



Attorneys At Law

- Joel L. Aberg*
- John Robert Behling
- Tanya M. Bruder
- Mindy K. Dale
- Richard D. Duplessie
- Christine A. Gimber
- Thomas J. Graham, Jr.
- Anders B. Helquist
- Melissa A. Kirschner*
- M. Laurie Klinkhammer*
- Donald R. Marjala
- William S. Milne
- Thomas J. Misfeldt
- G. Scott Nicastro
- Brian M. Nodolf
- Michael F. O'Brien
- Jack A. Postlewaite
- Kathryn J. Prenn
- Thomas B. Rusboldt
- Victoria L. Seltun*
- William J. Spangler
- Ryan J. Steffes
- Daneille M. Strong
- William H. Thedinga
- William G. Thiel
- Jacob P. Torgerson
- Andrea M. Voelker
- James M. Ward
- Paul H. Weinke
- Stephen L. Weld
- William J. Westerfund
- MaiVue K. Xiong

Of Counsel:
Frederick W. (Ted) Fischer
Thomas J. Sazama

Emeritus:
Geo. Michael Carroll
Richard J. Ricci

Stevens L. Riley, 1932-2000

Weld, Riley,
Prenn & Ricci, S.C.

A Wisconsin Limited
Liability Entity

3624 Oakwood Hills Pkwy.
P.O. Box 1030
Eau Claire, WI 54702-1030
715-839-7786
FAX 715-839-8609
Menomonie: 715-235-4216

www.wrpr.com

*Also licensed to practice
in Minnesota

January 21, 2011

J.B. Van Hollen, Attorney General
Department of Justice
PO Box 7857
Madison WI 53707-7857

Re: **Request for Opinion of the Attorney General**

Dear Attorney General Van Hollen:

Please be advised that my services have been retained by Pierce County as a special assistant to the Corporation Counsel, Bradley Lawrence, with respect to Pierce County and its office of County Administrative Coordinator. The office of Administrative Coordinator was created by the County, consistent with §59.19, Wis. Stats., well over a decade and one half ago and has been, from time to time, filled by full-time or part-time personnel. For a period of time, however, the employment "position" has been vacant and to fill this void, both to meet the requirements of §59.19, Wis. Stats., and its own needs for its services, the County Board appointed County Board Chairperson, Paul Barkla, to serve as the interim County Administrative Coordinator. Seemingly consistent with §59.19, Wis. Stats., Mr. Barkla did not vacate his elected office of County Board Supervisor/County Board Chairperson at the time and has served in both the capacity as a County Board Supervisor and Administrative Coordinator at all times since then.

Mr. Barkla recently expressed to the County Board his intent to vacate this position and the County Board and its Personnel/Finance Committee proceeded to ascertain a manner of filling it on either a part-time or full-time basis, the determination to be made in a manner best suited to fulfil the needs of the County for the duties assigned to it. Solicitations of candidates for a full time job ensued, but none of the applicants met the County's perceived needs or financial limitations with respect to filling the office. During this process and in the aftermath of candidate interviews, questions were raised as to whether the County truly required a full time equivalency position to perform the assigned duties of the position.

As a result of this self-examination of needs, it became apparent to members of the County Board that one member of the Board, in particular, demonstrated both the skills, interest, and ability within the County's budgetary limitations to fill the office on a part-time basis. This person did not actively seek out the nomination to serve

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50

J.B. Van Hollen, Attorney General

January 21, 2011

Page 2

as County Administrative Coordinator but, instead, was approached by the Chairperson who asked him of his interest. What was then discussed was the basis upon which this candidate might consider appointment thereto on a part-time basis while continuing to serve as an elected member of the Board of Supervisors, to be paid a salary and fringe benefits for his service as Administrative Coordinator. However, upon consultation with the undersigned and consideration of other factors involved in the process, the candidate withdrew his name, and the County has returned to the drawing board to determine what it should do. At the same time, the County Board Chairperson remains in the position of interim Administrative Coordinator.

Although Pierce County is on the fringes of metropolitan Minneapolis-St Paul, it remains predominantly a rural county with several urban centers, River Falls, Ellsworth, and Prescott and scattered, ex-urban development. Its County government is not as sophisticated as are several others in this part of the State, but in this sense it is not dissimilar from other predominantly rural counties whose county governments in this day and age are required to perform a myriad of functions and services but yet not of the level of fiscal or administrative complexity as to require either an elected County Executive or appointed County Administrator or, alternatively, a full-time employee to fill the position of Administrative Coordinator.

In my capacity as special assistant to the Corporation Counsel and in the name of Pierce County, I have been asked to solicit an opinion from you, regarding the eligibility of County Board members to the office of Administrative Coordinator under §59.19, Wis. Stats. This is because Pierce County, like other similarly situated counties that are predominantly rural and undeveloped, does not see the need for a full-time employee to fill the office of Administrative Coordinator and would potentially like to avail itself of the talent and local political, fiscal, and policy-driven knowledge available to it in the form of members of the County Board, officers in their own rights, who would contemplate both continuing to offer their legislative skills on behalf of the electorate while at the same time assisting in administering county government.

The issue that I raise on behalf of Pierce County is:

Under what circumstances, if any, may a sitting member of a county board of supervisors who is, in that capacity, an officer of the county, be appointed to serve as the §59.19, Wis. Stats. County Administrative Coordinator without first having to resign from his or her office as a county supervisor?

The following is my analysis of this question.

DISCUSSION

I. Application of §19.59, Wis. Stats.--Local Public Official Code of Ethics--to this Question

Sec. 19.59(1), Wis. Stats., regulates local public official ethical concerns. In its relevant parts, it states:

(1)(a) No local public official may use his or her public position or office to obtain financial gain or anything of substantial financial value for the private benefit of himself or herself

...

(c) Except as otherwise provided in par. (d), no local public official may: 1. Take any official action substantially affecting a matter in which the official...has a substantial financial interest. 2. Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official...

What is meant by using one's office to obtain financial gain is problematical, at best. It potentially encompasses such things as accepting any item or service, including food or drink, and travel if of more than nominal value and also prohibits a public officer from using information derived from holding office that is not available to the public, which is potentially broader than a mere prohibition against voting on a matter. To receive something of value means anything that could reasonably be expected to influence the officer's vote, official action, or judgment and includes money, property, favors or services. "Taking official action" includes any and all types of action vested in the officer under the framework of the office in which he or she serves. The basic test is whether action has an impact upon and benefits the officer and, as such, such an officer should not participate in or perform any discretionary act with respect to making, granting, or imposing an award, sanction, permit, license, contract, offer of employment, agreement or other matter in which the officer has a substantial financial interest or would gain a substantial benefit. The Government Accountability Board has gone so far as to opine that an officer should neither engage in the "making of policy" nor participate in the "application of policy", either of which could lend themselves to one of the above referred to described conflicts of interest. The latter is defined by the Board as including any participation in such a matter in a discretionary capacity including, but not limited to, discussions and debates and, as such, recommends that such an officer should not participate in any phase of an item of business and should leave the meeting room and not engage in any discussion, deliberations or votes "related" to that matter. It also recommends that the body on which he or she serves should note in its minutes his or her absence.

To avoid a potential violation of §19.59, Wis. Stats., requires that a potentially affected County Supervisor shall avoid any appearance of influencing the entire Board's decision on a matter in which he or she has an interest of the type described in the statute. The actual breadth of §19.59(1)(a), Wis. Stats., has not been established in the appellate courts. It is possible that

something as limited as applying for a position of employment with one's governmental body or seeking appointment to such a position by negotiating toward terms of employment may be a violation of the statute.

In all likelihood, merely being a supervisor who is the recipient of an inquiry made by the County Board or a representative of the Board as to his or her interest in accepting a position of employment with the County is not a violation of either of the two criteria of §19.59, Wis. Stats., noted above. However, upon being approached in such a manner (as opposed to the other way around) still requires that the supervisor be cautious to avoid the implication that he or she is "using" his or her office for the purpose of obtaining something of substantial value.¹ At the minimum, all appearances of engaging in discretionary acts on behalf of the governmental body in question should be avoided.

As is noted below, application of § 19.59, Wis. Stats., to this issue must be considered in light of the specific language of § 59.19, Wis. Stats., which authorizes a county "official", including a county board supervisor, to serve as the administrative coordinator and the further concept that if neither the county board nor the prospective county supervisor/administrative coordinator candidate can speak with each other regarding the prospect, a statutory absurdity results.

II. §§59.19 and 66.0501(2), Wis. Stats.

Sec. 59.19, Wis. Stats., lies at the heart of this issue. It reads simply:

In any county which has not created the office of county executive or county administrator, the board shall designate, no later than January 1, 1987, an elected or appointed official to serve as administrative coordinator of the county. The administrative coordinator shall be responsible for coordinating all administrative and management functions of the county government not otherwise vested by law in boards or commissions, or in other elected officers.

Sec. 59.19, Wis. Stats., not only authorizes but compels counties without an executive or county administrator to create the "position" of administrative coordinator. Unfortunately, this is a very spartan statute and really does not add much to the equation. It does, nonetheless, state that in such a county the "board shall designate...an elected or appointed official to serve as administrative coordinator..."² The statute envisions that a sitting County Board member (as an *elected official*

¹See, nonetheless, the commentary below regarding the application of §59.19, Wis. Stats., to this type of situation.

² The use by the legislature of the term "official" is of importance. Note the language of this section, which states in part: "In any county which has not created the office of county executive or county

of the County) may, during his or her term of office as Supervisor, be appointed to act as administrative coordinator. The question that remains unanswered under §59.19, Wis. Stats., is whether if an “elected official,” namely, a County Board Supervisor, is considered to be a candidate for the County Administrative Coordinator position, to what extent can that supervisor indicate his or her desire for the appointment and negotiate terms of employment while at the same time remaining on the County Board and if he or she remains on the County Board at least until such time as when he or she is selected, must he or she resign as supervisor before assuming the duties of Administrative Coordinator?

Sec. 59.19, Wis. Stats., is silent on the issue of remuneration for services rendered as Administrative Coordinator. It stands to reason, however, that it is unlikely that a county board will be able to procure such services on a gratis basis, even from a County Board Supervisor. Since the duties of the Administrative Coordinator are not derived from, nor are they to be performed as a matter of the assigned duties of the office of County Board Supervisor, the *cum onere* doctrine (see, among other cases, Geysso v. City of Cudahy, 34 Wis.2d 476 (1967) does not apply, by which I mean that it is not a violation of §66.0501, Wis. Stats., for the County Board to authorize a salary, wage or per diem consistent with the duties to be performed for service by a County Board Supervisor in the capacity as Administrative Coordinator.

administrator, the board shall designate...an elected or appointed **official** to serve as administrative coordinator...(emphasis supplied). Neither the term “office” or “official” are defined in this section or elsewhere in Ch. 59, Wis. Stats. In accord with the rules of statutory construction, courts use a recognized dictionary to establish the common meaning of a statutory word. Hocking v. City of Dodgeville, 320 Wis.2d 519 (2009) and where a given word has multiple dictionary definitions, the context shall control which definition is utilized. Ho-Chunk Nation v. Wis. Dept. of Revenue, 317 Wis.2d 553 (2009). Webster’s New Collegiate Dictionary defines “office” as meaning a “position of authority...a position of responsibility or some degree of executive authority” while “official” means “one who holds or is invested with an office...OFFICER...”. Each of these definitions is consistent with the context in which they are found in §59.19, Wis. Stats. Another rule of statutory construction is to the effect that rendering any given word in a statute to be mere surplus is to be avoided and effect is to be given to each and every word. Hambleton v. Friedmann, 117 Wis.2d 460 (1984). Further, in construing a statute, the entire section is to be considered, Beard v. Lee Enterprises, 225 Wis.2d 1 (1999) and where the legislature chooses to use two similar but different words, a court shall consider each separately and presume that the different words have different meanings. Pawlowski v. American Family Ins. Co., 322 Wis.2d 21 (2009). Under the circumstances, it is logical to conclude that use of the word “official” in §59.19, Wis. Stats., relates to a person—an officer—who fills an office, not generically to the “office” itself. As such, I arrive at the conclusion that it was within the contemplation of the legislature that this statute would authorize a sitting “official,” whether serving in an elected or appointed position, to be appointed to serve as county administrative coordinator at the same time as he or she is otherwise acting as an appointed or elected “official” or “officer” of the county. See, however, fn. 3 below for further advice along this line.

J.B. Van Hollen, Attorney General
January 21, 2011
Page 6

Continuing to the companion statute involved, §66.0501(2), Wis. Stats., states in part:

Except as expressly authorized by statute, no member of a...county board...during the term for which the member is elected, is eligible for any office or position which during that term has been created by, or the selection to which is vested in, the board...

The last sentence in §66.0501(2), Wis. Stats., reads:

This subsection does not apply to a member of any board...described in this subsection who resigns from the board...before being appointed to an office or position which was not created during the member's term in office.

There are no court cases interpreting this language; however, the Attorney General has stated with respect to a county supervisor who wanted an appointment as county veterans service officer that he was eligible for the latter position so long as he would resign from his office of supervisor before the county board acted on his appointment. 55 OAG 260 (1966).³

Sec. 59.19, Wis. Stats., was adopted at Laws of 1985, Act 29. It has not been substantively amended since then, the only modification being deletion of the word "county" as a modifier of "board" at Laws of 1995 Act 201 § 103. Current §66.0501(2), Wis. Stats., formerly §66.11(2), Wis. Stats., was originally adopted at Laws of 1979, Ch. 110.

³This raises another question in light of §59.19, Wis. Stats. It is quite clear that a member of the Board of Supervisors cannot serve in a position of employment (or other "position" with the County) which would result in a conflict of interest between the former and the latter. Illustrative of this is the case of Otradovic v. City of Green Bay, 118 Wis.2d 393 (1984) in which an alderperson applied for and was appointed to the employment position of assistant city auditor. Because as a member of the governing body, he had the power to vote on contracts setting the terms of his employment and could vote to terminate his own supervisor, the court held the two positions to be incompatible. Once again, §59.19, Wis. Stats., is an expression on the part of the legislature that it is not necessarily incompatible for an "official" of the County—a County Board Supervisor—to serve at the same time as County Administrative Coordinator; however, it appears to conflict with §66.0501, Wis. Stats., as to whether or not a County Board Supervisor may accept the position of Administrative Coordinator while continuing to serve as a supervisor. Applying the rules of statutory construction, it is my conclusion that for the very limited purpose expressed in §59.19, Wis. Stats., to the extent that there is a conflict between it and §66.0501, Wis. Stats., the former prevails for it is a specific statute whereas the latter is general with respect to the subject matter at hand. Town of Nasewaupsee v. City of Sturgeon Bay, 146 Wis.2d 492 (1988). Accordingly, my conclusion in reliance upon §59.19, Wis. Stats., is that a County Board Supervisor may continue to serve in that elected capacity as an "official" of the County notwithstanding his or her appointment as a full or part time Administrative Coordinator. [Whether such a supervisor should participate in deliberations leading up to establishing a wage, salary, and fringe benefits for such a position is another question, not related to this discussion.]

Where two statutes conflict, the later adopted statute prevails over the earlier. State ex rel Mitchell v. Superior Court of Dane County, 14 Wis.2d 77 (1961). Another applicable rule is that where two statutes have different purposes, and are not necessarily inconsistent, they must be construed together to give force and effect to the different sections. Pelican Amusement Co. v. Town of Pelican, 13 Wis.2d 585 (1961). Also, the Supreme Court has held that all statutes are presumably enacted with full knowledge of existing conditions of law and in reference to it, and they are to be construed in connection with and in harmony with existing law and as part of general and uniform system of jurisprudence. Town of Madison v. City of Madison, 269 Wis. 609 (1955). Finally in this respect, where a general and a special statute relate to the same topic, the special statute controls. Jones v. Broadway Roller Rink Co., 136 Wis. 595 (1908).

Sec. 66.0501(2), formerly §66.11(2), Wis. Stats., was in its current substantive form, adopted prior to §59.19, Wis. Stats.⁴

⁴Sec. 59.19, Wis. Stats., was adopted in the laws of 1985 while in its current substantive form, subject to non-substantive changes, §66.11(2), Wis. Stats., predated its adoption. In the 1983 Statutes, §66.11(2), Wis. Stats. read:

Except as expressly authorized by statute, no member of a town, village or county board or city council shall, during the term for which he is elected, be eligible for any office or position which during such term has been created by, or the selection to which is vested in, such board or council, but such member shall be eligible for any elective office. The governing body may be represented on city or village boards or commissions where no additional remuneration is paid such representatives and may fix the tenure of such representatives notwithstanding any other statutory provision. This subsection shall not apply to any member of any such board or commission who resigns from such board or council before being appointed to an office or position which was not created during his term in office. (emphasis supplied)

The emphasized language currently reads:

Except as expressly authorized by statute, no member of a town, village or county board or city council, during the term for which the member is elected, is eligible for any office or position which during that term has been created by, or the selection to which is vested in the board or council, but the member is eligible for any elective office. ... This subsection does not apply to a member of any board or council described in this subsection who resigns from the board or council before being appointed to an office or position which was not created during the member's term in office.

In other words, the changes have not been of a substantive nature, changing the intent of the legislature. As such, §66.0501(2), Wis. Stats., was in existence at the time in the Laws of 1985 when §59.19, Wis. Stats., was adopted.

Applying the rules of statutory construction, Sec. 59.19, Wis. Stats., is a special statute that applies specifically to the position of administrative coordinator in counties. Sec. 59.19, Wis. Stats., was also adopted after the latest substantive changes in §66.0501(2), Wis. Stats. Furthermore, these statutes can be harmonized to the effect that at the very minimum if a current County Board member proposed to be appointed to the office or position of Administrative Coordinator, resigns from his office before being appointed, the restrictions of §66.0501(2), Wis. Stats., are not encountered in a situation in which the office or position in question—as is the case in Pierce County—was not created during the term of office of a current County Board member. Taking this a step further, though, to the extent that §59.19, Wis. Stats., is a special statute, resignation from the County Board does not appear to be required because the statute specifically allows that the administrative coordinator may be appointed from among the ranks of “an elected or appointed official” of the County, without specifying the necessity of the appointee stepping down from his or her office as a county supervisor

III. §946.13, Wis. Stats.

This very harsh statute is divided into two sub components.

(1) Any public officer...who does any of the following is guilty of a Class I felony:

(a) In the officer's...private capacity, negotiates or bids for or enters into a contract in which the officer...has a private pecuniary interest, direct or indirect, if at the same time the officer...is authorized or required by law to participate in the officer's...capacity as such officer...in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on the officer's...part; or

(b) In the officer's...capacity as such officer...participates in the making of a contract in which the officer...has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on the officer's...part.

Sub. (1)(b) is neutralized if, as the advice of the Governmental Accountability Board with respect to §19.59(1), Wis. Stats., states, no participation in one's official capacity is maintained with respect to a contract in which the officer is interested in his or her private capacity. This is because (1)(b) requires some affirmative act, such as a vote or other participation in the making or execution of the contract before there is a violation.

It is sub. (1)(a) that remains at issue, however. Several examples of the potential breadth of its coverage are found in League of Wisconsin Municipalities Legal Opinion, *Compatibility of Offices*

#605 and Pecuniary Interests #389. [see fn.3]⁵ Reviewing the excerpts from the League Opinion leads to the obvious conclusion that as a strict liability statute, §946.13, Wis. Stats., can be very broadly interpreted in its application to a fact situation by a district attorney.

Collaterally, I can see an issue raised regarding application of §946.13(1)(a), Wis. Stats., to the situation of a county supervisor applying for and being appointed to serve as County Administrative Coordinator. Once again, §59.19, Wis. Stats., states, in part:

...the board shall designate an elected or appointed official to serve as administrative coordinator of the county. The administrative coordinator shall be responsible for coordinating all administrative and management functions of the county government not otherwise vested by law in boards or commissions, or in other elected officers.

First of all, this statute clearly contemplates that “elected officials” which includes, but is not limited to, county supervisors may be appointed to serve as administrative coordinator of a county. Secondly, it does not contain any prohibition against holding both one’s elective office and the appointed position of administrative coordinator at the same time. Thirdly, it clearly delineates that the functions of the statutory position of administrative coordinator are distinct from those that are, at the time of its creation, performed by other boards, commissions or, most importantly, “other elected officers” which as a generic term of reference includes county supervisors. Fourth, there is no indication in the statute that the Legislature intended to grant to county boards the unilateral right or option of simply assigning these “additional” duties to some elected official including, but not limited to, a county supervisor.

⁵Question: *You are a member of a city council and the human resources position has become vacant due to retirement. It pays \$50,000 per year. Can you apply before you resign from the council? No, submission of an application for employment is a bid for a contract. You must resign before applying for it. You intend to resign from office before submitting your application, but you know that the mayor will nominate the new director to the city council for approval and want to talk with her about your options. Can you talk with the mayor while you are still a member of the council and let her know your interest in the position? No, such discussion probably constitutes negotiation or bidding for the employment and violates § 946.13 (1)(a), Wis. Stats. The discussion with the mayor may also be an improper use of your office in violation of §19.59(1)(a), Wis. Stats. Would §946.13(1), Wis. Stats., be violated if you applied for the position before resigning but withdrew your application before the City acted upon it? Yes. Sec. 946.13(1)(a), Wis. Stats., prohibits a public officer from merely negotiating or bidding for a contract in which the officer has a financial interest if the officer is authorized to participate in his or her official capacity in the making of the contract. By applying for the position while being authorized to perform an official function involving discretion with regard to that contract, a violation of the statute occurs and it does not matter that you have withdrawn your application before it is acted upon.*

In other words, as is typical of any contractual situation, there must be an offer and an acceptance before a contract is formed and typically the process involves negotiations toward terms of agreement upon which both the offeror (the county board) and the offeree (the elected officer) will mutually accept. Finally, in a situation in which the office or position to which a sitting supervisor is appointed was created prior to the term of office of that particular supervisor, no implications of a violation of the civil statute, §66.0501(2), Wis. Stats., are involved.

To this extent, §59.19, Wis. Stats., could be argued as creating a statutory exception to a draconian application of §946.13(1)(a), Wis. Stats., in a fact situation involving a county board offering the position of administrative coordinator to one of its own supervisors, for it is clear to this writer that a county board could not force the duties of administrative coordinator on an unwilling supervisor (whose “job description” merely involves participating in county board business as a voting member of the board and of committees to which he or she are appointed). Ergo, negotiating the terms upon which a supervisor may be willing to accept such an appointment would appear to be contemplated by the legislature under the current language of §59.19, Wis. Stats.⁶

Where this logic breaks down is not in the realm of the analysis and general comparison of §§59.19 and 946.13, Wis. Stats., but, instead, in light of the very broad discretionary powers vested in the district attorney to prosecute crimes.⁷ Simply arguing, as I do in this opinion, that §59.19, Wis. Stats., may create an exception to §946.13(1)(a), Wis. Stats., a criminal statute that does not require proof of intent to violate its terms, places a given county supervisor at risk, not only to the extent that he or she—if charged with a violation of §946.13(1)(a), Wis. Stats.—must potentially retain an attorney to fight the charges but, more importantly, because under the statute, if convicted, a supervisor could be sentenced to prison as a Class I felon and/or be required to pay a substantial financial penalty to the State, as well. On the other hand, if the salary paid for the Administrative Coordinator position (together with all other and further payments made directly and indirectly to a given supervisor over

⁶It may similarly be argued that this statute precludes application of §19.59(1)(a), Wis. Stats., to such a fact situation for §59.19, Wis. Stats., is once again a special statute that deals with the specific situation of appointing an administrative coordinator and contemplates that a supervisor is a logical candidate for that position. Again, since the county board cannot simply ram acceptance of such a position down the throat of an individual supervisor, how logically can §19.59(1)(a), Wis. Stats., be applied to encompass negotiating with the county board by one of its own members toward terms of employment as the administrative coordinator as being an ethically impure “use” of his or her office “to obtain financial gain?”

⁷I have searched the rules of statutory construction for any cases which construe a civil statute directly on point as trumping the application of a general criminal statute and have found none. What this leads me to believe is that the application of the civil statute to a particular fact situation also subject to a general criminal statute is a matter of defense—a defense that one does not want to place him or herself in the position of raising, if at all possible because of the potentially drastic results should the court disagree and hold that §946.13, Wis. Stats., prevails and that a mere violation of it is cause for conviction.

a period of a year as a result of "contracts" do not exceed \$15,000.00, the exemption under §946.13(2)(a), Wis. Stats., applies.

CONCLUSION

Sec. 59.19, Wis. Stats., authorizes county boards to appoint one of their own fellow supervisors to serve as county administrative coordinator without requiring that either before a supervisor "applies" for such a position or before the board or a committee thereof approaches him or her about such an appointment, that the supervisor must resign from the office of county supervisor. Nor does it require that such an appointee must, before or after such an appointment, resign his or her office of supervisor. This statute also does not contemplate that such an appointment may be forced upon a supervisor, for by definition within the statute it is a position that is created for the performance of "job duties" that are not already assigned to a county supervisor in his or her capacity as a local legislator. Furthermore, despite that silence of the statute on this point, it is certainly within its contemplation that some form of salary or other remuneration will be paid for the assignment to some person of the duties of "coordinating all administrative and management functions of the county government ...". Finally, given the fact that a county supervisor is eligible to serve in this position, it stands to reason that he or she should be able to negotiate toward the terms and conditions of his or her appointment, whether by submitting an application and interviewing for or bargaining as to the terms and conditions of an acceptable offer (including salary or wages, fringe benefits and other emoluments of employment) or by simply responding to an offer that is tendered by or on behalf of the county board.

In my opinion, §59.19, Wis. Stats., takes the "negotiating" toward acceptance of the position of administrative coordinator by a county supervisor out of the realm of a §19.59(1)(a), Wis. Stats., ethical violation as being some form of use of his or her "office to obtain financial gain." I would, however, strongly recommend that any county supervisor who is considered for such an appointment should not take "official action" with respect to his or her appointment to this position, by which I mean that he or she should not participate in any discussions, deliberations, debates or votes, whether preliminary or final, in the matter of his or her possible appointment to the position.

As for §66.0501(2), Wis. Stats., so long as the position of administrative coordinator was not established by the county board during the term of office of a county supervisor who is contemplated to take such position, given the wording of §59.19, Wis. Stats., in particular and its comparison with the express exception at sub. (2) which allows a member of a county board who seeks to take a position with the county so long as he or she resigns "before being appointed," it is my position, again, that §59.19, Wis. Stats., is more specific and thus it is not required that such a supervisor must resign his or her office as a county supervisor before being appointed as administrative coordinator. However, much as with the potential of a violation of §19.59, Wis. Stats., in general, my recommendation is that any such supervisor should not in any way, shape, manner or form

participate in any discussions, deliberations, debates or votes, preliminary or final, with respect to such appointment process.

Finally, §946.13(1), Wis. Stats., remains highly problematical. Although the non-participation by a county board member in any aspect of the selection process for the position of county administrative coordinator takes the situation outside of the realm of a §946.13(1)(b), Wis. Stats., violation, the negotiation toward or bidding for a contract in one's private capacity, *even if unsuccessful*, is a violation of (1)(a) of this strict liability criminal statute. Because this is a criminal statute, application of which does not require proof of intent to violate and because it can result in substantial financial penalties as well as prison time, it cannot and should not be taken lightly. Once again, my opinion is that §59.19, Wis. Stats., creates a potential "civil" statutory defense to a charge under this statute but it is simply that—a defense. However, to avoid this risk, a supervisor who is contemplated for or who seeks out the position of Administrative Coordinator should only be considered if the total direct and indirect "contractual" remuneration to that supervisor does not exceed \$15,000 per year, including but not limited to salary, wages or per diems paid for service as the coordinator.⁸

As a result, because of the very onerous potential that exists that a district attorney independently or upon complaint of a third party could file criminal charges against a county board member who is relying upon the language of §59.19, Wis. Stats., my recommendation is that the County Board exercise extreme caution and engage in action only under the most limited of circumstances to potentially appoint a supervisor to the position of administrative coordinator.

First, the County Board should not offer such a position to a County Board member who is in the middle of a term of office unless that County Board member resigns his or her office as a supervisor voluntarily without any promises or pledges about the potential that he or she will be the candidate selected for the position of administrative coordinator if the floor of \$15,000 in direct or indirect payments is exceeded. Even the making of an application or interviewing for the position or negotiating terms of a contract could create a violation of §946.13(1)(a), Wis. Stats.

Yet another manner of approach would be if the position carried with it nothing of "substantial benefit" it would neutralize application of §19.59, Wis. Stats. This is in conjunction with my comments above to the effect that §59.19, Wis. Stats., potentially takes this situation outside of the realm of an ethics violation. Also, once again, §946.13, Wis. Stats., is taken out of the picture if receipts by the supervisor as a result of "this [and other] contracts" would not exceed \$15,000 in any given year. Sec. 946.13(3), Wis. Stats. Paying "\$0.00" to "\$14,999.00" for this service would

⁸In so stating, I am not including in the \$15,000 ceiling such per diems or salary as are received by the Supervisor for service as an elected officer. Such payments are an emolument of the office, not the result of an individual contract.

probably take care of all concerns under §946.13, Wis. Stats.⁹ For purposes of §19.59, Wis. Stats., the issue is what is something of substantial value and whether it is, as I have stated above, this concern appears to be neutralized by application of §59.19, Wis. Stats., to the fact situation.

In summary, it is my opinion that §59.19, Wis. Stats., in comparison with §§19.59, 66.0501 and 946.13, Wis. Stats. is a specific statute which overrides general statutes pertaining to the subject matter at hand although, having said this, I cannot recommend a facial violation of §946.13, Wis. Stats., because of its very draconian nature as a strict liability criminal statute, violation of which is a felony. I do take the position, though, that §19.59, Wis. Stats., does authorize a county board supervisor, as an “elected official” of a county to serve concurrently with his or her service as a local legislator as the county administrative coordinator. This is because the *cum onere* doctrine does not apply and the wording of the statute does not compel the conclusion that a sitting county board supervisor must resign that office, either before applying for or negotiating for or before accepting the position of county administrative coordinator. As for §66.0501(2), Wis. Stats., again §59.19, Wis. Stats., is specific and the former is general and, as such, barring language in §59.19, Wis. Stats., compelling the conclusion that a county supervisor must resign as supervisor before assuming the position of administrative coordinator, it is not the intent of the legislature that this must occur.

Further, because statutes are not to be construed in a manner leading to an absurd result (see, e.g., State v. West, 181 Wis.2d 89 (1993)), because the intent of §59.19, Wis. Stats., is that a sitting “elected official” of a county may be named as its administrative coordinator, the fact that prior to this occurring there will as a matter of course be some back and forth negotiations as to an offer and an acceptance and terms and conditions of such employment, §59.19, Wis. Stats., once again, prevails over application of the general standards of §19.59, Wis. Stats.

Had the legislature intended that county board supervisors were not eligible for the office of county administrative coordinator or that they must resign from office before accepting such a position or that they must refrain from “negotiating” terms and conditions of such employment, it would have used more definitive, limiting language in §59.19, Wis. Stats. That it did not leads to the logical conclusion that sitting supervisors, subject only to the potential application of the strict liability provisions of §946.13, Wis. Stats., may apply for, negotiate terms for and may accept the position of administrative coordinator while remaining in their elected offices as supervisors.

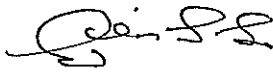
⁹This comment must be taken with a grain of salt. Full exploration of an individual’s situation vis-a-vis other contracts in which he or she or a member of his or her family or business associated with may result in excessive receipts must be considered, as well.

J.B. Van Hollen, Attorney General
January 21, 2011
Page 14

I respectfully request of you that you review this opinion and advise Pierce County as to your construction of the statutes involved and my conclusions as to the prevalence of §59.19, Wis. Stats. to the facts construed above.

Respectfully submitted,

WELD, RILEY, PRENN & RICCI, S.C.



William G. Thiel

WGT/db

cc: Paul Barkla, County Board Chairperson
Bradley Lawrence, Corporation Counsel

F:\docs\COUNTYPIERCE\0237AdminCrdnt\Ag ltr.wpd