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October 10, 2012

Wisconsin Attorney General
Wisconsin Department of Justice
c/o Attorney Kevin Potter, Administrator
Division of Legal Services
17 W. Main Street
P.O.Box 7857
Madison, WI 53707-7857

OCT 12 2012

Re: Attorney General Opinion
County Board Supervisors – unfunded health, dental and life Insurance

Dear Attorney General and Attorney Potter:

I am the Corporation Counsel for Brown County, Wisconsin. I respectfully request your review of the following issues presented, and give Brown County a legal opinion. These are issues which the County believes need immediate attention as they relate to the budget process, which the County is currently working on for 2013.

- ISSUES:**
1. Whether health, dental and life insurance fringe benefits are considered compensation to be fixed by a two-thirds vote of the members?
 2. If only a simple majority vote is necessary to pass a motion, not a super majority vote of two-thirds, but the county board operates under the assumption that a super majority is required, are the supervisors required to correct the situation and uphold a previous motion which passed by a simple majority vote on the issue?
 3. May the county board at any time draft a resolution to change their health, dental and life insurance benefits?
 4. Whether the county board may set future insurance contributions for future board terms beyond the next elected term?
 5. Whether Brown County supervisors have a right to apply for and have insurance benefits through the county in accordance with the policy set by the county board on November 7, 2011 with the adoption of the motion?

FACTS:

Brown County is requesting a formal opinion from the Attorney General's office in regard to unfunded health, dental and life insurance benefits for county board supervisors. In Brown County, the board has given supervisors the option to participate in the county health, dental and life insurance plan by personally contributing an amount of 25% of the total premium. On November 7, 2011, at the annual budget meeting, the board established the compensation for the supervisors for the following term, and further, handled the insurance benefits for the supervisors in a separate motion. The county board of supervisors, at the time they took up the vote on the insurance issue, were informed by the county board chair that there was a required two-thirds majority vote necessary to pass their motions pursuant to Wis. Stat. 59.10 (3)(i). After numerous motions ranging in percentage contributions from 30% to 100%, the supervisors finally adopted a motion by a two-thirds vote, to set the contribution of the supervisors for insurance benefits increasing the contribution to 50% for 2012 and 55% contribution for 2013. Upon making the final motion, no specific reason was given by the board member when he included a contribution for 2013 in the motion. On November 16, 2011, the county executive partially vetoed the adopted motion eliminating the funding which had been included in the budget in the amount of \$64,638.00, which is the amount earmarked to pay for the insurance benefits of the county board supervisors, effective April 17, 2012. (See veto letter attached). Although the county executive vetoed the funding on the insurance for the supervisors, he specifically left in place the benefit and did not address the 50% contribution for 2012, or the 55% contribution for 2013. The partial veto of the motion was returned to the supervisors, but the veto was not overturn on reconsideration. Thereby, the benefit remains in place, but there is no funding for it. Based on the above facts, the county requests your opinion on various issues.

ANALYSIS:

1. **Whether the health, dental and life insurance fringe benefits are considered compensation to be fixed by a two-thirds vote of the members?**

Answer: Yes.

Brown county supervisors have taken differing positions as to whether or not health, dental and life insurance benefits are compensation which need to be fixed by a two-thirds vote of its members. The issue arises between the statutes dealing with health insurance as opposed to those dealing with compensation for supervisors.

The insurance statutes include **Wis. Stat. § 59.52(11) (c)** which states:

(11) INSURANCE. The board may:

...

(c) *Employee insurance.* Provide for individual or group hospital, surgical and life insurance for county officers and employees and for payment of premiums for county officers and employees...

And **Wis. Stat. §66.0137(5) (b)** which states:

(b) HOSPITAL, ACCIDENT AND LIFE INSURANCE. The state or a local governmental unit may provide for the payment of premiums for hospital, surgical and other health and accident insurance and life insurance for employees and officers and their spouses and dependent children....

Neither of these statutory provisions state that insurance is to be considered compensation or salary, nor do they address when the benefit needs to be set for the supervisor or what type of vote is necessary to pass the benefit.

On the other hand, when looking at the compensation statutes for the supervisors of Brown County, which county is not self-organized, the compensation section governing this county is **Wis. Stat. §59.10 (3) (f)** which states:

(f) *Compensation.* Each supervisor shall be paid a per diem by the county for each day that he or she attends a meeting of the board. Any board may, at its annual meeting, by a two-thirds vote of all the members, fix the compensation of the board members to be next elected....

However, this statute does not clearly explain whether insurance benefits would be included in the compensation to be fixed. In looking at the word “compensation” it can take on a broad meaning to include fringe benefits as was discussed under the Attorney General Opinion **OAG 5-11, December 19, 2011.**

“*Compensation* consists of wages and benefits in return for services. It is payment for work. If the work contracted for is not done, there is no obligation to pay. [Compensation] includes wages, stock option plans, profit-sharing, commissions, bonuses, golden parachutes, vacation, sick pay, medical benefits, disability, leaves of absence, and expense reimbursement.” **Kurt H. Decker & H. Thomas Felix II, Drafting and Revising Employment Contracts §3.17, at 68 (1991). P4.**

By the broad reading of the word “compensation” health, dental and life insurance would be fringe benefits that are considered compensation that may be set at the board’s annual meeting by a two-thirds vote of all the members. This broad reading appears to be consistent with the analysis under the Attorney General Opinion 5-11, December 19, 2011, where “payment of health insurance premium contribution constitutes “compensation,” [however] within the meaning of Wis. Stat. §59.10(1)(c).” **OAG 5-11, at [*3] ¶ 4.**

Furthermore, health, dental and life insurance could be viewed as alternative compensation. Pursuant to **Wis. Stat. §59.10(3)(i)** alternative compensation may be set for the supervisors as well:

(i) Alternative compensation. “[t]he board may at its annual meeting, by a two-thirds vote of the members entitled to a seat, fix the compensation of the supervisors to be next elected at an annual salary for all services for the county...”

Although Wisconsin Statute §59.10(3)(i) appears at first blush to allow alternative compensation, to include health, dental and life benefits, this statutory section limits the term “compensation” to wages or periodic cash payments for services rendered, since, the legislature qualified the term “compensation” to be an “annual salary.” Salary is defined as “money paid regularly (as by the year or month) for work or services.” **MERRIAN-WEBSTER’S SCHOOL DICTIONARY 857 (2010)**. Fringe benefits do not meet this definition, as the benefits are not paid regularly to the supervisor, and therefore, would not be contemplated to be included in the compensation that is fixed annually as alternative compensation.

Since insurance benefits for county officers and employees are addressed specifically under separate statutory sections (**Wis. Stats. §§ 59.52(11) (c) and 66.0137(5)**), these sections will control how these benefits are handled. It is well settled law that specific statutory sections take precedent and will govern over general ones. See State ex rel. Auchinleck v. Town of LaGrange, 200 Wis.2d 585, 595-96, 547 N.W.2d 587 (1996); and In re Lindsey A.F. 257 Wis.2d 650, 653 N.W.2d 116 (Wis.App. 2002) citing to Kapischke v. County of Walworth, 226 Wis.2d 320, 327, 595 N.W.2d 42 (Ct.App.1999).

Although Wis. Stat. § 59.52 (11)(c), and §66.0137(5) are specific to insurance, neither one set a specific time period in which to adopt the insurance benefits for the officers and employees during the year, nor do they address whether a simple majority or a super majority vote is needed to pass the benefit. In viewing these insurance benefits as compensation, they would be subject to appropriations in the budget which would naturally be handled at the annual budget meeting. As an appropriation of the budget, the vote required for appropriations would be controlled by the statutory section dealing with appropriations in the budget. In order to change the insurance appropriations under the budget, which the county board was attempting to do, and succeeded in doing so by going from a 25% contribution to a 50% contribution for 2012 and a 55% contribution in 2013, it requires a two-thirds vote of the county board. “[T]he amounts of the various appropriations and the purposes for such appropriations stated in a budget required under sub. (1) may not be changed unless authorized by a vote of two-thirds of the entire membership of the governing body of the municipality.” **Wis. Stat. 65.90(5)(a) [Municipal Budgets]**.

On the other hand, Wis. Stat. §59.10 (3)(f) allows compensation for the board members next elected to be fixed at the board’s annual meeting by two-thirds vote. Under this statutory section, the compensation in the form of insurance benefits may be fixed at the board’s annual meeting in addition to addressing the issue at the annual budget meeting.

Therefore, health, dental and life insurance are benefits in the form of compensation offered to the supervisors and regulated by specific state statutes. There is no restriction under these state statutes on when these benefits need to be fixed, however, if they are presented during the budget process, as an appropriation, a two-thirds vote of the members of the county board entitled to a seat is needed for adoption. Thereby, whether the insurance benefits are adopted as part of compensation or as an appropriation under the budget, the statutes both require that the board pass any changes to compensation by a two-thirds vote.

2. If only a simple majority vote was necessary to change the insurance benefits of the supervisors, and not the super majority vote of two-thirds which the county board operated under in their voting, are the supervisors required to correct the situation and uphold the previous motion which passed by a simple majority vote on the issue?

Answer: Yes, the Board would be required to correct their actions if not in compliance with some statutory or constitutional requirement. However, in this case a two-thirds vote was required as noted in the above analysis under question number one, therefore no correction is needed.

In a situation where the supervisors took the position that a super majority was necessary on a motion when in reality only a simple majority was necessary, it may be necessary for the Board to go back to correct their actions to adopt the motion that passed by the simple majority if that particular motion is controlled by statute or the Wisconsin Constitution. County boards may not adopt rules requiring a larger vote than is required by the statutes to authorize expenditures, as this would be in conflict with the statutory provisions. **12 Op. Atty. Gen. 24 (1923)**. When the county board passes an appropriation resolution but fails to comply with procedural rules of the board, the action is valid unless the Board failed to comply with some statutory or constitutional requirement. **21 Op. Atty. Gen. 214 (1932)**. In the case where the board made it a larger vote than the statute requires, it would need to rescind their actions that followed the first motion that rightfully passed by a simple majority in order to correct their error.

The county board of supervisors made numerous motions attempting to change the 25% insurance contribution for its members. The board, at the time of the vote was taken, was informed by the county board chair that there was a required two-thirds majority vote necessary to pass pursuant to Wis. Stat. 59.10 (3)(i) (alternative compensation)¹. An issue arose as to the voting procedure after the votes were all taken and after the budget meeting was adjourned. The issue was whether the board was only required to have a simple majority vote in order to pass the change in insurance contribution. The reasoning was that insurance was not salary, but rather a fringe benefit, and this fringe benefit was addressed under Wis. State. §§ 59.52 (11)(c) and 66.0137(5), where the board could provide for insurance benefits for the employees and its county officers. In neither of these statutory provisions dealing with insurance does it require a super majority to make a change to the health, dental and life insurance benefit, so a simple majority vote would have been sufficient.

1. The county board chair mistakenly cited to Wis. Stat. §59.10(3)(i) as the section that required a two-thirds vote, as he was viewing the insurance as alternative compensation. However, it is more appropriate to cite to 65.90 (5)(a) as the controlling statutory section for the requirement of a two-thirds vote when changes are made to appropriations

Although, the board would be required to correct their action if they followed a super majority vote when a simple majority was required by statute or by constitution, based on the above analysis a two-thirds vote was required by statute, which vote the board adhered to, therefore, the board does not need to correct any actions.

3. May the county board at any time draft a resolution to change their health, dental and life insurance benefits?

Answer: Yes, however the adopted benefit must be effective for the next elected board.

The county board of supervisors inquire as to whether or not they can at any time bring back the insurance benefit to a vote, even after the veto of the County Executive and months after the budget meeting to change the health, dental and life insurance benefits for the supervisors. The Attorney General has recognized “[A]s a general rule the county board has continuing power to reconsider its actions and adopt an ordinance or resolution which has previously been defeated.” (OAG 16-85, May 9, 1985, Citing 56 Am. Jur. 2d Municipal Corporations §352). Therefore, it appears that the board may bring back the insurance issue at any time. However, although they can vote on the issue at any time, the effective date of the changes will not take place until the next elected board takes office. Compensation for elected officials shall be set prior to the filing of nomination papers for the elective office. Wis. Stat. § 59.22. Further, Compensation for supervisors may be fixed by the board members at its annual meeting by a two-thirds vote for the board members to be next elected. Wis. Stat. § 59.10 (3)(f). The reasoning behind setting the compensation prior to the next elected board is so there is:

[A] period remote from the time when such officers were to be chosen, in order to prevent the influence of partisan bias or personal feeling on the part of members of the board in fixing the salary. And furthermore, it was probably deemed desirable that candidates for office should know precisely what compensation was attached to the office. Hence the statute provided that the board should fix the amount of annual salary which each county officer should receive at its annual meeting.”

Feavel v. City of Appleton, 234 Wis. 483, 291 N.W. 830, 833 (Wis. 1940).

In this case, there is a specific statute dealing with compensation for county board supervisors, and that statute sets forth when said compensation may be set by the board. The use of the word “may” under Wis. Stat. §59.10 (3)(f) is permissive, and not mandatory. Further, Wis. Stat. §59.22, does not list when compensation must be set, but only that it needs to be prior to the filing of the nomination papers. Therefore, the board is not restricted when it sets the compensation, including insurance benefits as long as the statutory requirements are followed and the effective date of implementation is after the next elected board to prevent any bias on the part of the supervisors.

4. Whether the County Board may set future insurance contributions for future terms beyond the next elected Board?

Answer: Yes, the supervisors may set future insurance contributions, but those changes are always subject to the following Board's discretion.

The county board fixed the health, dental and life insurance contribution for the supervisors for both 2012 (50% contribution) and 2013 (55% contribution). It is unknown if there was any specific reason for including 2013 into the motion. The supervisors were presenting all different kinds of scenarios in their motions in an attempt to get the insurance benefit passed for the supervisors. Pursuant to **Wis. Stat. §59.10 (3)(f)** the legislature specifically directed the county board to fix compensation for the board members to be next elected. Therefore, the county board may set insurance contributions for the next elected future board term, but the statute is silent as to boards beyond the next elected. When looking at how that would affect a future board, when the current board sets a benefit amount two or three years out, it does not appear that it would result in any irreparable harm to the future boards. Especially since any up and coming board would have the ability to change what the past board had put in place for future implementation.

5. Whether the Brown County Supervisors have a right to apply for and have insurance benefits through the county in accordance with the policy set by the county board on November 7, 2011 with the adoption of the motion?

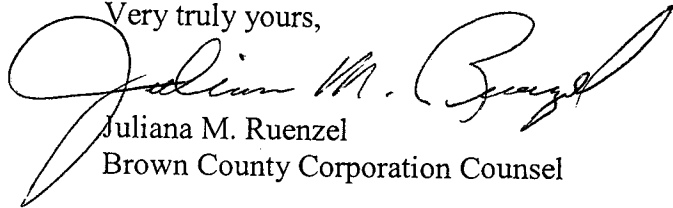
Answer: Yes, but if no funding is allotted for the supervisor's share of the benefit, the supervisor would need to fully self-fund the premium in order to get the benefit.

The county executive vetoed the funding for the insurance for the board of supervisors during the budget process in the amount of \$64,638.00 which is the amount earmarked to pay for the insurance benefits of the county board supervisors, effective April 17, 2012. On November 21, 2011, a motion was made to override the county executive's veto of the insurance funding for the county board supervisors. The statutes require a two-thirds vote of the entire membership of the county board in order to override the veto. **Wis. Stat. § 59.17 (6)**. The motion did not carry. So with the partial executive veto defunding the insurance benefits, but leaving the required benefit contribution in place at 50% for 2012 and 55% for 2013, this resulted in an approved benefit for the supervisors, but no appropriation to fund it. "[A]ppropriations may be approved in whole or in part by the county executive and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for in other resolutions or ordinances." **Wis. Stat. 59.17 (6)**. So the insurance benefit remains in place as that was approved and not vetoed, but in order for the supervisors to now have this benefit they would need to fund the entire amount of the premium contribution, as that portion was vetoed. Therefore, if the supervisor pays the full amount of the insurance benefit, the county is obligated to grant the benefit which

was adopted by the board.

Thank you for your assistance in this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Juliana M. Ruenzel". The signature is fluid and cursive, with a large initial 'J' and 'R'.

Juliana M. Ruenzel
Brown County Corporation Counsel

Enc: Motion on insurance
Veto Letter