

State of Wisconsin\Government Accountability Board

Ethics & Accountability Division
44 East Mifflin, Ste. 601
Madison, WI 53703
Phone (608) 266-8123
Fax (608) 264-9319
E-mail: ethics@ethics.state.wi.us



KEVIN J. KENNEDY
Legal Counsel

17 W Main St Suite 310

53703

January 11, 2008

Attorney General J. B. Van Hollen
Wisconsin Department of Justice
State Capitol, Room 114 East
Madison, WI BY HAND

Dear Attorney General Van Hollen:

I write on behalf of the State of Wisconsin Government Accountability Board ("GAB") to ask your opinion whether two Board members are eligible to continue to serve on the GAB. Specifically, the question is whether Article 7, §10 (1) of the Wisconsin Constitution or §757.02 (2), *Wisconsin Statutes*, bar Judge David Deininger or Judge James Mohr from serving as members of the GAB.

The GAB was created by 2007 Wis Act 1. The Board is composed of 6 members. Section 15.60 (3), *Wisconsin Statutes*, provides:

Each member of the board shall be an individual who formerly served as a judge of a court of record in this state and who was elected to the position in which he or she served.

Two GAB members – Judge Deininger and Judge Mohr – resigned their judicial offices mid-term. Judge Deininger's term of office would have expired July 31, 2009 and Judge Mohr's term of office would have expired July 31, 2008.

Article 7, §10 (1) of the Wisconsin Constitution provides, in pertinent part:

No justice of the supreme court or judge of any court of record shall hold any other office of public trust, except a judicial office, during the term for which elected.

Similarly, §757.02 (2), *Wisconsin Statutes*, provides:

The judge of any court of record in this state shall be ineligible to hold any office of public trust, except a judicial office, during the term for which he or she was elected or appointed.

In *Wagner v. Milwaukee County Election Commission*, 263 Wis.2d 709 (2003), the Wisconsin Supreme Court made clear that the constitutional and statutory provisions at issue prohibit a judge from holding a nonjudicial office of public trust during the full period of time for which he or she was originally elected, regardless whether a judge resigns his or her judgeship. The Court did not address the meaning of "office of public trust" or "judicial office" in its opinion.

I am seeking your advice because the matter does not seem entirely free from doubt. Pursuant to your instructions for requesting an opinion (in 77 Op. Att’y Gen. Preface (1988)), my tentative conclusion is that the provisions in question do not bar Judge Deininger or Judge Mohr from serving.

The long-standing practice of the Legislature to create statutory agencies that require judges to be members of an agency’s governing body and the Supreme Court’s acquiescence in the practice by appointing judges to be members of state agency governing bodies suggests that neither the Legislature nor the Court has ever understood the constitutional provision or statute to act as a bar in such circumstance. In this respect, membership on the GAB appears no different than judges’ membership on the Judicial Commission, the Sentencing Commission, the Council on Uniformity of Traffic Citations and Complaints, and the Attorney General’s Crime Victims Council. Like the GAB, the statutes creating these state agencies require that one or more judges serve on those bodies.¹

Art. 7, §10 (1) and §757.02 (2) appear to apply only to elective offices

The constitutional history of Art. 7, §10 (1), as so ably laid out by the Court in *Wagner v. Milwaukee County Election Commission*, 263 Wis.2d 709, *supra*, establishes that the intent of the provision was to bar judges from seeking elective office during their judicial terms.

Article VII, Section 10 was instituted as part of the original constitution adopted by Wisconsin citizens in 1848. At the time of its adoption, Section 10 stated:

Each of the judges of the supreme and circuit courts shall receive a salary, payable quarterly, of not less than one thousand five hundred dollars annually; they shall receive no fees of office or other compensation than their salaries; they shall hold no office of public trust, except a judicial office, during the term for which they are respectively elected, and all votes for either of them for any office except a judicial office, given by the legislature or the people, shall be void. . . .

Wis. Const. art. VII, § 10 (1848) (emphasis added).²

During the second constitutional convention, on December 24, 1847, the Committee on the Judiciary reported to the convention a prior version of Article VII, Section 10, stating, in relevant part:

¹ The GAB differs from these other bodies in that the statutes specify that former, rather than sitting, judges shall serve. In addition, the appointing authority for these agencies varies – in some cases the Chief Justice makes the appointment, in other cases the appointment is made by an executive branch official.

² At the time of adoption of the Wisconsin Constitution, the Legislature elected United States Senators. It was not until the adoption of the 17th Amendment to the United States Constitution in 1913 that the election of Senators was placed in the hands of the people.

They shall hold no other office of public trust, and all votes for either of them for any office, except that of judge of the supreme or circuit court, given by the legislature or the people shall be void.

Tenney, Journal of the Convention to Form a Constitution (1848) at 67 (emphasis added). One amendment in the formulation of this article had the following explanation:

Mr. KILBOURN moved so to amend that the disqualification of a judge from being elected to any other office, should not apply to a judicial office. His object was to leave the restriction so that a judge of the district court might be elected a judge of the supreme court.

The amendment was adopted.

Id. at 422 (emphasis added).

That the impetus for the amendment was the fear that judges might use judicial office as a stepping-stone to other elective offices is made clear from the history of the debates over the proposed constitution as laid out by the Court in *Wagner, supra*, at pp. 762-765. The concern was on judges deciding cases with a view toward political advancement by the electorate. *Id.*

It was only in 1977, in the constitutional amendment reorganizing the judicial system in Wisconsin, that the reference to the voiding of votes was removed. There is no evidence of any intent to effect a substantive change in the provision. The Legislative Reference Bureau, in analyzing this change to Article 7, §10 by 1977 Senate joint resolution 9, simply stated:

Deleted are existing provisions which now guarantee judges an annual salary of not less than \$1,500, which now require justices and judges to be at least 25 years old, and which declare void any votes cast for the holder of a judicial office who, during his term of office, seeks election to a nonjudicial office.

(Emphasis added).³

Similarly, the statutory history of §757.02 (2), *Wisconsin Statutes*, leads to the same conclusion that the intent is to prohibit a judge from seeking or holding a nonjudicial elective office. As the Court stated in *Wagner, supra*, at pp. 766-768:

Wisconsin Stat. ch. 115, § 2523-22 (1913) provided:

No judge of any court of record in this state, except judges of county courts, shall be eligible to or hold any office of public trust, except a judicial office, during the term for which

³ See also the Attorney General's Explanatory Statement which described the effect of the proposal only as "an amendment" of the prohibition.

he is elected, and all votes cast for any such judge for any office, except a judicial office, shall be void.

This statutory language appears to simply codify the constitutional provision and provides no real guidance regarding correct interpretation. However, it is of note that the drafters of this statute carried over the language of the constitution and left intact the prohibition of holding any office of public trust "during the term for which elected."

See *id.*

* * *

In 1919, the statute, renumbered as Wis. Stat. § 2564m(2), was amended to read:

The judge of any court of record in this state shall be ineligible to hold any office of public trust, except a judicial office, during the term for which he was elected, and all votes cast for any such judge for any office, except a judicial office, shall be void.

* * *

By 1961, the clause stating the votes would be void was eliminated. See § 113, ch. 495, Laws of 1961. This might help explain the elimination of the same language in the 1977 constitutional amendment to Article VII, Section 10.

Thus, it appears that both Art. 7, §10 (1) and §757.02 (2), *Wisconsin Statutes*, are intended to bar judges from serving in a nonjudicial elective office during their judicial terms.⁴

Membership on the Government Accountability Board appears to be a "judicial office"

Neither Article 7, §10 (1) of the Wisconsin Constitution nor §757.02 (2), *Wisconsin Statutes*, applies to a judge seeking or holding another "judicial office." Thus, even if these provisions apply to appointed offices, it appears that membership on the GAB is a judicial office as that term has been understood.

The longstanding, continual practice of the Supreme Court and the Legislature establishes that "judicial office" does not mean simply being a judge. The following executive branch agencies, created by statute, all require one or more judges as members:

- Wisconsin Judicial Commission (§757.83, *Wisconsin Statutes*) – (one circuit court judge and one court of appeals judge);
- Wisconsin Sentencing Commission (§15.105 (27), *Wisconsin Statutes*) – (two circuit court judges);
- Council on Uniformity of Traffic Citations and Complaints (§15.467 (4), *Wisconsin Statutes*, -- a member of the Judicial Conference;
- Crime Victims Council (§15.257, *Wisconsin Statutes*) – one representative of the judiciary; and
- Government Accountability Board (§15.60 (3), *Wisconsin Statutes*) -- six former judges.

⁴ The only court case that appears to have addressed the applicability of the constitutional provision to a nonelective office is *In re Appointment of Revisor*, 141 Wis. 592 (1910), in which the Court found that being a trustee of the state library was not an "office."

The important, distinguishing feature of these agencies is that serving, or having served, as a judge is a statutory condition for office – membership is dependent on holding or having held a judgeship. This is not a case of a judge being selected to fill an office for which any citizen is eligible. Moreover, unlike the other commissions and councils on which non-judges also serve, the GAB is composed solely and entirely of individuals who have been judges. It would appear difficult to say that, on the one hand, an agency composed of a majority of lay people, such as the Judicial Commission, is a judicial office while a board whose major qualification is to have been a judge is not a judicial office.⁵

Further, in the case of the Judicial Commission, the Sentencing Commission, and the GAB, the statutes require the active participation of the judiciary in the selection of members. All GAB members must be nominated by a committee consisting entirely of court of appeals judges. §15.60 (2), *Wisconsin Statutes*. Those judges, in turn, are selected by lot by the chief justice. *Id.* This was, in fact, the procedure recently used to select GAB members.

Finally, much of the work of the Government Accountability Board is judicial in character.⁶ The GAB is responsible for administering laws rooted in the very heart of a democratic society – elections laws and laws governing the ethics of state officials, including judges, and the persons trying to influence the election and legislative processes. The GAB is charged with issuing opinions interpreting the laws it administers, hearing and deciding certain challenges in election matters, and investigating and making probable cause determinations concerning alleged violations of law.⁷ The Legislature determined that judges could best oversee and administer these laws. That is why it determined that service as a judge was the primary qualification for office.

Conclusion

For these reasons, I believe that Judge Deininger and Judge Mohr may, consistent with Art. 7, §10 (1), Wis. Const., and §757.02 (2), *Wisconsin Statutes*, continue to serve as members of the Government Accountability Board. The Board would like this issue

⁵ I note that under Supreme Court Rule 60.05 (3) (b), a *sitting* judge may serve in another governmental position only if the agency's concern is the improvement of the law, the legal system, or the administration of justice. This provision does not apply to reserve judges. SCR 60.07 (2).

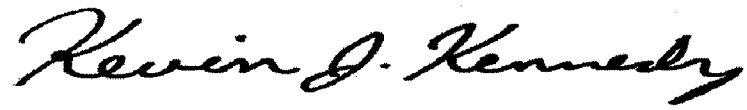
⁶ Cases addressing the issue of separation of powers are instructive because they illustrate duties and activities that the Supreme Court has held are properly delegated to, and performed by, judges. See *In re Appointment of Revisor*, 141 Wis. 592, *supra*, pp. 597-598.

⁷ The Court has held that judges may properly perform both an investigative and charging role conferred by the John Doe statutes. *Wisconsin v. Unnamed Defendant*, 150 Wis.2d 352 (1989); *Wisconsin v. Washington*, 83 Wis.2d 808 (1978).

Attorney General J.B. Van Hollen
January 11, 2008
Page 6

clarified so it can proceed to fulfill its responsibilities. I would appreciate your opinion.

Sincerely,

A handwritten signature in black ink that reads "Kevin J. Kennedy". The signature is written in a cursive, flowing style with a prominent initial "K".

Kevin J. Kennedy
Legal Counsel