

In *Jackson v. Weinberger* E.D. N.Y. February 9, 1976, the plaintiffs challenged federal and state regulations permitting recoupment of AFDC payments by deduction of sums from future payments when the overpayment is caused by the willful withholding of information by the recipient. The plaintiffs argued that the regulations conflict with the "income and resources" rule found in 42 U.S.C. sec. 602 (a) (7) which requires a state to take the income and resources of an applicant for AFDC into consideration in determining need. The court concluded that the plaintiffs' challenge was substantial but that they did not show probable success on the merits sufficient to support a preliminary injunction.

In summary, existing case law appears to require that the state specify a uniform statewide policy on recoupment and provide for recoupment only when the recipient has income or resources actually available exclusive of the current grant. If the overpayments were caused by the recipient's willful withholding of information concerning circumstances affecting the amount of payment, the state may be able to recoup without showing that the recipient has income or resources exclusive of the current grant which are available in fact.

There is a split of authority on the question of whether there must be specific statutory authority for recoupment of AFDC overpayments. *Ogdon v. Workmen's Comp. A.B., San Bernardino Cty. W.D.* (Calif. S.Ct. 1974), 113 Cal. Rptr. 206, 11 Cal. 3d 192, 520 P. 2d 1022, concluded that in the absence of a statute, no liability rests upon the recipient of public assistance to reimburse the state or county for aid legitimately obtained and granted. The court based its conclusion on the fact that at common law, in the absence of fraud in procuring relief, a recipient of charity was under no obligation to repay such charity.

In *Webb v. Swoap* (Calif. Ct. of Appeals 1974), 114 Cal. Rptr. 897, 40 Cal. App. 3d 191, the court observed that, absent a statute authorizing recoupment of aid paid pending appeal, a departmental regulation calling for such recoupment exceeded the department's statutory powers. The court found that none of the general provisions of the statute (such as authority to adopt regulations consistent with law and necessary for administration of aid, or to implement, interpret or make specific the statutes) authorized the recoupment regulation. The court also noted that the regulations

could not be bottomed upon conformity to federal law because the federal regulation on recoupment was permissive and not mandatory.

The court in *Redding, supra*, on the other hand, found that the power to seek recoupment of benefits illegally paid is inherent in the delegation of authority to administer the program. The court held that under the New Jersey statutes and regulations a welfare board has the right and power to bring a civil action to recover overpayments in AFDC assistance except where the overpayment was the result of administrative error.

In requesting my opinion on recoupment of overpayments, you noted that secs. 46.22 (4) (a) and 49.51 (2) (a) (7) provide for administration of the AFDC program by county welfare agencies. Since there is no express provision for recoupment in the statutes, such authority, if it exists, must be implied by secs. 46.22 (4) (a) and 49.51 (2) (a) (7). Unfortunately, there are no court decisions interpreting these sections from which implied authority might be derived. Further, as noted above, there is a split in authority in other jurisdictions as to whether a specific statutory provision is necessary for recoupment of AFDC overpayments. In these circumstances, I must conclude that serious questions remain as to whether a specific statute authorizing recoupment of AFDC payments improperly paid is necessary before rules can be promulgated. Therefore, I suggest that you seek such statutory authorization from the legislature.

BCL:WLJ

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*Ballots; Secrecy; Elections; Votes And Voting; Governmental Operations, Board Of; Public Officials; Alderman; Cities; A city Common Council may not vote to fill a vacancy on the Common Council by a secret ballot. Sec. 19.88 (1), Stats. OAG 46-76*

July 30, 1976.

JAN MEERDINK, *Aldерwoman*  
*Menasha, Wisconsin*

You advise that a vacancy in the Common Council of the City of Menasha is about to occur as a result of an announced resignation and that the Common Council will fill that vacancy pursuant to the provisions of sec. 17.23 (1), Stats., which provides in pertinent part:

"Vacancies in offices of cities operating under the general law or special charter shall be filled as follows:

"(a) ... In the office of alderman ... in cities of 2nd, 3rd and 4th class, by the common council ...."

Pursuant to sec. 19.98, Stats., authorizing "any person to request advice from the attorney general" on subch. IV of ch. 19, Stats., Wisconsin's Open Meetings of Governmental Bodies Law, you request my opinion on whether the Common Council may vote by secret ballot to fill the vacancy pursuant to the provisions of above-quoted sec. 17.23 (1), Stats.

The pertinent statutory provision, sec. 19.88 (1), Stats., provides as follows:

"Unless otherwise specifically provided by statute, no secret ballot may be utilized to determine any election or other decision of a governmental body except the election of the officers of such body in any meeting."

It is my opinion that the Common Council may not vote by secret ballot to fill the vacancy in the Common Council of the City of Menasha.

I construe the phrase in sec. 19.88 (1) "officers of such body" to mean the leadership positions or officially designated positions of the body as contrasted with members of the body. Members of the Common Council are, for many purposes, considered officers of the city. But this does not make such council members officers of such body.

RCL:WHW

*County Clerk; County Treasurer; Accountants; Bookkeeping; Auditor; Public Officials; Administrative Procedure;* County board can only grant powers of indirect supervision to finance director with respect to accounting or bookkeeping duties of county clerk required by statute or board resolution to be performed by such officer. OAG 48-76

August 3, 1976.

VICTOR MOYER, *Corporation Counsel*  
Rock County

You advise that Rock County has an administrator appointed under sec. 59.033, Stats., and a finance director. The latter

position was formerly that of auditor appointed under sec. 59.72, Stats., and was redesignated and given additional duties under the provisions of sec. 59.025 (3), Stats.

You state that on June 12, 1975, the Rock County board passed a resolution which provides:

(1) " ... all accounting functions of the County Clerk's and County Treasurer's offices and all data processing activities, be conducted under the line authority of the finance director .... " and

(2) " ... the Finance Director shall have authority of direct control over accounting policies in all county departments or offices. No accounting procedure policy changes shall be made by any department or office of the county without the prior authorization and approval of the County Finance Director .... " and

(3) " ... Finance Director shall be consulted in process of evaluation of vacant accounting and bookkeeping positions for skill levels required, and should participate in evaluation of applicants."

You indicate that the county clerk does not raise a question "regarding the authority of the board to avail itself of the Finance Director's advice in setting skill levels and selecting employes for accounting and bookkeeping positions. However, the County Clerk contends that the board lacks authority to delegate the keeping of books of account to a finance director or to give such an employe the authority to direct other employes in the keeping of such books of account. He concludes that such board action does violence to the 'immemorial and important' duties of his office."

You inquire whether supervision over the county's books of account can be delegated by the county board to an officer denominated "finance director."

I am of the opinion that it can, providing that such supervision is directed through the county clerk in a manner which will not result in a transfer of statutory powers from the county clerk or substantially interfere with that officer's ability to carry out such duties.