State of Wisconsin
Department of Health Services

Scott Walker, Governor
Kitty Rhoades, Secretary

To: Legislative Council Study Committee on the Review of Criminal Penalties

From: Alex Ignatowski, Department of Health Services

Re: Subcommittee on Penalty Alignment and Organization Request

The Legislative Council Study Committee on the Review of Criminal Penalties formed a subcommittee to review penalty alignments. The Subcommittee has requested input from the Department regarding possible revisions to misdemeanors that are punishable by a fine only.

Background: Crimes in Wisconsin are those offenses punishable by a fine or imprisonment or both. Potential penalties for criminal violations range widely in Wisconsin. Generally, felonies are punishable by imprisonment in Wisconsin state prisons. Misdemeanors are those offenses punishable by a fine only or by either a fine or imprisonment for less than one year. Offenses that are punishable by forfeiture only are not crimes.
This distinction can be important for several reasons. The responsibility to investigate and prosecute violations can fall on different agencies, as district attorneys and the Department of Justice prosecute crimes. The responsibility to prosecute forfeitures can fall to a number of agencies such as city and town attorneys, state agencies, etc.
A second distinction is that criminal violations frequently carry collateral consequences. Criminal convictions can affect employability in many fields, affect the ability to obtain or retain professional or occupational licensure, and other consequences.
The stigma and collateral consequences for violation of forfeitures are far less harsh.

Review: The Subcommittee is considering reclassifying unclassified misdemeanors and has requested input from the Department regarding that proposal. At your request the Office of Legal Counsel reviewed a number of currently unclassified misdemeanors under consideration by the subcommittee, with a particular focus on fraud related misdemeanors and fine-only misdemeanors that would be reclassified as forfeitures.

Two additional factors should be considered.

- Responsibility to prosecute: Typically, criminal matters are pursued by local district attorneys and the assistant attorneys general. Authority to prosecute forfeitures is more scattered. The subcommittee may want to consider providing guidance in the statutes on the authority to prosecute. For example, may the department commence and prosecute the matter, or is the matter left to the discretion of the city, town, and district attorneys?
- Type of hearing: In criminal proceedings, the defendant has a right to a jury trial and a unanimous verdict. In typical forfeiture proceedings, the party seeking a jury trial must pay a fee and the verdict may be based upon agreement by 5/6ths of the jury panel. If the amended statutes are treated as administrative forfeitures, (similar to 153.78 (3)) a hearing would be heard by the DOA Division of Hearings and Appeals.

Specific considerations:
The Department requests the Committee to give special consideration to the following provisions. A short explanation of the Department's concerns follows each provision.

Chapter 49 This chapter addresses Public Assistance and Children and Family aid. There are numerous penalties provisions throughout this chapter ranging from forfeitures to felonies. Few of the criminal provisions fit within the standard criminal penalties found in classified offenses. For example, many of the felony fraud provisions have Class H felony maximum imprisonment terms but have potential maximum fines of $25,000. Given the unique nature of this chapter, ***the Department suggests that no revisions be considered***. Having a few classified misdemeanors interspersed with many unclassified felonies does not significantly address the Committee's goals. Additionally, reducing the potential maximum penalty for convictions related to fraudulently obtaining need based aid is not consistent with the Department's efforts to eliminate waste, fraud and abuse in government programs. More specifically, the Department opposes any changes to §§ 49.49 (1)(b)2, 49.688(9)(c), 49.795(8)(a)1, 49.795(8)(b)1, and 49.83

50.49 (8) *Unlicensed operation of a home health agency*
Currently Sec. 111.355 (1) (b) provides that it is permissible to refuse to license, or suspend licensure any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the licensed activity. Reducing this provision to a forfeiture may negatively impact the ability of the department to consider past unlicensed activity as a basis to deny a future license application even though the activity is substantially related. If this provision is decriminalized, consideration should be given to adding language in the licensing provisions that would allow license denial based upon conviction (even as a forfeiture) of unlicensed practice.

254.30 (2) (b) *Various violations relating to toxic substances and environmental health*
A violation is now a forfeiture but a *knowing* violation is a crime punishable by a fine and probation. Probation would no longer be available. It may make sense to continue with recognition of the difference between a negligent violation and a knowing or wilful violation.
The authority to assess a criminal penalty applies only to violations statutes governing lead paint poisoning and abatement. Even if not used so far, the criminal penalty is a useful additional enforcement tool for responding to behavior that has potentially-serious health consequences for children.

254.88 *Various violations relating to food and lodging protections*
The authority to fine should be retained because it gives the department the ability to work with a cooperative DA who can use enforcement tools locally that are unavailable to the department. We had a case some years ago involving a restaurant in northwestern Wisconsin that refused to comply with safety orders and continued to operate without a permit required under s. 254.64. A violation of s. 254.64 is subject to a fine under s. 254.88, and the DA was willing to bring an action, and then agreed to bond on condition that the operator discontinue operation without a license. We were in no position to enforce our cease and desist orders in northwestern Wisconsin. I am aware of one other case where a DA in the Green Bay brought criminal charges against an individual for operating a restaurant without a permit. I believe the DA

ultimately withdrew the criminal charges, but the criminal charges provided the authority to enforce the public health requirement.

Department concurs with the Committee on changes to the following:

254.47 (3) *Violations related to recreational sanitation permits and fees*

The same statute authorizes assessment of a forfeiture of $25/day for violation of a departmental order. Department administrative rules effectively make the forfeiture enforceable by the department, by providing the right to an administrative appeal. Given the difficulty of persuading a local DA to take a case like this, making violation of the rules subject to forfeitures may be a more effective and more efficient sanction. The DA would be in a better position to investigate the facts of a particular occurrence, but a county corporation counsel who works with the local public health department would be similarly situated and could bring a forfeiture action in the local court**.**

254.59 (4) *Refusal to allow a local health officer to enter into and examine a place to ascertain health conditions*

This section would be enforced at the local level. If a corporation counsel could enforce a forfeiture action, there is reason to make this a forfeiture because it may increase the likelihood of prosecution.