Mental Health—Regulation and Licensing of Private Mental Hospitals.

Opinion Requested by Dr. William F. Sheeley, Mental Health Commissioner.

I am in receipt of your request for an opinion concerning the authority of the Department of Mental Health to license various types of institutions established to treat persons suffering from mental illness. Your letter specifically refers to two types of institutions, out-patient clinics and what are known as Half-Way Houses, but it implies a need for clarification in relation to all types of institutions. The answer to your question, therefore, will require examination of a number of statutes.

A reasonable starting place for the examination of statutes would be Acts 1945, ch. 335, which created the Indiana Council for Mental Health, and gave that Council certain powers in relation to both public and private institutions. The second section of the Act, the same being Burns IND. STAT. ANN. § 22-5032, specified the duties and powers of the Council, which include:

"... (3) To have and exercise the power to make rules and regulations: (a) for the maintenance of standards, as herein provided, for the operation of private institutions for the diagnosis, treatment and care of psychiatric patients, and (b) for licensing private institutions in the manner herein provided, which meets such standards; and to inspect such private institutions for the purpose of ascertaining whether or not they meet and are maintaining such standards."
The Indiana Council for Mental Health was abolished by Acts 1953, ch. 197. The 1957 Act created the Department of Health, described its organization, provided for a Division of Mental Health within the Department of Health, and provided for a Mental Health Commissioner to administer that Division.

Two separate sections of the Act concern the transfer of the authority previously held by the Council for Mental Health.

Section 202 provides:

"Powers and Duties. The Commissioner shall be the administrative head of the division, and as such shall: (a) Exercise general supervision and control of the division. (b) Direct the medical and physical care and mental rehabilitation of patients in the institutions under the control of the division. (c) Exercise all other powers and duties previously conferred upon the Indiana Council for Mental Health, which powers are hereby preserved, transferred to and conferred upon the Commissioner of this division."

Section 204 provides:

"Indiana Council for Mental Health Abolished. On the effective date of this act the Indiana Council for Mental Health shall be abolished and the term of its members terminated. All its powers and duties are hereby preserved, transferred to and conferred upon the Commissioner of this division."

The Division of Mental Health was in turn abolished by Acts 1961, ch. 58, the Mental Health Act of 1961, the same being Burns §§ 22-5001 to 22-5031, which Act created the Department of Mental Health as a separate agency of state government. The powers of the Commissioner of the Department of Mental Health are set out in section 7 of the Act, Burns § 22-5007, which provides in part:

"The commissioner of mental health shall be the chief mental health authority for the State of Indiana, and shall be the chief administrative officer of the de-
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partment of mental health, and as such shall: (1) Exercise the general supervision and control of the department of mental health;

“(2) Direct the medical and physical care and mental rehabilitation of patients in the institutions which are under the control and supervision of the department of mental health; and

“(3) Exercise all the rights, powers, duties, functions and authority previously conferred upon the Indiana Council for Mental Health, including all the rights, powers, duties, functions and authority previously conferred upon the Commissioner of Mental Health of the Division of Mental Health of the Department of Mental Health, all of which rights, powers, duties, functions and authority are hereby preserved, transferred to and conferred upon the Commissioner of Mental Health of the Department of Mental Health.”

Thus the authority to license private mental institutions originally granted to the Indiana Council for Mental Health is now vested unchanged in the Commissioner of Mental Health.

Unfortunately, while the 1945 Act established the power to regulate private institutions it contains no definition of the phrase “private institutions for the diagnosis, treatment and care of psychiatric patients.” However, the third section of the Act, Burns § 22-1401, establishes minimum requirements for such institutions, and the language used in that section might be indicative of the interpretation to be given that term:

“Private institutions for treatment and care of psychiatric patients shall have physicians holding unlimited licenses to practice medicine available for the medical care such patients may reasonably be expected to need, and also such facilities and accommodations as such patients may reasonably be expected to need. The standards of treatment and care to be maintained shall be such as would be appropriate under existing
knowledge of the needs of such patients, as determined by the Council, and the Council shall be empowered to prescribe minimum standards for such private institutions and for care and treatment of patients therein."

The requirements set out in the above statute imply that a private mental institution must be something more than a clinic for out-patient treatment. Availability of medical care and provision of facilities and equipment do not seem pertinent to a one or two hour visit by the patient.

Another consideration supports the conclusion that the licensing authority granted by the 1945 Act does not apply to clinics established for out-patient treatment. Any person, whether known as a psychiatrist, a psychologist, an analyst, or by any other name, who treats or claims to treat persons suffering from mental disorders in his office is in fact operating an out-patient clinic, although on a much smaller scale than that term usually connotes. Unfortunately, Indiana has no law requiring persons who treat or claim to treat mental illness to be licensed, or even to meet certain professional qualifications. Interpreting the powers granted to the Department of Mental Health as including the authority to license and regulate out-patient clinics would be granting the Department the authority to license and regulate a profession that the General Assembly has not as yet seen fit to regulate. Such an interpretation would obviously involve a usurpation of the legislative power.

Therefore, it is my opinion that the Department is not given the general power to regulate clinics established for the treatment of persons suffering from mental illness on an out-patient basis. This conclusion, of course, does not eliminate the possibility that the Department has been given some authority in relation to a special class or classes of such clinics, but a direct reading of the statutes, if any, pertaining to clinics of a given class should reveal whether the Department if granted any authority in relation to those clinics.

Having eliminated out-patient clinics in general from possible inclusion in the category of private institutions that must
be licensed by the Department of Mental Health, the next step is to establish the simplest form of residential institution that must be licensed. More specifically, would an institution that operates in a manner similar to a nursing home but specializes in the care and maintenance in a controlled environment of persons suffering from some mental disorder, such as a Half-Way House operating as a residential rehabilitation center for reforming alcoholics, be subject to the licensing provisions?

Whether such institutions would be included within the term "private institutions" as used in the 1945 Act would be a rather difficult question to answer. Fortunately, that question need not be answered since, as your letter indicates, subsequent legislation has provided for the licensing and regulation of such institutions. Acts 1963, ch. 239, the same being Burns §§ 42-1448 to 42-1465, empowers the State Board of Health to license and regulate certain health facilities through the Indiana Health Facilities Council created by that Act. (See section 2, Burns § 42-1449.) The third section of the Act, Burns § 42-1450, contains the following definition:

"(a) The term 'health facility' means and shall be construed to include any building, structure, institution, or other place, for the reception, accommodation, board, care or treatment extending beyond a continuous twenty-four hour period in any week of more than two unrelated individuals requiring, in apparent need of, or desiring such services or combination of them, by reason of age, senility, physical or mental illness, infirmity, injury, incompetency, deformity, or any physical, mental or emotional disability, or other impairment, illness or infirmity not specifically mentioned hereinabove, and shall include by way of illustration, but not in limitation thereof, institutions or places furnishing those services usually furnished by places or institutions commonly known as nursing homes, homes for the aged, retirement homes, boarding homes for the aged, sanitariums, convalescent homes, homes for the chronically ill, homes for the indigent: Provided, however, That the reception, ac-
commodation, board, care or treatment in a household or family, for compensation of a person related by blood to the head of such household or family, or to his or her spouse, within the degree of consanguinity of first cousins, shall not be deemed to constitute the premises in which the person is received, boarded, accommodated, cared for or treated, a health facility: Provided, further, That any state institution or any municipal corporation may specifically request such licensure and upon compliance with all sections of this act and upon compliance with all existing rules and regulations, the petitioning facility may then be so licensed under the provisions of this act.

“(b) The term ‘health facility’ within the meaning of this act, shall not mean or be construed to mean or include, respectively, hotels, motels, or mobile homes when used as such, hospitals, mental hospitals, institutions operated by the federal government, boarding homes for children, schools for the deaf or blind, day schools for the retarded, day nurseries, children’s homes, child placement agencies, offices of practitioners of the healing arts, offices of Christian Science practitioners, industrial clinics providing only emergency medical services or first-aid for employees, and any hospital, sanatorium, nursing home, rest home, or other institution wherein any health care services and private duty nursing services are rendered in accordance with the practice and tenets of the religious denomination known as the Church of Christ, Scientist.”

It is immediately apparent that residential rehabilitation centers such as Half-Way Houses would fall within the above definition. Therefore, the licensing of such institutions would be a function of the Indiana Health Facilities Council rather than of the Department of Mental Health.

Your letter specifically inquires “what legally differentiates a ‘private psychiatric institution’ from a ‘health facility’?” That is, where is the dividing line between an institution that must be licensed by the Indiana Health Facilities Council and
an institution that must be licensed by the Department of Mental Health?

That question is not subject to a precise answer. In 1960 O.A.G. p. 230, the Attorney General suggested that the difference between a hospital for physical ailments and a nursing home was to be made on the nature and purpose of the institution, whether it is an institution for medical care and treatment or an institution for care and maintenance. Even in a situation concerned solely with physical disability, the Attorney General was forced to admit that it would be possible that an institution nominally intended as a nursing home would restrict its admissions to persons so infirm and in need of medical care that it would in fact constitute a hospital. The opinion concluded that any given institution must be examined individually and classified in accord with its true nature.

The problem is much more complex in the area of mental illness since care and maintenance in a controlled environment is in fact a form of treatment. However, there is no doubt that all institutions providing residential care for persons suffering from mental illness must be licensed by either the Health Facilities Council or the Department of Mental Health, and the members of those agencies are capable of determining whether any given institution is primarily a health facility devoted to care and maintenance or a hospital devoted to treatment and cure. Needless to say, cooperation between the two agencies is necessary both in classifying any given institution and in developing rules and regulations that will guide future founders and supervisors of such institutions.

To summarize, the Department of Mental Health has the authority to regulate and license private mental hospitals; the Health Facilities Council has the authority to regulate and license residential institutions that specialize in providing care and maintenance in a controlled environment to persons suffering from a mental disorder; clinics providing treatment to persons suffering from mental illness on an outpatient basis are not generally subject to licensing, although a given subclass of such clinics might be required to obtain licenses by a
specific statute applying solely to that sub-class. Whether a particular residential institution is a "health facility" or a "hospital" depends on whether it is primarily intended to provide care and maintenance or to provide treatment and care, a determination that must be cooperatively made by the state agencies involved.

OFFICIAL OPINION NO. 25

June 6, 1968

PUBLIC EMPLOYEES—LABOR RELATIONS—Supervisory or Professional Employees Holding Membership in Labor Union.

Opinion Requested by Hon. Roger D. Branigin, Governor.

You have asked me to advise you on the following question:

"May a department of State Government prohibit its supervisory and/or professional employees from holding membership in any employee association?"

You stated that one department head reports that some of his supervisory employees are not effectively carrying out department policies and orders because of a conflict with their loyalty to the employees' union to which they belong. You also ask whether, if such membership cannot be prohibited under the law, association activities of supervisory and professional employees can be restricted in any way by the department head. Although your question is rather broad, from the context I have concluded that you are concerned primarily with unions organized on a "vertical" pattern, i.e.,