and legitimate public purpose behind the legislation," which purpose should be "directed towards remedying a broad and general social or economic problem." *Chappy v. LIRC*, 136 Wis. 2d 172, 187–88, 401 N.W.2d 568 (1967), "[I]t seems clear that, for the police power of the state of Wisconsin to affect the constitutionally protected right of contract, there should be evidence that the legislation is necessary for the vital interests of the state." *State ex rel. Bldg. Owners v. Adamany*, 64 Wis. 2d at 300. Limiting of the interest crediting to annuitants does not appear to rise to the magnitude of "remedying a broad and general social or economic problem" nor would it seem to be "necessary for the vital interests of . . . the state."

There is nothing in question 6 which indicates such a public purpose. Saving and transfer of revenues to other purposes does not in itself indicate such a "vital interest."

> A government entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977). (Footnote omitted.)

> A statute that seeks to modify, by the invocation of the police power, a constitutionally guaranteed right, such as the right of contract, should be carefully drawn to show that the use of such power is necessary and exigent and serves a vital purpose of government. While courts are willing to indulge any reasonable presumption to sustain police-power-type legislation, they ought not be asked to speculate or conjure up possible explanations to support a legislative act.

State ex rel. Bldg. Owners v. Adamany, 64 Wis. 2d at 303.

Present statutes allow "equitable" distribution of annuity surpluses. *See* sec. 40.27(2)(b), Stats.

> [A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well.

United States Trust Co. v. New Jersey, 431 U.S. at 30-31. It should be noted that the Legislature has chosen a more moderate course in the past by limiting interest crediting to employe accumulation accounts on a prospective basis. *See* section 40.04(4)(a)2. which limits interest to the assumed benefit rate and section 40.04(4)(a)2m (as created by 1989 Wisconsin Act 13) which prospectively limits separation benefit interest to three percent. I therefore conclude that legislation limiting interest crediting to annuity reserve accounts, for contributions made before the enactment of the limiting statute, would probably be held unconstitutional.

Your eighth question states:

> 8. If a negative answer to any of the previous questions is based on the fact that many participants have made additional contributions to the WRS over and above the legally-required contributions, would the answers become positive if the statutory changes in each case

specified that the full investment earnings credit would be added to all such additional contribution amounts while limiting or directing the credits to required contribution accounts as previously noted?

None of the negative answers to previous questions is based on participants' rights generated from making additional deposits or being the beneficiary of additional deposits made by employers. Employes and employers (on behalf of employes) may make additional contributions to the WRS. Sec. 40.05(1)(a)5. and (2)(g), Stats. "[A]dditional employer contributions shall be available for all benefit purposes [except separation benefit] and shall be administered and invested on the same basis as employe additional contributions . . . ." Sec. 40.05(2)(g), Stats. A participant's account in the employe accumulation reserve is credited with both employer and employe additional deposits. Thus participants who have additional deposit credits have, as a minimum, the contractual rights of participants arising from required employe deposits.

The Legislature has apparently recognized greater rights resulting from additional deposits. Section 40.04(4)(a)2., which limits interest crediting to employe accumulations accounts to the assumed benefit rate (five percent) for participants after December 31, 1984, does not include "employe and employer additional contribution accumulations" within such interest limitation. Similarly, the section 40.04(4)(a)2m. (as created by 1989 Wisconsin Act 13) limitation of interest to three percent for separation benefit purposes for those terminating covered employment on or after January 1, 1990, does not apply to additional contributions. While there are indications that there may be other bases for objection to statutes infringing on rights resulting from additional contributions, a discussion of such bases is unnecessary here absent specific statutory language for analysis.

Your final question states:

9. Is there any constitutional bar to the Legislature closing the present WRS and creating a new retirement system applicable to all future service of existing and future employes using the present WRS assets to fund all benefits accrued to the date of closing and applying the "excess" assets to reducing taxes?

It is my opinion that the Legislature can, without violating contract rights, close the present WRS and create a new retirement system for future service if it does not abrogate the various rights vested on the date of terminating the WRS. One of those vested rights is that of fixed annuity reserve surplus distributions under section 40.27. A second vested right is that of choosing the alternative purchase money form of annuity under section 40.23(3). A third right vested is that of a pre–1982 participant, applying for a separation, to have the effective rate of interest (including TAA increases to the current income account) credited in determining the amount of the separation benefit. Secs. 40.25(2) and 40.04(4)(a)2., Stats. I, therefore, have no basis upon which to assume that there would be any "excess assets" available on the hypothetical closing of the WRS since these vested rights have substantial claims on the trust funds.

Section 40.19(1) explicitly provides that "[r]ights 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." Such statute continues by stating that the system can be repealed at any time and "there shall be no right to *further accrual* nor to future exercise of rights for service *after* . . . repeal." This contractual right based on service rendered includes benefits determined by and based upon monies in the TAA.

The Wisconsin Supreme Court has held, in the case of teachers, that certain benefits vested at commencement of teaching service. In *State ex rel. Stafford v. State A. and I. Board*, 219 Wis. 31, 33, 261 N.W. 718 (1935), the court held that a legislative enactment that required payment from the contingency

fund of the State Retirement System (for teachers) to one not belonging to the group entitled to a benefit violated the contractual rights of the teachers participating in the fund. The court stated:

> The conceded facts show the nonexistence of a right or claim in this particular fund in Mr. Stafford at the time of his death. It therefore follows that the attempt to place within the reach of Stafford's estate or of his beneficiary this fund, or any portion of it, results in the invasion of the rights of others, because it is a direct impairment of contractual rights of teachers entitled to participate in said fund under a contract between them and the state.

219 Wis. at 33. There was no showing, in the case, that employed teachers' ultimate annuities would be affected other than by a potential lessening of the "distribution of gains and savings" authorized by section 42.34, Stats. (1935).

Similarly in *State ex rel. O'Neil v. Blied*, 188 Wis. 442, 447, 206 N.W. 213 (1925), an attempt by the Legislature to repeal, retroactively, a death benefit provision of the 1921 Teachers Retirement Act was held to be an unconstitutional impairment of teachers employment contracts. Repeal of the death benefit was held constitutional, however, for teachers hired after the effective date of the repealing act.

In *State Teachers' Retirement Board v. Giessel*, 12 Wis. 2d 5, 9–10, 106 N.W.2d 301 (1960), the court stated:

> It is argued that the plaintiff board is required to pay out funds according to law and appropriations from the earnings of the fund have been made by law each year, and therefore there is no vested right in the gross earnings of the fund. We do not agree. The teacher's right, based on contract, extends to the retirement system. The earnings on investments, part of which represent contributions made by the teachers and part contributed by the state under the contract with them,

> constitute assets of the system. The reserve for contingencies set up by the board is a part of the system.
>
> The appellant's argument would deny any rights to the earnings on the investment until they are allocated and credited to the individual teacher's account. The right cannot be construed so narrowly. The right includes the proper use of the earnings. The expense of administering the system, losses on investments, and other proper expenses and charges are, of course, to be paid by the system. However, the legislature and the plaintiff board are not free to spend or appropriate the earnings of the fund except in a manner authorized by statute relating to the state teacher's retirement system.

These three cases together indicate that contractual rights vest during employment and that those rights extend to the trust funds of the retirement system. While the three cited cases involved prior teacher retirement systems, the same concept is set forth in section 40.19(1). This interpretation is furthered by the stated purpose of the trust fund.

Section 40.01(2) sets forth the purpose of the trust fund, which funds operations of the WRS, as follows:

> The public employe trust fund is a public trust and shall be managed, administered, invested and otherwise dealt with *solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants*, as set forth in this chapter, *and shall not be used for any other purpose.*

It, therefore, appears that vested rights of employes and annuitants in the "excess assets" may preclude use of those assets for other than benefit purposes.

DJH:WMS

County Board; County Executive; Referendum; A county board may adopt an ordinance creating the office of county executive and make the ordinance contingent upon approval in a countywide referendum. The office of county executive is created at the time the results of the referendum become final. The first election for the office occurs at least 120 days after the creation of the office becomes effective. The county executive takes office on the third Tuesday in April of the year of the election. OAG 39-89

November 3, 1989

STEPHEN C. LEPLEY, *Corporation Counsel*
Waukesha County Courthouse

The Waukesha County Board of Supervisors is considering an ordinance that would create the office of county executive contingent upon approval at a countywide referendum. You have asked for my opinion concerning section 59.031, Stats., and other statutes as they apply to the creation of the office of county executive in counties having a population less than 500,000.

1. May the County Board's legislative act creating the office require that the matter be approved at a county-wide "contingent referendum?" May the County Board alternatively schedule an "advisory referendum" on the subject of the creation of the office, intending to wait for the results of such a referendum prior to deciding whether to take any legislative action?

The answer to both questions is yes. As you point out in your letter, both types of referenda are authorized by section 59.07(67), which provides that the county board may "[c]onduct a countywide referendum for advisory purposes or for the purpose of ratifying or validating a resolution or ordinance adopted by the board contingent upon approval in the referendum." In addition, the use of a referendum to ratify or validate legislation has been approved by the supreme court in *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N.W. 961

(1910), and in attorney general opinions, including 62 Op. Att'y Gen. 14 (1973), 21 Op. Att'y Gen. 146 (1932) and 21 Op. Att'y Gen. 207 (1932).

When a legislative body schedules a referendum that concerns the subject of a resolution or ordinance, the body must take care not to delegate its legislative power. In *Van Alstine*, 142 Wis. at 324–25, however, the court explained: "[W]hile the legislature may not delegate its power to make a law, it can make a law to become operative on the happening of a certain contingency or on the ascertainment of a fact upon which the law makes or intends to make its own action depend." In *Van Alstine*, the court approved the use of a referendum as long as the legislative act was a complete law in itself when it received the executive sanction and was published and as long as it was to become operative only on the happening of a future contingency, *to wit*, its approval by a majority of the electorate voting on the question.

In the case of the creation of the office of Waukesha County executive, the county board may schedule a contingent referendum as long as the county board's act is a complete law in itself.

2. For purposes of determining when a first election for the office is to be held under § 59.031 (1) (b), Stats., and assuming a contingent referendum may be scheduled, when is the office of county executive "created?"

The time for holding the first election for a newly created county executive office is provided for in section 59.031(1)(b), which states, in part:

> The county executive shall be elected the same as a county executive is elected under par. (a) for a term of 4 years commencing with the 1st spring election occurring at least 120 days after the creation of the office and shall take office on the 3rd Tuesday in April of that year.

When the county board passes an ordinance creating the office of county executive contingent upon approval in a subsequent referendum, the office of county executive for the purpose of holding the first election would be created after the results of the referendum become final under sections 7.60 and 9.01.

Although the ordinance adopted by the county board must be complete in itself so that the referendum is not deemed a delegation of legislative authority, the referendum is the contingency upon which the action of the county takes effect and becomes operative. *Van Alstine*, 142 Wis. at 325; 21 Op. Att'y Gen. at 147–48; and 21 Op. Att'y Gen. at 208. Because the ordinance creating the office of county executive would not take effect until after the results of the referendum approving the ordinance became final, the office could not be considered to be created until after the results of the referendum became final. Therefore, the first election for the new office of county executive would be held in the first spring election occurring at least 120 days after the results of the referendum become final.

3. Which of the procedures in § 59.031 (1) (a), Stats., are to be followed in paragraph (1) (b) of that section, in accordance with the latter paragraph's declaration that: "(T)he county executive shall be elected the same as a county executive is elected under paragraph (a)..."?

Section 59.031(1)(b), which was quoted above, provides that the county executive shall be elected the same as a county executive is elected under paragraph (a) for a term of four years commencing with the first election.

Section 59.031(1)(a) provides:

> In each county having a population of 500,000 or more, a county executive shall be elected for a term of 4 years at the election to be held on the first Tuesday in April of each year in which county supervisors are elected, and shall take office on the first Monday in May following the election. The county executive shall be elected from residents of the

> county at large by a majority vote of all qualified electors in the county voting in the election. In any county which attains a population of 500,000 or more, the first election under this paragraph shall be held on the first Tuesday in April in the year following the official announcement of the federal census.

Paragraph (b) has its own specific requirements as to the length of term of office, the time of the first election and the date when the county executive takes office. When paragraph (b) refers to electing the county executive the same as the county executive is elected in paragraph (a), it is therefore incorporating only the requirement that "[t]he county executive shall be elected from residents of the county at large by a majority vote of all qualified electors in the county voting in the election."

The provision in paragraph (a) that the county executive is elected for a term of four years in elections held in each year in which county supervisors are elected would not be applicable to paragraph (b) because supervisors in counties having a population of less than 500,000 serve for terms of two years whereas the supervisors in counties having a population of 500,000 or more serve for four year terms, just as the county executive. Secs. 59.03(2)(b) and (3)(d), Stats. It would not be possible for the county executive serving the four year term to be elected in each year in which county supervisors are elected for two year terms.

4. Under § 59.031 (1) (b), and the facts recited herein, when must the first election to the office be held, and when does the elected county executive take office?

Pursuant to section 59.031(1)(b), the first election for the county executive occurs at least 120 days after the creation of the office. Under the facts set forth in your letter, that would be 120 days after the ordinance creating the office becomes effective. The effective date of the ordinance would depend on whether there was a contingent referendum held after the county board acted on the ordinance. In either event, however, the effective date of the ordinance would trigger the running of the 120 days.

Pursuant to section 59.031(1)(b), the new county executive would take office on the third Tuesday in April of the year of the election.

DJH:SWK

Banks And Banking; Public Records; Vital Statistics; A bank, its employes and agents violate section 69.24(1)(a), Stats., when copying a certified copy of a vital record for use by the Federal Reserve Bank. OAG 40–89

November 14, 1989

TOBY E. SHERRY, *Commissioner*
Office of Commissioner of Banking

You ask whether a bank violates section 69.24(1)(a), Stats., by photocopying a certified copy of a vital record for use by the Federal Reserve Bank.

Apparently the Federal Reserve Bank of Chicago recently modified its guidelines for processing all savings bond reissue transactions for seventh district institutions. If a party desires to redeem or reissue savings bonds after the death of a person, the party must provide a certified copy of the death certificate to the bank. The bank then will copy the death certificate and give the original back to that customer. While at the same time attesting that they saw a certified copy of the vital record, the bank then sends the uncertified copy to the Federal Reserve Bank who then will pay the bank.

Recent legislation has rendered moot the earlier opinion in 46 Op. Att'y Gen. 276 (1957) to which you refer in your letter. Section 69.24(1)(a) was repealed and recreated with the rest of subchapter I of chapter 69 under 1985 Wisconsin Act 315 and originally provided:

> Any person who does any of the following shall be fined not more than $10,000 or imprisoned not more than 2 years or both:
>
> (a) Prepares or issues any paper or film which purports to be, or carries the appearance of, an original or a copy of a vital record, certified or uncertified, except as provided under this subchapter and except for any hospital which issues any written announcement of the birth of a person to

the parents of the person if the announcement contains plain notice that the announcement is not for official use.

Section 69.24(1)(a) was enacted in apparent response to a substantial increase in the practice of obtaining and using false identification documents by manipulating the existing system. For example, it was easy for a person to procure a photocopy of a birth certificate from a source other than those discussed in chapter 69. This certificate, which might be accurate or already altered, could be altered to provide a new identity or other erroneous identifying information. The presence of a seal on the altered document gave it the appearance of a legitimate certificate. The Legislature obviously determined that this evil and its consequences could only be prevented by a strict measure which makes copying *per se* a criminal violation unless done under the authority of subchapter I of chapter 69.

The language of this statute as originally enacted is clear and unambiguous and, therefore, there is no need to resort to rules of construction or legislative history. *State v. Gilbert*, 115 Wis. 2d 371, 377, 340 N.W.2d 511 (1983); *In re Estate of Bundy*, 81 Wis. 2d 32, 40, 259 N.W.2d 701 (1977). Among other things, it prohibits the duplication of birth and death certificates as vital records unless the authority for duplication and method of duplication are provided for elsewhere under subchapter I of chapter 69. Banks and their employes are not among those authorized by subchapter I to duplicate vital records.

With the enactment of 1987 Wisconsin Act 247, effective April 21, 1988, another exception was added to the prohibition under section 69.24(1)(a) for vital records prepared or issued under section 610.50. Section 610.50 now provides:

> An insurer or an employe, agent or attorney of an insurer is not subject to s. 69.24(1)(a) for copying a certified copy of a vital record for the insurer's own internal administrative use in connection with the payment of insurance claims or benefits if the copy is marked "FOR ADMINISTRATIVE USE" and is retained in the files of the insurer or attorney.

In addition to an exception created under state law, a person or entity can benefit from a broader exemption under federal law. For example, employers are required to verify that an individual is not an unauthorized alien by examining documents establishing both employment authorization and identity of the individual including, among other things, some form of birth record. 8 U.S.C.A. § 1324a(b)(1) (West Supp. 1989). Subparagraph (b)(4) of this section provides that "[n]otwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted under law) for the purpose of complying with the requirements of this subsection."

At present I know of no similar exception under the federal banking laws which would supersede the prohibition in section 69.24(1)(a) under the Supremacy Clause of the United States Constitution. Although the state statute itself could be amended to exempt banks and their employes and agents as was accomplished for insurers, my position on the current law is consistent with the interpretation placed upon these relatively new provisions by the state registrar and the vital records personnel within the Department of Health and Social Services. 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). In addition to the clear and unambiguous language creating the prohibition, neither the agency nor I can find any federal or state law exempting banks, their employes or agents.

The Federal Reserve Bank guidelines are published by the Bureau of the Public Debt in a fiscal manual which apparently has no special force of law. As there is no special mention or treatment of these guidelines in any federal banking legislation or regulations, they are at most interpretive rules which do not operate to preempt state law. *See State v. Amoco Oil Co.*, 97 Wis.

2d 226, 250, 293 N.W.2d 487 (1980). The very context in which the word "guidelines" is used in the materials accompanying your letter further indicates to me that these guidelines have no special or preemptive effect.

It should be noted that later subparagraphs under section 69.24(1) require a showing of criminal intent, an element which is assumed under subparagraph (1)(a). Unless a person violated some later subparagraph, I see no reason why the certified copy could not be used during the entire process described in your recent letter. At present the fee collected by the state registrar or any local registrar for one certified copy of a death certificate is $5, but an additional certified copy of the same death certificate can be issued at the same time for only $2. Sec. 69.22(1)(a), Stats.

Although a prompt legislative change could permit Wisconsin banks to follow the Federal Reserve Bank guidelines, the Detroit branch of the Federal Reserve Bank of Chicago has provided a temporary solution for Wisconsin banks. When some Wisconsin banks discovered this statutory prohibition against copying certain records, those banks began sending the originals to the Detroit branch with a request that they be copied there and returned. Instead of engaging in this activity which would have been illegal in Wisconsin, the Detroit bank created a special exception for Wisconsin banks whereby they now send the original document to the Detroit branch rather than a photocopy. The underlying concern for costs incurred by the bank customers still exists, however, because under this special exception the Detroit branch now retains the original.

DJH:DPJ

Veterinarian; Words And Phrases; Section 453.05(2)(a), Stats., does not require a license for a person to engage in the activity of artificial insemination of animals but does require a license for persons engaged in pregnancy examinations if they were not engaged in the practice prior to February 11, 1968. OAG 41-89

December 27, 1989

FRED A. RISSER, *Chairperson*
Senate Organization Committee

Section 453.05, Stats., provides that, with certain exceptions, it is an offense for any person to practice veterinary medicine in Wisconsin without a license to do so. You have requested my opinion regarding one of the exceptions to this licensing requirement which is found at section 453.05(2)(a). It states as follows:

> (2) No veterinary license or temporary permit is required for the following activities or persons:
>
> (a) Artificial insemination, or for continuing the practice of pregnancy examinations of animals when such practice was engaged in prior to February 11, 1968.

The letter accompanying your request states:

> It is clear from this section that if an individual engaged in artificial insemination prior to February 11, 1968, the individual would not have to have a license to practice veterinary medicine to continue that practice after that date. Likewise, it is equally clear that if a party engaged in the practice of pregnancy examinations prior to February 11, 1968 that individual would be allowed to continue to conduct pregnancy examinations of animals after that date.

Unfortunately, it does not immediately become clear from the language of the statute whether the grandfather clause is applicable to an unlicensed individual who engaged in either artificial insemination or pregnancy examination of animals prior to February 11, 1968, and then engaged in the other practice after

that date. Because the statute can reasonably be interpreted in more than one way, the proper way to resolve the ambiguity is to look at both extrinsic and intrinsic aids. *Tahtinen v. MSI Ins. Co.*, 122 Wis. 2d 158, 166, 361 N.W.2d 673 (1985). Such an analysis would look to both the legislative intent as well as principles of statutory construction.

Generally a statute making the practice of medicine without a license an offense is to be strictly construed, although not so as to defeat the obvious legislative intent. 65 Op. Att'y Gen. 231 (1976). Prior to 1968, no licensure was required for either artificial insemination or pregnancy examinations. The original 1967 Assembly Bill 888 required that all technicians be licensed for artificial insemination and pregnancy examinations. Through subsequent amendments, however, the Legislature seemed to abandon that proposal. One such amendment was proposed by the original drafter of the bill, Assemblyman Nuttelman. Assembly Substitute Amendment 1 to 1967 A.B. 888 was the first to separate the two activities so that artificial insemination became included in a list of other activities that did not require licensure. The amendment kept the practice of pregnancy examinations as an entirely distinct section requiring annual licensing. Likewise, the drafting request to Assembly Substitute Amendment 2 to 1967 A.B. 888, Legislative Reference Bureau 7297, proposed by Representative Azim illustrated legislative intent when it requested a grandfather clause for persons engaged in pregnancy examinations. Representative Azim's substitute amendment itself also kept the two activities in separate categories similar to the Nuttelman amendment proposed two days earlier.

While intrinsic aids alone are not controlling in an analysis of this type, they can be useful to support a prior determination of legislative intent. Section 453.05(2)(a) contains some grammatical indicators that also support a finding that the activity of artificial insemination does not require licensure. The first indicator is the well-placed comma separating the words "artificial insemination" from the rest of the passage containing the grandfather clause.

This comma holds particular significance here because "[w]hen punctuation discloses a proper legislative intent or conveys a clear meaning the courts should give weight to it as evidence." 2A Singer, Sutherland Statutory Construction § 47.15 (Sands 4th ed. 1984). The position of the comma in this instance only supports the Legislature's intent that artificial insemination should be a separate and distinct activity exempt from the licensure requirements, whereas the practice of pregnancy examinations will only be exempt from licensing when the grandfather clause applies.

The next indicator is the word "or" that was placed between the two clauses. The word "or" should normally be read in its disjunctive sense, unless to do so would cause an absurd interpretation. *Menominee River B. Co. v. Augustus Spies L. & C. Co.*, 147 Wis. 559, 569, 132 N.W. 1118 (1911). Since the word "or" was placed between the two activities and not the word "and," it should be interpreted to support the Legislature's intent that the grandfather clause should only apply to the practice of pregnancy examinations and that artificial insemination technicians need no license at all.

A further grammatical indicator is the use of the words "continuing the practice of pregnancy examinations when such practice was engaged in prior to February 11, 1968." The word "practice" is used both times in its singular form. Although section 990.001(1) indicates that the use of a word in its singular form does not necessarily preclude its possibly being intended to mean the plural, such an interpretation must remain consistent with the manifest intent of the Legislature. Further, it is only logical that the grandfather clause applies to pregnancy examinations exclusively because the words "continuing the practice" relates directly back to engaging in the practice prior to February 11, 1968. For all of the reasons stated above, it appears that the Legislature's intent was to apply the grandfather clause only to pregnancy examinations.

Finally, it is my understanding that it has been the practice of the Veterinary Examining Board not to require a license for anyone practicing artificial insemination of animals. It is well settled that an agency's interpretation of a statute within its expertise is entitled to great weight. *Milwaukee v. WERC*, 71 Wis. 2d 709, 714–15, 239 N.W.2d 63 (1976).

Thus, the legislative history and administrative interpretation of this section indicates that the intent of the Legislature was not to require any licensure for artificial insemination but that those engaged in the practice of pregnancy examinations should be annually licensed. In order to accommodate those who had already begun the practice of pregnancy examinations before its enactment, the statute included a grandfather clause to allow those practitioners to continue that activity without the need for a license. The grammatical indicators support the conclusion that the two activities are separate and distinct.

Therefore, in answer to your question, it is my opinion that a person who had engaged in the practice of pregnancy examinations prior to February 11, 1968, would be entitled to engage in the activity of artificial insemination because licensing for that activity is not required. In all instances, however, any person who wishes to perform pregnancy examinations but had not begun to do so prior to February 11, 1968, is required to be annually licensed regardless of whether or not such person had begun the activity of artificial insemination prior to the enactment of the statute.

DJH:PJC

STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION LAWS, LEGISLATIVE BILLS, OPINIONS OF THE ATTORNEY GENERAL, AND RESOLUTIONS REFERRED TO AND CONSTRUED

U.S. CODE

UNITED STATES CONSTITUTION

WISCONSIN CONSTITUTION

SENATE BILLS

ASSEMBLY BILLS

JOINT RESOLUTION

SESSION LAWS

OPINIONS

STATUTES

INDEX

N.B. The texts of Unpublished Opinions appearing in this Index without page references are available on request from the Office of the Attorney General.