



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
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April 9, 2013

OAG-01-13

Ms. Juliana M. Ruenzel
Corporation Counsel
Brown County
Post Office Box 23600
Green Bay, WI 54305-3600

Dear Ms. Ruenzel:

¶ 1. Your predecessor asked for an opinion concerning two questions involving the authority of the Brown County Board of Supervisors ("Brown County Board") to employ a private attorney who acts independently of the county's salaried corporation counsel and his or her staff: (1) whether Wis. Stat. § 59.42(3) authorizes a county board to retain a private attorney to provide legal services in civil matters to the county board and the human resources department in addition to the services provided by the county's salaried corporation counsel and his assistants; and (2) whether the county board has the authority to execute contracts for such services from a private attorney.

¶ 2. I conclude that a county board has the authority to authorize and approve such contracts. The county board must authorize, approve, and establish the parameters for such contracts; contract negotiation, and administration are duties performed by the county executive.

¶ 3. The first question is whether Wis. Stat. § 59.42(3) authorizes the Brown County Board to retain a private attorney to provide civil legal services to the county board and human resources department apart from the services provided by corporation counsel's office.

¶ 4. Brown County, with a population of less than 500,000, has a county executive and a salaried corporation counsel. The county board has at times approved written proposals from a private attorney to furnish legal services in civil matters to the county board and human resources department. Your predecessor did not indicate whether the appointing authority was the county executive or the county board, but corporation counsel did not supervise or review the private attorney's services. Your predecessor advised that the county board maintains that Wis. Stat. § 59.42(3) grants the county board broad general authority to obtain such services.

¶ 5. Wisconsin Stat. § 59.42(3) provides:

CORPORATION COUNSEL; ATTORNEY DESIGNEE. In lieu of employing a corporation counsel under sub. (1) or in addition to employing a corporation counsel under sub. (1) or (2)(a), a board shall designate an attorney to perform the duties of a corporation counsel as the need arises. Two or more counties may jointly designate an attorney to perform the duties of a corporation counsel. If an attorney has been designated to perform the duties of a corporation counsel, that person may exercise any powers and perform any duties of the corporation counsel.

¶ 6. Your predecessor suggested that Wis. Stat. § 59.42(3) is inapplicable to Brown County because he was appointed by the county executive under Wis. Stat. § 59.42(1)(b) rather than by the county board under Wis. Stat. § 59.42(1)(a). Wisconsin Stat. § 59.42(3) applies where corporation counsel is employed under “sub (1) or (2)(a),” language which includes subsection (1)(b).

¶ 7. Your predecessor also asserted that a designated attorney may be retained only if corporation counsel determines there is a need for legal services beyond those provided by the corporation counsel’s office, based on the language in Wis. Stat. § 59.42(3) providing for retention of counsel “as the need arises.”

¶ 8. Wisconsin Stat. § 59.42(3) empowers the county board to retain a designee in addition to hiring a salaried corporation counsel. There is no language in Wis. Stat. § 59.42(3) that accords salaried corporation counsel a role in determining whether a need for such retention exists or whether a designee should be retained. The phrase “as the need arises” requires the county board to assure that the county obtains legal services in civil matters whenever such services are needed. That framework may consist of a salaried corporation counsel and his or her assistants, a private practitioner, or some combination of the two.

¶ 9. Your predecessor pointed to several attorney general opinions that concluded that, under statutory language predating the enactment of Wis. Stat. § 59.42(3), a county board could retain the services of an attorney who acts independently of the county’s salaried corporation counsel only where expressly authorized to do so by statute. *See* 72 Op. Att’y Gen. 114, 116 (1983): “[U]nless otherwise specifically provided by statute, the duty to provide or supervise the provision of legal services in civil matters is vested exclusively in the district attorney or corporation counsel.” *Accord* 70 Op. Att’y Gen. 136, 137-38 (1981) (county department of social services or public welfare may not retain an attorney from its own funds unless the attorney is supervised by the corporation counsel); 65 Op. Att’y Gen. 245, 247-50 (1976) (county board may not retain an attorney to act as police legal advisor to the sheriff’s department unless the attorney is supervised by the corporation counsel). *See also* 73 Op. Att’y Gen. 8, 13-15 (1984). These opinions also stated that “[i]n general, the district attorney or corporation

counsel assumes office *cum onere* and is required to provide all needed legal services.” 72 Op. Att’y Gen. at 117, citing 70 Op. Att’y Gen. at 138.

¶ 10. Those opinions relied on statutory language that has been superseded. 1989 Wisconsin Act 31 reduced or eliminated the duties of district attorneys in numerous county civil matters and prohibited fulltime district attorneys from acting as corporation counsel. Wis. Stat. § 978.06(3). The Legislature required counties with populations of under 500,000 without salaried corporation counsel to designate an attorney to provide the kinds of civil legal services that a salaried corporation counsel provides. Wis. Stat. § 59.457 (1989-90). The Legislature permitted counties to meet this requirement by allowing a county board to retain an attorney designee in addition to employing a salaried corporation counsel. The Legislature left the determination of how to meet a county’s needs for civil legal services to the county board.

¶ 11. Your predecessor’s second question is whether a county board may execute a contract for the services of a private attorney under Wis. Stat. § 59.42(3). Wisconsin Stat. § 59.01 grants a county board the authority 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.” The county board thus may decide to enter into a contract for the services of a private attorney. The county board establishes the parameters of the contract pursuant to its policy-making function. *See* 80 Op. Att’y Gen. 49, 50 (1991),

¶ 12. A county board’s organizational and administrative power is subject to power granted to a county executive or county administrator. Wis. Stat. § 59.51(1). In a county with a county executive, Wis. Stat. § 59.17(2)(a) grants the county executive the authority to “[c]oordinate and direct all administrative and management functions of the county government not otherwise vested by law in other elected officers.” The “elected officers” referred to in Wis. Stat. § 59.17(2)(a) are those enumerated in subchapter IV of Wis. Stat. ch. 59 and do not include county board supervisors.

¶ 13. Selecting or appointing an individual to perform a particular task or function is an organizational or administrative power. *Harbick v. Marinette Cnty.*, 138 Wis. 2d 172, 176-77, 405 N.W.2d 724 (Ct. App. 1987). Thus, within the parameters of a contract articulated by the county board, the county executive negotiates the contract and administers the contract. *See* 80 Op. Att’y Gen. 40, 50 (1991). Just as the county executive’s administrative and management functions include supervision of a salaried corporation counsel, they include supervision of an attorney designee. Other administrative and management functions are also performed by the county executive. It is not possible in this opinion to anticipate or identify what all of those functions might be. *See* 80 Op. Att’y Gen. at 51.

¶ 14. I conclude that, in a county with a population of under 500,000 with a county executive and a salaried corporation counsel, the county board may retain the services of a private attorney to provide legal services in civil matters to the county board and human

Ms. Juliana M. Ruenzel
Page 4

resources department. The county board must authorize, approve, and establish the parameters for such contracts; contract negotiation and administration are duties performed by the county executive.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBVH:FTC:CG:cla



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April 10, 2013

OAG-02-13

Mr. Robin J. Stowe
Corporation Counsel
Langlade County
800 Clermont Street, Rm. 102
Antigo, WI 54409

Dear Mr. Stowe:

¶ 1. You have requested an opinion regarding whether a county has the authority to exchange surplus funds for U.S. gold coins. I conclude that the answer is no. Wisconsin Stat. § 66.0603 provides the authorized list of investments that a county can make with county funds, and the statute does not authorize an investment in U.S. gold coins:

¶ 2. You advise that the Langlade County Finance Committee (“Finance Committee”) is interested in purchasing U.S. gold coins using surplus county funds. The Finance Committee believes that, given current economic conditions, county funds deposited or invested in U.S. currency will lose value. You ask whether a county has the authority to make such a purchase.

¶ 3. Your question implicates principles concerning the powers of a county. “Counties have no inherent power to govern.” *Ecker Bros. v. Calumet Cnty.*, 2009 WI App 112, ¶ 18, 321 Wis. 2d 51, 772 N.W.2d 240 (citation omitted). Instead, “[a] county is a creature of the legislature and as such, it has only those powers that the legislature by statute provided.” *Jackson Cnty. v. State of Wis. Dep’t of Natural Res.*, 2006 WI 96, ¶ 16, 293 Wis. 2d 497, 717 N.W.2d 713 (citing Wis. Const. art. IV, § 22). Accordingly, an analysis of your question begins with the relevant statutes governing county authority.

¶ 4. Wisconsin Stat. § 59.61 governs the management of county funds. The statute provides that counties must pay monies into the county treasury as prescribed by law and must keep an accounting of county funds. *See* Wis. Stat. § 59.61(1)(b), (c). Wisconsin Stat. § 59.61(2) provides that the county board must designate a county depository for county funds, such as a credit union, bank, savings bank, savings and loan association, or trust company.

¶ 5. Wisconsin statutes are specific in directing how county funds must be maintained and invested. Wisconsin Stat. § 59.61(3) establishes how county funds may be maintained. The statute provides that the county board may

invest any funds that come into the county treasurer's hands in excess of the sum the treasurer is authorized by the board to retain for immediate use in the name of the county in the local government pooled-investment fund, in interest-bearing bonds of the United States or of any county or municipality in the state or in any other investment authorized by statute.

Wis. Stat. § 59.61(3). The "other investment[s] authorized by statute" referred to in Wis. Stat. § 59.61(3) are spelled out in Wis. Stat. § 66.0603, which provides a comprehensive list of the investments a county is authorized to make.

¶ 6. The threshold question is whether U.S. gold coins are an "investment" under Wis. Stat. § 59.61(3). "Investment" is not defined in Wis. Stat. § 59.61(3) or 66.0603. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations and internal quotation marks omitted). Referring to a dictionary for a definition is one means of ascertaining a statutory word's plain meaning. *See id.*, ¶¶ 53-55.

¶ 7. Webster's New Collegiate Dictionary defines "invest" as "to commit (money) in order to earn a financial return." WEBSTER'S NEW COLLEGIATE DICTIONARY 603 (1979). Similarly, "investment" is defined as "the outlay of money usu[ally] for income or profit : capital outlay; also : the sum invested or the property purchased[.]" *Id.* Consistently, in *Brownie Oil Co. of Wis. v. Railroad Comm'n of Wis.*, the Wisconsin Supreme Court quoted approvingly from a Minnesota Supreme Court decision that defined "investment": "The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an "investment" as that word is commonly used and understood." 207 Wis. 88, 93-94, 240 N.W. 827 (1932) (quoting *State v. Gopher Tire & Rubber Co.*, 177 N.W. 937 (Minn. 1920)).

¶ 8. As you have described the Finance Committee's position, it appears that the purpose of the proposed exchange is to increase the value of surplus county funds, thereby securing a financial return. Based on the plain meaning of the word "investment," the exchange of surplus county funds for U.S. gold coins would be an investment within the meaning of Wis. Stat. § 59.61(3).

¶ 9. Your question thus turns on whether the investment of surplus county funds in U.S. gold coins is among the investments authorized under Wis. Stat. § 66.0603. The statute provides a list of specific investments in which a county may invest: (1) time deposits of the types specified in Wis. Stat. § 66.0603(1m)(a)1.; (2) bonds of the types specified in Wis. Stat.

Mr. Robin J. Stowe

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§ 66.0603(1m)(a)2., 3., 3m., 3p., 3q., 3s., 3t., 3u., 5.a., and 5.b.; (3) securities of the types specified in Wis. Stat. § 66.0603(1m)(a)2., 3., 4., and 5.a.; and (4) repurchase agreements. Wis. Stat. § 66.0603(1m)(a)5.c. Counties, as “local governments” under Wis. Stat. § 25.50(1)(d), may also invest surplus funds in the local government pooled-investment fund that is administered by the State of Wisconsin Investment Board. Wis. Stat. § 66.0603(1m)(c). Finally, a county may loan money to a public depository under Wis. Stat. § 34.01(5) “if the agreement is secured by bonds or securities issued or guaranteed as to principal and interest by the federal government.” Wis. Stat. § 66.0603(1m)(d). U.S. gold coins are not listed as an authorized investment in Wis. Stat. § 66.0603(1m).

¶ 10. “[A]s a general rule, where the statutes authorize certain specified investments, those investments not enumerated are not permitted.” 77 Op. Att’y Gen. 274, 275 (1988) (citation omitted). Because a county has the authority only to make investments provided for by statute, and no statute authorizes an investment in U.S. gold coins, I conclude that a county is not authorized to exchange surplus funds for U.S. gold coins.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBVH:CPK:tmf



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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).



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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

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¶ 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).

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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.

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.

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Mr. Tony A. Kordus
Page 4

¶ 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 the first letters of the first and last names being capitalized and prominent.

J.B. VAN HOLLEN
Attorney General

JBVH:FTC:cla

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Page 4

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J.B. VAN HOLLEN
Attorney General

JBVH:FTC:cla



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July 30, 2013

OAG-04-13

Mr. Ben Brancel
Secretary
Wisconsin Department of Agriculture, Trade and Consumer Protection
Post Office Box 8911
Madison, WI 53708-8911

Dear Secretary Brancel:

¶ 1. Through a letter from Chief Legal Counsel David V. Meany, you have requested an opinion concerning the lawfulness of certain residential lease provisions under Wisconsin statutes.

BACKGROUND

¶ 2. Some residential rental agreements in Wisconsin contain provisions requiring the tenant to pay the cost of professionally cleaning carpets at the termination of the tenancy. You question whether such provisions impermissibly waive the landlord's statutory obligation to keep rental premises in a reasonable state of repair, thereby rendering such residential rental agreements void.

QUESTIONS PRESENTED AND BRIEF ANSWERS

¶ 3. You first ask, based on current law: does routine carpet cleaning at the end of a tenancy fall within the landlord's duty to keep the premises "in a reasonable state of repair" as prescribed by Wis. Stat. § 704.07(2)?

¶ 4. In my opinion, the answer is no. Landlords' statutory duty to keep premises in a reasonable state of repair does not encompass routine carpet cleaning.

¶ 5. Your second question is: would a provision requiring the tenant to pay for professional carpet cleaning, in the absence of negligence or improper use by the tenant, render a rental agreement void under Wis. Stat. § 704.44(8)?

¶ 6. In my opinion, the answer is no. Because routine carpet cleaning is not a statutorily-imposed obligation of a landlord, assigning this responsibility to a tenant through a contractual provision does not render a rental agreement void.

ANALYSIS

¶ 7. Residential tenancies in Wisconsin are governed by both Chapter 704 of the Wisconsin Statutes, and by Wis. Admin. Code ch. ATCP 134, which was promulgated and is administered by the Department of Agriculture, Trade and Consumer Protection (DATCP).

¶ 8. Wis. Stat. § 704.07 prescribes the respective duties of landlords and tenants. Of relevance here, the statute provides that “[e]xcept for repairs made necessary by the negligence of, or improper use of the premises by, the tenant, the landlord has a duty to . . . [k]eep in a reasonable state of repair portions of the premises over which the landlord maintains control.” Wis. Stat. § 704.07(2)(a)1. Conversely, tenants are responsible for repairing damage caused by “negligence or improper use of the premises by the tenant.” Wis. Stat. § 704.07(3)(a). The statute is silent on the subject of responsibilities that fall outside the scope of “repairs.”

¶ 9. Both the statute and the administrative rule preclude residential leases from shifting the landlord’s statutory obligations onto the tenant. Section 704.07(1) of the statutes provides as follows: “An agreement to waive the requirements of this section in a residential tenancy, including an agreement in a rental agreement, is void.” The administrative code provides that “[n]o rental agreement may . . . [w]aive any statutory or other legal obligation on the part of the landlord to deliver the premises in a fit or habitable condition, or maintain the premises during tenancy.” Wis. Admin. Code § ATCP 134.08(7).

¶ 10. The Legislature, through enactment of 2011 Wisconsin Act 143, has incorporated the DATCP rule language into the statutes. Newly created Wis. Stat. § 704.44(8) provides that a residential rental agreement is void if it “[w]aives any statutory or other legal obligation on the part of the landlord to deliver the premises in a fit or habitable condition or to maintain the premises during the tenant’s tenancy.”

¶ 11. According to your letter, “some residential leases in Wisconsin contain clauses requiring the tenant to pay for the cost of cleaning the carpet upon termination of the tenancy regardless of whether the tenant has damaged the carpet due to willful or negligent use.” The question posed by your letter is whether such clauses are permissible under the statutes cited above.

¶ 12. You indicate that DATCP has taken the position that such carpet cleaning clauses are unlawful, relying on a letter authored by an Assistant Attorney General in 2001. That letter concluded that the carpet cleaning provisions of the type at issue here impermissibly waive a landlord’s statutory obligation to keep the rental unit in a reasonable state of repair, by shifting the landlord’s responsibility to the tenant. According to the letter, such provisions render residential rental agreements void.

¶ 13. You question the validity of this conclusion, and request that the Department of Justice revisit this question.

¶ 14. The dispositive question is whether the routine cleaning of carpet falls within the sphere of obligations statutorily assigned to landlords. If so, the law clearly provides that the obligation may not be reassigned to the tenant. If not, it may be validly assigned to the tenant in a residential rental agreement.

¶ 15. Chapter 704 does not supply a definition of the term “repair,” as it appears in Wis. Stat. § 704.07(2)(a). However, in ordinary usage the term “repair” is distinct from “cleaning.” For example, the Merriam-Webster online dictionary defines “repair” as “to restore by replacing a part or putting together what is torn or broken.” (The Merriam-Webster Dictionary, “repair,” Entry 3 (1)(a), <http://www.merriam-webster.com/dictionary/repair> .) The American Heritage Dictionary similarly defines “repair” as “[t]o restore to sound condition after damage or injury; fix.” (The American Heritage Dictionary 1047 (2nd ed. 1982).) While a carpet that is ripped might be said to need repair, a carpet that is merely dirty and needs cleaning would normally not be considered in need of “repair.”

¶ 16. Further, although the statutes do not define “repair,” the manner in which the term is used in various statutory provisions supports the conclusion that “repair” involves fixing something that is broken or not functioning properly, and does not include simply cleaning something that is dirty. In fact, the section of the statutes at issue, Wis. Stat. § 704.07, itself contains the following language in conjunction with the term “repair” (emphases added): “repairs made necessary by the *negligence* of, or *improper* use of the premises by, the tenant” (Wis. Stat. § 704.07(2)); “[k]eep in a reasonable state of repair *all equipment* under the landlord’s control necessary to supply services that the landlord has expressly or impliedly agreed to furnish to the tenant, such as *heat, water, elevator, or air conditioning*” (Wis. Stat. § 704.07(2)2.); “repair or replace any *plumbing, electrical wiring, machinery, or equipment furnished with the premises and no longer in reasonable working condition*” (Wis. Stat. § 704.07(2)4.). Subsections (3) and (4) similarly use the term repair in connection with portions of the premises that are broken, non-functional or dangerous.

¶ 17. It is apparent from the statutes and accepted usage that the term “repair” does not extend to routine cleaning. Thus cleaning carpets at the end of a tenancy does not fall within the sphere of duties assigned to landlords by Wis. Stat. § 704.07(2). Because carpet cleaning is not a landlord’s legally-prescribed duty, including a provision in a residential rental agreement requiring the tenant to have carpets professionally cleaned does not waive the landlord’s legal obligation.

¶ 18. On this point, I disagree with the 2001 letter discussed above. That letter erroneously assumed that the responsibility of routine carpet cleaning must be statutorily assigned to either the landlord or the tenant, and could not be shifted from the former to the latter by contract. As

Mr. Ben Brancel
Page 4

discussed above, the statute is silent with regard to the imposition of cleaning responsibilities, as distinct from repairs, leaving the parties free to assign responsibilities through lease provisions.

¶ 19. In light of my conclusion that the statutes do not compel landlords to engage in routine carpet cleaning, the presence of a provision requiring tenants to do so does not render such a residential rental agreement void and unenforceable pursuant to Wis. Stat. §§ 704.07(1) or 704.44(8).

¶ 20. Finally, I note that the permissibility of provisions requiring tenants to arrange or pay for carpet cleaning at the termination of their tenancy does not mean that landlords can deduct carpet cleaning charges from the security deposit of a tenant who has failed to comply with such a provision. Under your agency's present rule, ATCP § 134.06(3)(c), landlords are expressly prohibited from withholding security deposits "for normal wear and tear, or for other damages or losses for which the tenant cannot reasonably be held responsible under applicable law." The accompanying note cites carpet cleaning as an example of an impermissible basis for withholding a portion of a security deposit. My conclusion that carpet cleaning provisions are valid does not affect the prohibition against deducting carpet cleaning expenses from a tenant's security deposit as a means of enforcing such provisions.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBVH:JSG:alm



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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August 13, 2013

OAG—05—13

Ms. Juliana M. Ruenzel
Corporation Counsel
Brown County
Post Office Box 23600
Green Bay, WI 54305-3600

Dear Ms. Ruenzel:

¶1. You ask questions concerning insurance benefits for county supervisors in Brown County. You ask whether, in a county that is not self-organized, the provision of health, dental, and life insurance or the payment of insurance premiums for county supervisors is “compensation” within the meaning of Wis. Stat. § 59.10(3), which requires changes to compensation to be made by the county board (1) by two-thirds vote, (2) at the board’s annual meeting, and (3) limited to the supervisory term that begins after the next supervisory election. You next ask whether, if those benefits are not compensation under Wis. Stat. § 59.10(3), the county board must correct its decision to require a two-thirds vote regarding the approval of a package of benefits that included both salary and the payment of health insurance premiums. Finally, you ask for an interpretation of the legal effect of the county board’s actions taken at its November 7, 2011, meeting.

¶2. I conclude that the provision of health, dental, and life insurance and the payment of insurance premiums for county supervisors are not “compensation” under Wis. Stat. § 59.10(3), and thus that the procedural requirements of that statute are inapplicable to motions or proposals to change those benefits. The county board need not correct its decision to require a two-thirds vote regarding the approval of benefits including salary and health insurance premium payments because salary is a form of compensation under Wis. Stat. § 59.10(3). I decline to give an opinion on the effect of the county board’s actions at its November 7, 2011, meeting because that question does not involve the interpretation of state law.

¶3. At the annual meeting of the Brown County Board on November 7, 2011, the board chair advised the board that a two-thirds vote was required on all supervisors’ salary and insurance items. Various motions to change the level of supervisors’ required insurance contributions were voted upon but failed to obtain a majority. One motion in the form of an amendment to a motion to increase supervisors’ salaries did obtain a simple majority: “[A]t the start of the second year of the next term for County Board Supervisors compensation same as

present; mileage same as present and health benefits paid 100% by Supervisors’.” This motion amended a motion “to increase the Supervisors’ salary by \$2,367’.” The motion was treated as not passed. The board ultimately passed two separate motions by a two-thirds vote, one concerning supervisors’ insurance, and one establishing supervisors’ salary for the supervisory term beginning in April 2012.

¶ 4. You first ask whether, in a county that is not self-organized, the provision of health, dental, and life insurance or the payment of insurance premiums for county supervisors is “compensation” within the meaning of Wis. Stat. § 59.10(3), which requires changes to compensation to be made by the county board (1) by two-thirds vote, (2) at the board’s annual meeting, and (3) limited to the term that begins after the next supervisory election. Wisconsin Stat. § 59.52(11)(c) authorizes a county board to “[p]rovide for individual or group hospital, surgical and life insurance for county officers and employees, and for payment of premiums for county officers and employees.” Wis. Stat. § 59.52(11)(c); *see also* Wis. Stat. § 66.0137(5)(b) (“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, their spouses and dependent children[.]”).

¶ 5. In counties with a population of under 500,000 that are not self-organized, Wis. Stat. § 59.10(3)(f) governs the procedure for fixing supervisor compensation: “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.” The question is whether changes to the providing of insurance and payment of insurance premiums are “compensation” within the meaning of Wis. Stat. § 59.10(3). The term “compensation” is not defined, but various subsections of the statute provide that supervisor compensation may be in the form of per diems, salary, or a combination of per diems and salary. Wis. Stat. § 59.10(3)(f), (i), and (j).

¶ 6. In *Cramer v. Eau Claire County*, 2013 WI App 67, the court of appeals held that the term “compensation” in Wis. Stat. § 59.22(1)(a)1., which governs the fixing of compensation for certain county elected officials other than supervisors, does not include fringe benefits. Wisconsin Stat. § 59.22(1)(a)1. describes the types of compensation that may be provided in terms of salary, fees, per diems, or a combination thereof: “[T]he annual compensation may be established by resolution or ordinance, on a basis of straight salary, fees, or part salary and part fees[.]”

¶ 7. The plaintiff in *Cramer* argued that “compensation” in Wis. Stat. § 59.22(1)(a)1. includes fringe benefits, but the court of appeals held that it does not. It concluded that the statute expressly describes only salary and fees, and that compensation had long been treated by the courts as excluding fringe benefits:

As our supreme court has observed, at least as recent as the 1920s, fringe benefits such as employer-paid pension and insurance contributions were

excluded from the definition of “compensation.” *State ex rel. City of Manitowoc v. Police Pension Bd.*, 56 Wis. 2d 602, 611-12a, 203 N.W.2d 74 (1973). The court explained that both salary and compensation historically had the same meaning because “the payment of cash for services rendered was the only form of compensation in general use.” *Id.* at 611. . . .

In summary, we conclude that WIS. STAT. § 59.22(1)(a)1.’s prohibition against increasing or diminishing certain elected county officials’ compensation during the term of office does not preclude adjustments to fringe benefits. Rather, the statute expressly protects only salaries and fees. We agree with Cramer that the statute has laudable purposes, primarily, “preventing the influence of partisan bias or personal feeling [by] members of the [county] board in fixing the salary.” See *Feavel v. City of Appleton*, 234 Wis. 483, 488, 291 N.W. 830 (1940) (quoting *Hull v. Winnebago Cnty.*, 54 Wis. 291, 293, 11 N.W. 486 (1882)). However, “[i]f, in view of modern day employment inducements, fringe benefits such as insurance premiums, pension fund contributions and perhaps others are to be included in the [compensation protection afforded to certain county elected officials], the legislature, as a matter of desirable public policy, can so provide. The court cannot.” See *Police Pension Bd.*, 56 Wis. 2d at 612a.

Cramer, 2013 WI App 67, ¶¶ 20-21.

¶ 8. The court’s reasoning in *Cramer* is equally applicable to the definition of “compensation” in Wis. Stat. § 59.10(3). Like Wis. Stat. § 59.22(1)(a)1., Wis. Stat. § 59.10(3) describes the “compensation” fixed pursuant to that provision as including only salary, per diems, or a combination thereof. The statutory provisions have a similar function: governing the fixing of compensation for particular elected county officials. Particularly given that parallel purpose, Wis. Stat. §§ 59.10(3) and 59.22(1)(a)1. should be construed consistently. It is thus my opinion that the term “compensation” in Wis. Stat. § 59.10(3) does not include the provision of insurance or county payment of insurance premiums.¹

¶ 9. Because the provision of insurance and county contributions toward insurance premiums are not forms of compensation under Wis. Stat. § 59.10(3), the procedural requirements of that statute do not apply to a proposed change to those benefits. A two-thirds

¹In OAG-5-11, ¶ 4 (December 19, 2011), I stated that, in self-organized counties, the provision of health insurance and the payment of health insurance premiums for supervisors are forms of compensation within the meaning of Wis. Stat. § 59.10(1)(c). Following *Cramer*, I conclude that that statement is no longer valid. That statement did not affect the conclusion reached in that opinion: that, in self-organized counties, state law does not prohibit either discontinuation of all health insurance for county supervisors or involuntary increases in health insurance premiums for county supervisors during their terms of office.

vote is not required; the motion or proposal need not be made at the county board's annual meeting; and changes may be made for supervisors beyond those to be next elected.

¶ 10. Your next question is whether the board is required to correct the determination made on the floor of the November 2011 meeting that a two-thirds vote of the board was required in order to effectuate a change in the level of supervisors' contributions toward their health insurance premiums. I conclude that it is not. The motion that failed because it obtained only a simple majority was a combined proposal for salary and insurance contributions. Because proposals affecting salary require a two-thirds vote under Wis. Stat. § 59.10(3)(f), the conclusion that a two-thirds vote was required was correct as to that motion. The board can avoid this issue in the future by voting separately on motions or proposals involving salary and those involving insurance.

¶ 11. Your last question is whether Brown County Supervisors are entitled to insurance through the county at the levels established by the board on November 7, 2011, based on actions taken by the Board:

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 [of] supervisors, effective April 17, 2012. . . . [W]ith 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. . . . [T]he insurance benefit remains in place as that was approved and not vetoed, but in order for the supervisors to now have this benefit [for the first year of the term] they would need to fund the entire amount of the premium contribution, as that portion was vetoed. . . . [I]f the supervisor pays the full amount of the insurance benefit, the county is obligated to grant the benefit which was adopted by the board.

¶ 12. This question does not involve the interpretation of state statutes. Attorney General opinions should not be used as a device to ascertain the meaning and intent of municipal ordinances, resolutions, or motions. 77 Op. Att'y Gen. Preface, No. 3.H. (1988). Such determinations must be made by the corporation counsel after consulting with the county officials involved.

¶ 13. I conclude that, in a county that is not self-organized under Wis. Stat. § 59.10(1), the provision of health, dental, and life insurance and the payment of insurance premiums for county supervisors are not compensation under Wis. Stat. § 59.10(3). The procedural requirements of that statute, including a two-thirds vote, taking action at the board's annual meeting, and limiting changes to the supervisory term beginning after the next supervisory election, do not apply to motions or proposals to change those benefits. Where a motion

Ms. Juliana M. Ruenzel
Page 5

involves both salary and insurance, however, the requirements of Wis. Stat. § 59.10(3) apply because salary is a form of compensation under that statute.

Sincerely,

A handwritten signature in black ink, appearing to read "J.B. Van Hollen". The signature is written in a cursive style with a large, prominent initial "J" and "H".

J.B. VAN HOLLEN
Attorney General

JBVH:FTC:cla



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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August 14, 2013

OAG—06—13

Mr. Mark A. Grady
Acting Corporation Counsel
Milwaukee County
901 North Ninth Street, Suite 303
Milwaukee, WI 53233

Dear Mr. Grady:

¶ 1. Your predecessor asked for an opinion relating to the authority of a county board to (1) limit the lobbying activities of the county executive, (2) require county department heads appointed and supervised by the county executive to report the steps that have been taken in carrying out a directive to the county board, and (3) demote, suspend, or discharge department heads and employees.

¶ 2. I conclude that a county board may require a county executive to clarify that he or she is not representing the position of the county when engaging in lobbying activities on behalf of a position that is not the position adopted by the county. A county board may require county department heads to submit reports to the county board, but it cannot require county department heads appointed and supervised by the county executive to report to the board in a supervisory sense. A county board is not authorized to demote, suspend, or discharge a department head or employee not appointed by the board unless that power is specifically conferred by statute.

¶ 3. The first question is whether a county board is authorized by state law to pass ordinances limiting the lobbying authority of the county executive. This is a question of state statutory, not constitutional, law. When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes. *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006).

¶ 4. The Milwaukee County Board recently created Milwaukee County General Ordinance § 1.25(4)-(5), which reads in pertinent part as follows:

- (4) *Political Activity Prohibited.* The heads of county departments, bureaus, boards and commissions or any other member of their respective departments, bureaus, boards and commissions, in their official capacities, are prohibited from recommending any changes or amendments of the laws of the State of

Wisconsin to the legislature of the State of Wisconsin, or to any committee of the legislature, or to any member of the legislature . . . without first submitting to the county board any changes or amendments of the laws . . . and obtaining the approval of and a directive from said county board. In instances where matters are before the legislature at times when the county board is not in session, or when a meeting of the county board cannot be practicably convened, the directive of the committee on intergovernmental relations shall serve as the policy directive. . . .

- (5) *Other Political Activity.* Nothing in section 4 above, or the remainder of this section shall be construed as preventing any elected official from engaging in lobbying activities as an individual, or in their official capacity, if they make it clear that they are not representing the position of Milwaukee County. Further, no privately funded lobbying activities shall be engaged by any official elected or appointed, on behalf of any policy position that is not the adopted or stated position of Milwaukee County Government.

Section 1.25(4) applies to the heads of county departments, bureaus, boards, and commissions, and any of their members, in their official capacities. The ordinance does not apply to the county executive because he or she is not a county department head or a member of a county board or commission.

¶ 5. Section 1.25(5) clarifies that nothing in § 1.25(4) or in the remainder of § 1.25(5) prevents elected officials from engaging in lobbying activities, either as individuals or in their official capacities, if they make clear that they are not representing the position of the county. The provision also states that “no privately funded lobbying activities shall be engaged by any official elected or appointed, on behalf of any policy position that is not the adopted or stated position of Milwaukee County Government,” but that limitation also is inapplicable if the officials “make it clear that they are not representing the position of Milwaukee County.” Consequently, with respect to the county executive, § 1.25(5) prohibits only privately-funded lobbying activities on behalf of a policy position that is not “the adopted or stated position of Milwaukee County Government,” and then only if the county executive fails to make clear that he or she is not representing the position of the county.

¶ 6. A county board has authority to enact ordinances and resolutions, *see* Wis. Stat. § 59.02(1)-(2), and, except where specifically provided elsewhere by the state constitution or by statute, the county board “is vested with all powers of a local, legislative and administrative character,” *see* Wis. Stat. § 59.03(2)(a). The county board’s general organizational and administrative power is subject to legislative grants of that power to a county executive or to a person supervised by the county executive. Wis. Stat. § 59.51(1).

¶ 7. A county executive is the chief executive officer of the county. Wis. Stat. § 59.17(2). The county executive's primary duty is to "[c]oordinate and direct all administrative and management functions of the county government not otherwise vested by law in other elected officers." Wis. Stat. § 59.17(2)(a). In a county like Milwaukee County, which has an elected county executive, "the role of the county board is primarily policymaking and legislative, and the county executive exercises substantial direct and indirect control over personnel performing administrative and management functions for the various county departments and offices. 68 Op. Att'y Gen. 92, 95 (1979) (quoting 63 Op. Att'y Gen. 220, 227, 228 (1974)).

¶ 8. Lobbying activity on behalf of the county government is a policymaking function, not an administrative or management function. It is thus properly a role of the county board. A county executive has authority to make policy for a county only to the extent that such authority is conferred by statute or by the state constitution. Since the date this opinion was requested, 2013 Wisconsin Act 14 created Wis. Stat. § 59.53(24), which provides:

GOVERNMENT RELATIONS. In any county with a population of 750,000 or more, if the county has an office of intergovernmental relations or a department or subunit of a department that provides lobbying services for the county, that office, department, or subunit shall employ one individual who is responsible for representing the interests of, and reports to, the county executive and one individual who is responsible for representing the interests of, and reports to, the county board.

2013 Wis. Act 41, § 21E. This provision suggests that the Legislature has conferred some authority upon a county executive to lobby on behalf of the county executive's policy preferences, even if those preferences do not reflect the policy choices made by the county board.

¶ 9. Milwaukee County General Ordinance § 1.25(5) does not contravene the new statute. It applies only to privately-funded lobbying activities of the county executive. Such activity is not governed by Wis. Stat. § 59.53(24) because that statute involves publicly-funded lobbying. In my opinion, a county board lawfully may require that, if a county executive engages in privately-funded activities on behalf of a position that is not the position of the county, he or she must make that clear.

¶ 10. Your predecessor next asked whether a county board may require department heads to "report to" the county board. Milwaukee County General Ordinance § 1.25(3) requires county department heads to report both to the county board and to the county executive, "from time to time . . . the steps that have been taken in carrying out any directive[.]" Section 1.25(3) also requires county department heads to submit copies of their final report on the action taken to the county executive or to the appropriate standing committee.

¶ 11. The term “report” is not defined in the ordinance. “Report” has numerous meanings, including: (1) to be supervised by someone or an office; and (2) to make a report of particular facts. The ordinance uses “report” in the second sense. It provides that department heads shall report “the steps that have been taken in carrying out any directive[.]” “Steps” is the direct object of “report” and conveys that the department head shall report specific information, consistent with making a report of particular facts.

¶ 12. A county board lawfully may require county department heads to submit periodic reports as to steps taken in carrying out any directive both to the county board and to the county executive. The requirement is consistent with Wis. Stat. § 59.794(3)(b), which provides that “[a] board may require, as necessary, the attendance of any county employee or officer at a board meeting to provide information and answer questions.” The ordinance does not require county department heads to report to the county board in a supervisory sense, which would usurp the county executive’s administrative and managerial supervision of county department heads under Wis. Stat. § 59.17(2)(b)1. Similarly, requiring copies of final reports of county department heads to be submitted to the county executive or the appropriate standing committee does not usurp the administrative and managerial supervision of the county executive.

¶ 13. Finally, your predecessor asked whether a county board may penalize county department heads and employees through demotion, suspension, or discharge. Milwaukee County General Ordinance § 1.25(6) provides that willful violation of the county code of ordinances is considered a cause for demotion, suspension, or discharge of a county department head or employee. The ordinance does not purport to empower the county board to demote, suspend, or discharge a county department head or employee.

¶ 14. Only county officers appointed by the county board may be removed by the county board. Wis. Stat. § 17.10(2). Except where the statutes provide for the appointment of a department head to be made by a board or commission, or by other elected officers, county department heads are appointed by the county executive. Wis. Stat. § 59.17(2)(b)1. County employees who are not subject to a civil service ordinance may be disciplined only by the appointing authority unless otherwise stated in a statute, ordinance, or contractual provision. Wis. Stat. § 17.10(6). State law would preempt an ordinance that purported to authorize a county board to demote, suspend, or discharge employees that it had not appointed.

¶ 15. I conclude that a county board is authorized by state law to require a county executive to clarify that he or she is not representing the position of the county if he or she engages in privately-funded lobbying activities on behalf of a position that is not the position of the county. A county board may require county department heads to submit reports to the county board, but it cannot require them to report to the county board in a supervisory sense. Finally, a county ordinance that purported to authorize a county board to demote, suspend, or discharge

Mr. Mark A. Grady
Page 5

county department heads and employees not appointed by the county board would be preempted by state law unless that power were specifically conferred by statute.

Sincerely,

A handwritten signature in blue ink, appearing to read "J.B. Van Hollen". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

J.B. VAN HOLLEN
Attorney General

JBVH:DCR:cla



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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December 12, 2013

OAG—07—13

Mr. Mark Grady
Deputy Corporation Counsel
Milwaukee County
901 North 9th Street, Rm. 303
Milwaukee, WI 53233

Dear Mr. Grady:

¶ 1. Former Milwaukee County Corporation Counsel Kimberly Walker asked whether the Milwaukee County Board (“Board”) may require confirmation of the county executive’s or other administrator’s appointments to positions in the unclassified service other than specific positions for which the Legislature has authorized the Board to require confirmation. I conclude that the Board may require confirmation of the county executive’s appointments to any position in the unclassified service that is a department head. The Board may not require confirmation of the executive’s or other administrators’ appointments to positions in the unclassified service that are not department heads.

¶ 2. The Legislature has explicitly authorized the Board to require confirmation of the executive’s appointments to certain specific positions: medical examiner, corporation counsel, and the five positions enumerated in Wis. Stat. § 59.17(2)(bm)1. *See* Wis. Stat. § 59.17(2)(bm)1. (director of parks recreation and culture; director of county department of human services; director of county department of administration; director of personnel of county civil service commission; director of transportation); Wis. Stat. § 59.38(5) (medical examiner); and Wis. Stat. § 59.42(2)(a) (corporation counsel). In addition, the Board controls the management of the house of corrections. *See* Wis. Stat. § 303.17(1). Former corporation counsel did not raise any question concerning the Board’s authority to require confirmation of appointments to those positions.

¶ 3. Section 17.30(2) and (3) of the Milwaukee County ordinance requires that, in addition to those positions, appointments to a number of other positions in the unclassified service must also be confirmed:

Chief information officer, Director of child support enforcement, Airport director, Director of county economic development, Behavioral health administrator, Director department on aging, Zoological gardens director, Director of employee benefits, Director of family care, Fiscal and budget administrator, Deputy director

of child support enforcement (administration); Chief deputy medical examiner, Chief of operations, Deputy Director D[eartment of] P[ublic] W[orks]/transportation, Director of highway engineering and operations, Deputy airport director (operation/maintenance), Chief of recreation services, and Deputy zoological director (administration/finance).

Former corporation counsel asked whether the Board may require confirmation of appointments to these positions.

¶ 4. As to appointments to positions in the unclassified service that are department heads, the Board may require confirmation. Wisconsin Stat. § 59.17(2)(b)1. provides that, in a county with a population of 750,000 or more, the county executive “[a]ppoint[s] and supervise[s] the heads of all departments except where the statutes provide that the appointment shall be made by a board or commission or by other elected officers.” Wisconsin Stat. § 59.17(2)(b)1. also provides that “[a]ny appointment by the county executive under this subdivision requires the confirmation of the county board unless the county board, by ordinance, elects to waive confirmation.” The Board has express statutory authority to require confirmation of all department heads, including department heads that are not specifically mentioned in Wis. Stat. §§ 59.17(2)(bm)1., 59.38(5), and 59.42(2)(a).¹

¶ 5. As to other positions in the unclassified service, there is no such statutory authority. Other than Wis. Stat. §§ 59.17(2)(bm)1., 59.38(5), and 59.42(2)(a), there are no other statutes that expressly authorize the Board to require confirmation of the executive’s appointments to positions that are not department heads. Absent that authority, the Board may not require confirmation of the executive’s appointments.

¶ 6. Wisconsin Stat. § 59.51(1) grants county boards “the authority to exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive . . . or to a person supervised by a county executive . . . or any enactment which is of statewide concern and which uniformly affects every county.” The Legislature has chosen to grant broad administrative and managerial powers to county executives. Wisconsin Stat. § 59.17(2)(a) provides that the county executive “[c]oordinate[s] and direct[s] all administrative and

¹Although appointments of department heads under what is now Wis. Stat. § 59.17(2)(b)1. originally were not subject to county board confirmation, the Legislature authorized a confirmation requirement in 1985 Wisconsin Act 29, § 1156. See Wis. Stat. § 59.031(2r) (1985-86).

management functions of the county government not otherwise vested by law in other elected officers.”²

¶ 7. Among the county executive’s administrative functions is the selection or appointment of an individual to a position. Selecting or appointing an individual to perform a particular task or function is an organizational or administrative power. *Harbick v. Marinette Cnty.*, 138 Wis. 2d 172, 176-77, 405 N.W.2d 724 (Ct. App. 1987); OAG-01-13, ¶ 13. A requirement that the executive’s appointment be confirmed gives the county board the ability to negate the administrative power to appoint. Because Wis. Stat. § 59.17(2)(a) vests administrative and management functions in the county executive to the exclusion of the county board, county boards can require confirmation of the county executive’s appointments only if authorized by the Legislature to do so. No statute authorizes the Board to require confirmation of the executive’s appointments to any position in the unclassified service listed in § 17.30(2) and (3) of the Milwaukee County ordinance unless the position is a department head.

¶ 8. Former corporation counsel also questioned whether the Board can require confirmation of appointments by department heads or other administrators to subordinate positions in the unclassified service listed in § 17.30(2) and (3) of the Milwaukee County ordinance. No statute expressly authorizes the Board to require confirmation of such appointments. The Board may not require confirmation if the power to make appointments to those positions is an “organizational or administrative power [statutorily granted] to a county executive . . . or to a person supervised by a county executive[.]” Wis. Stat. § 59.51(1).

¶ 9. Among the county executive’s organizational or administrative powers is the duty to “administer, supervise, and direct all county departments[.]” Wis. Stat. § 59.17(2)(b)1. This broad language grants the county executive the authority to direct department heads and administrators to make appointments of specific, eligible persons to subordinate positions in the unclassified service, or to make such appointments directly if the executive chooses to do so. The Board cannot require confirmation of appointments by department heads or other administrators to subordinate positions in the unclassified service because a confirmation requirement would negate the county executive’s authority.

²The “elected officers” referred to in Wis. Stat. § 59.17(2)(a) are those enumerated in subchapter IV of Wis. Stat. ch. 59 and do not include county board supervisors.” OAG-01-13, ¶ 12 (April 9, 2013). The phrase “elected officers” in Wis. Stat. § 59.17(2)(b)1., which is applicable to Milwaukee County, similarly does not include county board supervisors.

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¶ 10. I therefore conclude that the Board may require confirmation of the county executive's appointments to any position that is a department head, but it cannot require confirmation of appointments by the executive or by other administrators to other positions in the unclassified service except in cases where the Board is authorized by statute to require confirmation.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBVH:FTC:cla