

which is the same or similar to that prohibited by chs. 941-947, Stats. The provisions of sec. 66.051(1) and (2), Stats., would empower a town board to prohibit conduct substantially similar to that prohibited by ch. 945, Stats. Section 66.051(3), Stats., authorizes prohibition of conduct the same or similar to that prohibited by sec. 947.01, Stats. A search of ch. 60 and other statutes relating to towns would have to be made to determine whether a town board has power to prohibit conduct the same or similar to that prohibited by chs. 941, 942, 943, 944, 946, and secs. 947.02-947.15, Stats.

The problem is not one which is within the direct duties of a district attorney; however, after you have done further research, you may submit further questions on a specific problem area and I will attempt to be of assistance to you. Please refer to 62 OAG Preface (1973) relative to the requirements to be observed by district attorneys requesting an opinion from this office.

BCL:RJV

Anti-Secrecy; Ballots; Collective Bargaining; Elections; Open Meeting; Public Officials; Regents, Board Of; Salaries And Wages; State University System; University; Votes And Voting; University subunit may discuss promotions not relating to tenure, merit increases and property purchase recommendations in closed session. OAG 17-77

February 23, 1977.

NEWTOL PRESS, *President*

Wisconsin Conference

American Association of University Professors

Pursuant to sec. 19.98, Stats., you request my advice with respect to applicability of provisions of the open meeting law to meetings of departments or formally constituted subunits of the University of Wisconsin system.

This opinion assumes that some governmental body within the meaning of sec. 19.82(1), Stats., is involved in each of the questions you pose. It is my opinion that departments or formally constituted subunits of the University of Wisconsin system or campus are

governmental bodies within the meaning of sec. 19.82(1), Stats., as created by ch. 426, Laws of 1975, and are subject to the open meeting law although they are exempt from giving the notice required by sec. 19.84(1) to (4), Stats. However, they must give the notice required by sec. 19.84(5), Stats., the public notice required by sec. 19.85(1), Stats., and the individual notice required by sec. 19.85(1)(b), Stats., where applicable.

“(1) Are considerations of recommendations of promotions *not* related to tenure covered under exemptions?”

The answer is yes. Section 19.85(1)(b), Stats., permits a closed session where grant or denial of tenure for a university faculty member is involved and requires actual notice to the person under consideration before any evidentiary hearing is held or before final action on grant or denial. Grant of tenure may be considered a promotion for certain purposes. However, sec. 19.85(1)(c), Stats., would apply to promotions not involving a grant or denial of tenure and provides:

“(c) *Considering* employment, *promotion*, compensation or performance evaluation data *of any public employe over which the governmental body has jurisdiction* or exercises responsibility.” (Emphasis added.)

“(2) Are considerations of merit salary increase recommendations covered under exemptions?”

A closed meeting could be held for such purpose under sec. 19.85(1)(c), Stats., since consideration of merit salary increase recommendations is clearly the consideration of “compensation ... of ... [a] public employe.”

“(3) Are meetings of Departmental Committees that consider the purchasing of capital equipment, or plans for building remodeling or construction, covered under exemptions?”

If the committee is formally constituted, the exemption in sec. 19.85(1)(e), Stats., would apply to purchases the committee has power to recommend or delegated power to consummate. Whether the exemption would apply to plans for remodeling or construction would depend on existence of competitive or bargaining reasons

which require a closed session. Section 19.85(1)(e), Stats., allows the convening of a closed session for the purpose of:

“(e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.”

“(4) Is the law applicable to votes to recommend where the power of the committee is so limited and the final power is vested in administrators or the Board of Regents?”

The answer is yes, subject to the qualifications discussed below.

Section 19.83, Stats., provides that:

“... At any meeting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session except as provided in s. 19.85.”

A vote may be taken in closed session if the vote is an integral part of the purpose for which the closed session was properly called. However, final approval of collective bargaining agreements must be taken in open session. Sec. 19.85(3), Stats.

“(5) In each of the items above, must the vote of each participant be ‘ascertained and recorded?’”

The answer is no, except as noted below.

The vote of each member must be ascertained, recorded and record preserved where a governmental body votes to convene in closed session. Section 19.85(1), Stats., provides in part:

“(1) Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes”

Where a statute does not require voting in a form that the vote of each member can be ascertained and recorded, or where no member demands the vote be taken in that manner, voting may be *viva voce* or by hand. Section 19.88, Stats., provides:

“**Ballots, votes and records.** (1) 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.

“(2) Except as provided in sub. (1) in the case of officers, any member of a governmental body may require that a vote be taken at any meeting in such manner that the vote of each member is ascertained and recorded.

“(3) The motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection to the extent prescribed in s. 19.21.”

“(6) Some offices that are filled by appointment require (or are traditionally preceded by) an advisory ballot. Must advisory ballots be recorded?”

Under sec. 19.88(1), Stats., most secret advisory ballots are prohibited unless some statute permits them. Depending on the context, an advisory ballot may or may not be a *decision* of a governmental body. I am informed that institutions within the University of Wisconsin System have faculty rules that provide for advisory votes on appointive offices such as department chairperson. The vote may or may not be taken at a meeting. This advisory vote is transmitted directly to the dean. Where an advisory vote is required or permitted and the voters happen to be a group which also constitutes a governmental body and the body itself does not make the appointment or take further action the advisory vote can be taken by secret ballot because the action is neither an election (the ballot being advisory) or a decision (the ballot being a tally of individual preferences and not a departmental recommendation).¹

However, there may be circumstances where an advisory ballot is called for as a recommendation from the governmental body. In such cases I am of the opinion that a paper ballot may be used if it utilizes the name or other identifying mark of the member casting the same. If used, such ballots must be made of record and preserved. If an

¹ Such a result is consistent with the intent of the law in appointments cases such as departmental chairman. If the department elected the chairman, that vote could be taken by secret ballot under sec. 19.88(1), Stats., which provides an exception for “the election of the officers of such body in any meeting.”

advisory vote is by roll call, it must be recorded. See secs. 16.80(2)(a), 19.21(1), (2), 19.88(3), Stats.

Section 19.88(3), Stats., provides:

“(3) The motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection to the extent prescribed in s. 19.21.”

BCL:RJV

Circuit Court; Clerk Of Courts; Counties; County Court; County Judge; County Clerk; Courts; Judges; Justice Court And Justice Of Peace; Municipal Court; Municipalities; Traffic; In traffic regulation cases, sec. 345.315, Stats., controls over sec. 300.05, Stats., insofar as request for substitution of a justice is concerned but not over sec. 300.055, Stats., which grants defendant right to secure transfer to county court upon request, accompanied by \$1 fee, at any time prior to trial. OAG 18-77

February 25, 1977.

WILLIAM F. BOCK, *Corporation Counsel*
Racine County

Your predecessor requested my opinion of the applicability of secs. 300.05, 300.055 and 345.315, Stats., with regard to the transfer of traffic cases from municipal court to the county court. He asked whether sec. 345.315(4), Stats., controls all requests by defendants for transfers of traffic matters from municipal court to county court. In my opinion, it supersedes the provisions of sec. 300.05, Stats., but not of sec. 300.055, Stats.

Section 300.05, Stats., provides:

“(1) Any party may file an affidavit stating that he believes that he cannot have a fair trial because of the prejudice of the justice, naming him. The affidavit shall be filed not later than 7 days after the return day of the process. Upon filing the affidavit, the filing party shall forthwith mail a copy to each party in the action.

“(2) Upon receipt of the affidavit, accompanied by a fee of \$4, the justice shall call in another justice of the county where the offense occurred or transfer the case to the county court of the county where the offense occurred. A justice so called in shall receive compensation as the governing body determines, to be paid by the municipality.

“(3) If the case is transferred to county court, the justice shall transmit to the clerk of the county court all the papers in the action and \$3 as payment of the clerk’s fee and suit tax. The action shall proceed as if it had been commenced in the county court.

“(4) No party is entitled to file more than one affidavit of prejudice in any one action.”

Section 300.055, Stats., provides:

“In counties having a population of less than 500,000, the defendant in municipal court may, at any time prior to trial, transfer the cause to the county court of said county. Upon receipt of such a request, accompanied by a fee of \$1, the justice shall forthwith transmit all the papers in the cause to the clerk of said court.”

Section 345.315, Stats., as amended by ch. 218, Laws of 1973, provides:

“(1) In traffic regulation cases a person charged with a violation may file a written request for a substitution of a new judge or justice for the judge or justice assigned to the trial of that case. The written request shall be filed not later than 7 days after the return date of the citation. Upon filing the written request, the alleged violator shall forthwith serve a copy thereof on each party to the action.

“(2) Not more than one judge or justice can be disqualified in any action. All defendants must join in any request to substitute a judge or justice.

“(3) In a court of record in counties having 3 or more county judges the clerk shall reassign any case transferred by virtue of the substitution of a judge as provided herein. The county board of judges shall make rules for such assignment. All other cases shall be assigned as provided in s. 251.182.