



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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April 30, 2013

OAG-03-13

Mr. Tony A. Kordus
Corporation Counsel
Shawano County
311 North Main Street
Shawano, WI 54166

Dear Mr. Kordus:

¶ 1. You have asked for an opinion concerning whether a tribal law enforcement officer who is an active duty deputy sheriff but is not on the county's payroll may serve as a county board supervisor. I conclude that, under Wis. Stat. § 59.10(4), the office of county supervisor is incompatible with the office of active duty deputy sheriff, even if the deputy sheriff is not paid by the county.¹

¶ 2. You advise that a fulltime tribal law enforcement officer employed by the Stockbridge-Munsee Tribe desires to become a county supervisor. The tribal law enforcement officer has been deputized by the Shawano County Sheriff pursuant to a cooperative agreement between the county and the tribe that facilitates joint law enforcement efforts. Under the agreement, the sheriff's department retains the right to supervise and control tribal law enforcement officers in connection with joint law enforcement efforts, except for matters relating to tribal law enforcement and tribal courts. Under the agreement, the sheriff also retains the right to suspend or revoke deputizations of tribal law enforcement officers, using specified procedures. The tribal law enforcement officers are not on the county's payroll and never receive compensation from the county for acting in their capacity as deputy sheriffs.

¶ 3. Wisconsin Stat. § 59.10(4) provides that the office of county supervisor is incompatible with any other county office or position of county employment: "COMPATIBILITY. No county officer or employee is eligible for election or appointment to the office of supervisor . . ." If the tribal law enforcement officer is a "county officer or employee" within the meaning of Wis. Stat. § 59.10(4) while serving as an active duty deputy sheriff, then he is prohibited from becoming a supervisor.

¹This opinion is not intended to address the appointment of honorary deputies who serve in a purely ceremonial capacity. See 68 Op. Att'y Gen. 334, 338-39 (1979); 37 Op. Att'y Gen. 381, 383 (1948).

¶ 4. Wisconsin's constitution and statutes define "county officer" in various ways, depending on the context. *See, e.g., State ex rel. Williams v. Samuelson*, 131 Wis. 499, 111 N.W. 712 (1907) ("county officer" in Wis. Const. art. XIII, § 9 refers only to county officers, or the duties incident thereto, as existed at the time of the adoption of the Wisconsin Constitution); *Barland v. Eau Claire Cnty.*, 216 Wis. 2d 560, 586, 575 N.W.2d 691 (1998) (describing interpretation of "county officer" in predecessor version of Wis. Stat. § 59.22 as "any elective officer whose salary or compensation is paid in whole or in part out of the county treasury"); 66 Op. Att'y Gen. 315, 317 (1977) ("A deputy sheriff is a county officer rather than a county employee.").

¶ 5. In my opinion, "county officer" in Wis. Stat. § 59.10(4) includes deputy sheriffs. The statutory language "[n]o county officer or employee . . ." expresses a legislative purpose to codify the common law rule of incompatibility, which applies both to public offices and positions of public employment. *See Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 396, 347 N.W.2d 614 (Ct. App. 1984). These two broad categories capture, not a limited subgroup of public officials, but all public officials whether they are officers or employees. The distinguishing factor between officers and employees is that an officer exercises some portion of the sovereign power of the state. *Martin v. Smith*, 239 Wis. 314, 332, 1 N.W.2d 163 (1941). Deputy sheriffs, who exercise some portion of the sovereign power of the State, *see* 65 Op. Att'y Gen. 292, 295 (1976), fall under the category of "county officers" in Wis. Stat. § 59.10(4).

¶ 6. The inclusion of deputy sheriffs in Wis. Stat. § 59.10(4) is consistent with the history of legislative changes to that statute. The predecessor statute, Wis. Stat. § 59.03(3) (1963), provided: "No county officer or his deputy, or undersheriff is eligible to the office of supervisor . . ." Interpreting this language, a prior attorney general opinion concluded that the office of county supervisor is incompatible with service as a deputy sheriff. 28 Op. Att'y Gen. 32, 33 (1939).

¶ 7. There is no indication that the Legislature intended to alter or relax this longstanding determination when it enacted the current, much broader statutory language. Chapter 220, sec. 8, Laws of 1965 added the word "employee" to Wis. Stat. § 59.03(3) (1963) and deleted the words or "his deputy, or undersheriff." After the amendment, the statute encompassed two broad categories of county officials prohibited from serving as supervisors: county officers and county employees. Deputy sheriffs, explicitly listed in the prior statute, remained covered by the new Wis. Stat. § 59.10(4) by virtue of their status as county officers.

¶ 8. The prohibition in Wis. Stat. § 59.10(4) includes deputy sheriffs. This is so regardless of whether the county officer or employee receives compensation. The statute is not limited on its face to officers who receive payment for their services. Further, the statute must be read in light of common law incompatibility doctrine. A statute abrogates a rule of common law only if the abrogation is clearly expressed and leaves no doubt of the Legislature's intent. *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, ¶ 25, 244 Wis. 2d 758, 628 N.W.2d 833. Here, where

the Legislature adopted the common law categories of officers and employees in its amendment to Wis. Stat. § 59.10(4), there is no indication that such abrogation was intended.

¶ 9. Under Wisconsin common law, incompatibility exists where the nature and duties of two offices or positions render it improper as a matter of public policy for one person to discharge the duties of both offices or positions. *Otradovec*, 118 Wis. 2d at 396; *State v. Jones*, 130 Wis. 572, 575-76, 110 N.W. 431 (1907). Incompatibility does not depend on compensation. It exists where one office is subordinate to the other or is subject to its supervision or control. *Jones*, 130 Wis. at 575-76. In *Otradovec*, for example, the court held that the office of alderman is incompatible with the position of city appraiser in part because the city council appointed the assessor, who was the appraiser's superior. *Otradovec*, 118 Wis. 2d at 397.

¶ 10. Here, the positions of deputy sheriff and supervisor are incompatible, regardless of compensation, because one office is subordinate to the other or subject to its supervision or control. The county board establishes the compensation of the sheriff and the budget for the sheriff's department. *See* Wis. Stat. §§ 59.02; 59.22(1)(a)2.; 65.90. It is conceivable that, while acting as a county supervisor, the tribal employee might give more favorable budgetary or other treatment to the sheriff's department than he would if he were not a deputy sheriff. Similarly, a sheriff has extensive authority over tribal employees when they are on active duty as deputy sheriffs on joint law enforcement projects. It is possible that a sheriff might give the tribal employee more favorable or desirable assignments than he would receive if he were not a county supervisor. As the 1939 attorney general opinion concluded, construing the predecessor statute to Wis. Stat. § 59.10(4):

[I]f there were no legislative establishment of incompatibility, we do not believe that a mere willingness on the part of a county supervisor to serve as a deputy sheriff without pay removes incompatibility. The sheriff is the superior officer. When the supervisor as a member of the county board passes upon claims or matters relating to the sheriff, it seems to us that he is necessarily placed in the position of trying to serve two masters. Such a situation is one of incompatibility regardless of [the lack of] legislative declaration with respect thereto.

Mr. Tony A. Kordus
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¶ 11. I conclude that the office of county supervisor is incompatible with the office of active duty deputy sheriff, even if the deputy sheriff is not paid by the county.

Sincerely,

A handwritten signature in black ink, appearing to read "J.B. Van Hollen". The signature is fluid and cursive, with a long horizontal stroke at the end.

J.B. VAN HOLLEN
Attorney General

JBVH:FTC:cla