

OFFICE OF THE CORPORATION COUNSEL



KENOSHA COUNTY COURTHOUSE
912 - 56TH STREET
KENOSHA, WISCONSIN 53140 - 3747
262 - 653 - 7112
FAX: 262 - 653 - 6684
E-MAIL: fvolpint@co.kenosha.wi.us

Frank Volpintesta
Corporation Counsel

Bernard R. Vash
First Assistant

Lorette Pionke
Senior Assistant

Joseph Cardamone
Assistant

DEPT. JUSTICE--
JUL 19 8:39
July 19, 2010

J.B. VanHollen
1. Wisconsin Department of Justice
PO Box 7857
Madison WI 53707-7857

Re: Request for Attorney General's
Opinion Regarding a County
Executive's Exercise of His Veto
Power and the Effect of Such Veto
[Corporation Counsel Opinion #O-
10-23]

Dear Attorney General VanHollen:

Our Office seeks assistance and guidance regarding the manner in which a County Executive may veto an action or appropriation of the County Board and the effect of a County Executive budget veto on the budget as well as a prior policy of the County Board.

Background

On September 27, 2005, the Kenosha County Board of Supervisors passed a resolution which required any County Board Supervisor who was elected to office in the 2006 Spring election, and who elected to participate in the County's group health insurance plan, to

contribute 10% of the premium. That contribution was not changed in subsequent elections, except as described below.

In 2009, the County Executive proposed an annual budget for 2010 which budgeted \$286,586 for health insurance for County Board Supervisors. This number was based upon (1) historical data reflecting the number of Supervisors who elected to participate in the County's group health insurance in prior years in either the family plan or single plan, (2) the projected premium for 2010 and (3) on an increase of 5% in the premium contribution for a total contribution of 15% of the premium.

The County Executive budget was presented to the County Board with the understanding that the prior policy of the County Board was proposed to change in 2010 so as to require a 15% contribution as opposed to a 10% contribution. The Finance Committee of the County Board adopted that recommendation and forwarded the budget to the full County Board with the understanding that there would be a 15% contribution required in 2010.

When the budget was being considered by the full County Board, a motion to amend was successfully made to change the contribution from 15% to 0%. Because the \$286,586 that was in the budget was based on a 15% contribution, a 0% contribution would require additional dollars — specifically an additional \$50,573. No motion was made, however, to add \$50,573 to the budget. The motion to amend and subsequent Board action and approval was in terms of percentages and not dollars. It was a fiscal motion to a fiscal budget and had a fiscal impact.

The Finance Department did, however, show an additional \$50,573 being added to the budget passed by the Board and forwarded to the County Executive and furthermore they adjusted the total for that column in the budget from \$286,586 to \$337,159 so as to reflect the added \$50,573. This action of the Finance Department was based solely on the motion to go from 15% to 0%. The County Executive struck/vetoed the \$50,573 increase and adjusted the \$337,159 back down to \$286,586. This was explained in his veto message as set forth herein. Questions have arisen as to the effect of that veto on the budget. It has been contended that sustaining the veto could not have the effect of changing the prior policy of the Board which was to require a 10% premium contribution. The veto was upheld in a 27 - 1 vote. Our office has opined that this was a valid exercise of the County Executive's power to exercise a partial veto.

1. WHEN AN APPROPRIATION IS INCREASED OR DECREASED MUST THAT INCREASE OR DECREASE BE ADDRESSED IN OTHER RELATED AREAS OF THE BUDGET?

The first question is whether the Finance Department could, without a direct motion or directive from the County Board, increase the budget by \$50,573 and adjust the \$286,586

to \$337,159 so as to reflect the change from 15% to 0% or should it have left the \$286,586 alone and not increase the budget by the \$50,573 thus knowingly under-funding the budget based upon their analysis of what the projected insurance was going to cost. It is understood that the budget is an estimate and that the costs could vary depending upon variables such as who was going to elect to take insurance in 2010 [an election year] and how many would be on the family plan and how many would be on the single plan. On the other hand, if the \$286,586 was correct but later determined to be insufficient, a budget change later in the year would be required along with a 2/3 vote which may or may not have been attainable and, if not attained, adversely affect the total compensation of elected County Board Supervisors which is to be set prior to their election..

In our opinion, due diligence would be required on the part of the Finance Department thus obligating the budget adjustments of \$50,573 and \$337,159 as discussed above. The Kenosha County budget resolution also treats each series of line items in the same accounting group as a separate appropriation. Wis. Statutes section 65.90 furthermore requires, in our opinion, that these figures be reflected in the budget. If they were not, the County Executive would not have the ability to veto the increase over his proposed budget recommendation for this line item. Here his only choice would be to veto health insurance in its entirety. He can, however, veto only part of an appropriation. In addition, while the County Board could not amend the proposed veto, they understood the nexus between the \$286,586 and the 15% and they could have addressed the issue in a separate resolution.

Our Finance Department has taken a position [which this office agreed with] that there is both a legal and ethical obligation to clearly show in the budget the effect of the motion to eliminate the revenue generated by a premium contribution. The motion was a fiscal motion to a fiscal budget that had a fiscal impact and the fiscal impact has to, of necessity, be presumed to be embodied within the fiscal motion — especially if a balanced budget is to be achieved.

To do otherwise would be both disingenuous and deceptive. In this regard we would cite Wisconsin Statutes § 946.12 (4) which states that it is misconduct in office that is punishable as a Class 1 felony for an employee or official to make an entry in an account or record book which in a material respect is intentionally falsified. Our local Code of Ethics would also dictate that the budget reflect or address the assumptions upon which it is based. In addition, the rules of conduct of the Accounting Examining Board State Administrative Rules state at Accy 1.102 entitled "Integrity and Objectivity:"

No person licensed to practice as a certified public accountant . . . shall knowingly misrepresent facts, and when engaged in the practice of public accounting, including the rendering of tax and management advisory services, shall not subordinate his or her judgment to others. . . .

In addition the Government Finance Officers Association Code of Ethics offers additional standards addressing responsibility of public officials and professional integrity which would dictate full disclosure of any assumptions built into a municipal budget.

In 74 OAG 73 (May 9, 1985) the Attorney General's Office has also addressed the need to adjust line items and budget totals that were impacted by an Executive veto. Along those same lines logic would dictate that the same standard and protocol apply on motions to amend a budget that is before the County Board. In that opinion it was stated:

There may be a misunderstanding as to the effect of the veto of the county executive on the budget. Our statement of facts states that the county executive "approved the total levy." I believe such conclusion is erroneous. **In my opinion, the act of a county executive in deleting or in some manner reducing an appropriation has the direct effect of reducing the amount of total funds to be raised and any necessary tax levy.** Section 70.62 establishes limitations on tax levies. The board cannot make tax levies for future years or create a sinking fund. Immega v. Elkhorn, 253 Wis. 282, 34 N.W.2d 101 (1948). A veto does not have the effect of transferring the budgeted amount to surplus or to the general fund as is made clear by section 59.032(5). This is extremely important and ties in with the purposes of section 65.90. Where an entire budget is vetoed, a county board might be expected to take prompt action to approve another for submission to the executive. Where separate items are vetoed, the county executive always runs the risk that the vetoes will be overridden or that further legislative action will address the particular area. The executive's influence as to amounts and subjects to be included in a budget is probably more direct and greater at formulating time than at veto time. Section 59.032(5) provides:

Notwithstanding any other provision of the law, the county executive shall be responsible for the submission of the annual proposed budget to the county board and may exercise the power conferred under sub. (6) to veto any appropriation made by the county board in the budget. No money may be appropriated for any purpose unless approved by the county board. The failure of the county board, upon

reconsideration under sub. (6), to approve any appropriation vetoed by the county executive does not operate to appropriate the amount specified in the proposed budget submitted by the county executive . (Emphasis added.)

It is the opinion of this office that the above language in sub-section 59.032(5) appears to have been changed under its new cite at sub-section 59.17 (5) which now merely states that "Notwithstanding any other provision of the law, [the County Executive] shall be responsible for the submission of the annual budget to the board and may exercise the power to veto any increases or decreases in the budget under sub (6)." Thus the law does not preclude the Executive from vetoing part of an appropriation. . . ie., in our example, the increase in the appropriation [\$50,573] necessitated by the Board's action. In fact, Wisconsin Statutes § 59.17(6) also states very clearly that ". . . appropriations may be approved in whole or in part . . . and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for in other resolutions or ordinances." The above language cited in the Attorney General's opinion pertaining to a veto not operating to appropriate an amount of money as originally specified in the budget as originally submitted by the County Executive may have been removed precisely, as set forth below, because it only works in situations where the County Board has decreased the Executive's proposal and not in situations where the County Board has actually increased and appropriated more money than what the Executive had originally submitted to the County Board. This leads to our next question.

2. WHEN THE COUNTY BOARD HAS INCREASED AN APPROPRIATION IN THE BUDGET SUBMITTED BY THE COUNTY EXECUTIVE, MAY THE COUNTY EXECUTIVE VETO THE INCREASE OR PART OF THE INCREASE AND WHAT IS THE EFFECT OF A VETO ON THE COUNTY BOARD BUDGET?

We believe that under the statutes cited above, ie., Wisconsin Statutes §§ 59.17(5) and (6), the budget document that is presented by the Executive and acted upon enables the Executive to exercise a veto of a part of an appropriation. As to the effect of a veto on a County Board increase in an appropriation, we would note that the budget itself contains 10 columns. The veto in this case shows up in the last two columns. This increase of the County Board budget was vetoed [see attached Exhibit "A"] by the County Executive with a message [see attached Exhibit "B"] In his veto message to the Board, the County Executive indicated that by striking out the \$50,573 and adjusting the \$337,159 back to \$286,586 that the \$286,586 was "inseparably linked to a 15% health insurance premium contribution by County Board Supervisors in 2010. That veto message stated as follows:

... I am utilizing the County Executive veto authority to impose a tax levy and expenditure reductions in the 2010 Kenosha

County Budget. The effect of the veto is to reduce the appropriation for County Board Supervisor health insurance from \$337,159 to \$286,586. The \$286,586 allocation is based upon and is inseparably linked to a 15% health insurance premium contribution by County Board Supervisors for 2010. This will have the effect of implementing the County Board Budget Business Unit Number 11100 and the Health Insurance Business Unit Number 15150 initially recommended by the Finance Committee. . . .

The veto was sustained and now the effect of the veto is in question. To wit, can a County Executive veto of an increased appropriation have the effect of reinstating the appropriation originally submitted by the County Executive? Here again we believe it could for the reasons set-forth herein. Can the veto also have the effect of altering a prior policy of the County Board which had set the contribution at 10%? In our opinion it could for the reasons that follow.

It was the opinion of this office that the effect of the veto of the increase in funds for County Board Supervisor health insurance operated so as to nullify the increase only and restore the amount budgeted by the County Executive and endorsed by the Finance Committee [to wit, \$286,586] which was 85% of the projected cost of the health insurance premium and thus based upon an assumption that Supervisors pay the remaining 15% as a contribution toward their health insurance.

The County Executive veto and its effect has been discussed in 80 OAG 214 (April 2, 1992). In that opinion the example provided for a County Executive proposed budget of \$100,000, a reduction of that budgeted amount by the County Board to \$50,000, and a County Executive veto that was sustained. In that opinion the Attorney General's Office opined that Wisconsin Statutes section 59.032(5) was amended so as to provide that "no money may be appropriated for any purpose unless approved by the county board. The failure of the county board, upon reconsideration under sub. (6), to approve any appropriation vetoed by the County Executive does not operate to appropriate the amount specified in the proposed budget submitted by the County Executive." While that language no longer appears in the pertinent statutes of today that deal with the Executive veto, the Attorney General's opinion nevertheless concluded that the correct interpretation is that the failure to override a veto does not operate to reinstate the Executive's proposed appropriation. Here again, for the reasons already discussed, we believe that this conclusion is only valid in a situation where the County Board has decreased an appropriation as proposed by the Executive and as was discussed in 80 OAG 214. To this extent we ask that 80 OAG 214 be clarified.

Nevertheless, the facts presented under this opinion request do not deal with a situation

where the County Board has decreased the appropriation proposed by the Executive but rather a situation where the County Board has increased the Executive's proposed appropriation and the Executive has vetoed only the proposed increase with the effect of decreasing the budget. Both the Executive and Board show an intent to fund or appropriate at least up to a minimum of \$286,586. Article IV, section 23a of the Wisconsin Constitution provides that if the County Executive approves an appropriation, he or she may do so in whole or in part and "the part approved shall become law, and the part objected to shall be returned in the same manner provided for in other resolution or ordinances." Wisconsin Statutes § 59.17(5) mirrors that provision. That opinion [80 OAG 214] went on to say that although the executive's partial veto with respect to appropriations is legislative in nature, the authority granted is "the authority to change the policy of the law as originally envisaged by the county board." Here what was envisioned by the County Board was no contribution toward insurance premiums, and as seen in Exhibit "A," there is a \$50,573 figure that can be crossed-out....thus changing the policy of the county board that County Board Supervisors not have to pay a premium contribution. If the county board has decreased the appropriation proposed by the Executive, the decrease can be stricken as well as a like amount in the total levy but the practical effect is that the Executive cannot appropriate it back in.

We understand, as stated in the above-cited Attorney General opinion [80 OAG 214] that the Executive can veto and not appropriate. Appropriation in this context means: "money set aside by formal action for a specific use" [Webster's 9th]. Decreasing a budget cannot be construed, however, to mean "setting money aside." Decreasing a budget is the opposite of setting money aside. You cannot use money not set aside for any use, or any specific use. The money does not exist to be used, because it has not been set aside. Reducing a budget cannot be considered "appropriating" funds.

As to the ability of the Executive to change or alter a policy of the County Board as originally envisaged by the County Board, the Attorney General's Office opined as follows at 77 Op. Att'y Gen. 113, 118, OAG 25-88 (May 23, 1988):

In fact, the county executive's partial approval/partial veto authority with respect to appropriations carries with it a power, legislative in nature, similar to that exercised by the Governor in reference to acts of the Legislature, to change the policy of the law as originally envisaged by the County Board. 74 Op. Att'y Gen. 73, 74 (1985); 73 Op. Att'y Gen. 92, 93-94 (1984). . . .

The key is that the act of appropriating can be either the original act of placing dollars in an account, or increasing the dollars in the account. Decreasing a budget, or not funding a budget, is not appropriating. The example used in the above-cited AG opinion was an increase, not a decrease. It deals with a situation where the law had just been changed, and the Dane County Executive was attempting to appropriate more money than approved

by the County Board by using his veto. If the budget law and constitution were to be interpreted this way, a Board could never decrease any Executive budget without a 2/3rds majority anytime an Executive vetoed a decrease. This AG opinion stemmed from Dane County trying to interpret a mistake by the legislature when they merged the statutes as an ability to **INCREASE** i.e. "appropriate" funds through the veto. The AG opinion was not written to mean that the Executive could not reduce a budget with his only other option being to completely wipe out the entire line item.

The Board adopted the Executive's original amount of \$286,586 which had earned the endorsement of the Finance Committee. It amended it by eliminating the 15% contribution and thus requiring or setting in motion a need to fund or appropriate an additional \$50,573, the amount needed to carrying out its intent of having a 0% contribution for health insurance. The Executive vetoed the \$50,573. The veto was a reduction. It was not an appropriation. Increasing the budget is the act of appropriating. Decreasing a budget is not appropriating funds. Thus there is sound reasoning for supporting the position that in the case of an **increase** being vetoed the original amount is in fact reinstated.

As to the ability of the Executive to effectuate a change in County Board policy, we would note that prior to his opinion [at 80 OAG 214] the Attorney General opined at 73 OAG 92 (August 22, 1984) that:

. . . a County Executive has power to approve any part of a resolution or ordinance containing an appropriation and can, therefore, effect a change in policy. Such executive power is not dissimilar to that of the Governor. . . .

Under the Wisconsin Constitution, the Governor may exercise his partial-veto power by removing provisos and conditions to an appropriation so long as the net result of the partial veto is a complete, entire, and workable bill which the legislature itself could have passed in the first instance

At 73 OAG 92 [August 22, 1984] your office opined:

Your basic question is whether a County Executive's power of approval or non-approval is limited to monetary amounts with respect to appropriations or whether such power extends to other portions of a resolution or ordinance containing an appropriation and can thus effect a change in the policy envisaged by the County Board of Supervisors.

I am of the opinion that a County Executive has power to

approve any part of a resolution or ordinance containing an appropriation and can, therefore, affect a change in policy. Such executive power is not dissimilar to that of the governor. In *State ex rel Kleczka v Conta*, 82 Wis. 2d 679, 715, 262 N.W. 2d 539 (1978) it was stated:

Under the Wisconsin Constitution, the governor may exercise his partial-veto by removing provisos and conditions to an appropriation so long as the net result of the partial veto is a complete, entire, and workable bill which the legislature itself could have passed in the first instance.

. . . . The Court in effect stated that the Governor is not "confined to the excision of appropriations or items in an appropriation bill." *Kleczka*, 82 Wis. 2d at 705. Provisos and conditions are not subject to veto if inseparably connected to the appropriation. Once a part objected to is determined not to be inseparable from the appropriation within a bill, a second determination is made whether the remaining parts "constitute, in and of themselves, a complete, entire and workable law The *Kleczka* court recognized the importance of severability . . . : "Severability is indeed the test of the Governor's constitutional authority to partially veto a bill"

From a financial and logical perspective, it would make no sense to interpret any veto of a Board amendment to increase the Executive budget to require the Executive to have to veto his own budget line item in its entirety. This would make the veto authority meaningless. In other words, if any time the Executive would exercise his veto power he would also have to veto his own budget proposal. If that is the practical effect, why would an Executive ever exercise his veto power. The result would be absurd and would, in our opinion, test the separation of powers doctrine in that this would force the Executive/Administrative branch to undermine itself in order to act on changes made to the administration's budget. In *Panzer et al v. Doyle et al* at 271 Wis. 2d 295 (2004), the Wisconsin Supreme Court stated:

The Wisconsin State constitution has created three branches

of government, each with distinct functions and powers. The separation of powers doctrine is implicit in this tripartite division of government. There are zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding. In reality, governmental functions and powers are too complex and interrelated to be neatly compartmentalized. For this reason, the Supreme Court of Wisconsin analyzes separation of powers claims not under formulaic rules but under general principles that recognize both the independence and interdependence of the three branches of government.

Based upon the above rationale, it is the conclusion of our office that by vetoing 15% of the appropriation for County Board Supervisors health insurance and only funding/approving 85% of the funds needed to provide health insurance for County Board Supervisors, the County Executive effectively changed the prior policy of the County Board which was to provide for a 10% premium contribution by County Board Supervisors and taxpayer funding of the remaining 90%.

3. WHAT IS THE EFFECT OF RECENT CONSTITUTIONAL AMENDMENTS PERTAINING TO THE GOVERNOR'S VETO ON THE VETO POWER OF A COUNTY EXECUTIVE?

Prior opinions of the Attorney General have likened the County Executive veto to that of the Governor [60 OAG 202, 73 OAG 92 (August 22, 1984); 74 OAG 73 (May 9, 1985)]. Here again we ask for clarification of these prior opinions from your office in light of this comparison and the fact that the State Constitution has not been amended with respect to the veto power of the County Executive. We seek your input into the conclusions arrived at by our office that the County Executive has a veto power not unlike that of the Governor ***prior to*** the constitutional amendments in 1990 and 2008, to wit, not just what has been termed the Vanna White veto but also the Frankenstein veto as well as the ability to strike out a number in an appropriation and write a new number in its place. Specifically in *Citizens Utility Board v. Klauser*, 194 Wis. 2d 485, 534 N.W.2d 608 (1995), the Court ruled that the governor may approve part of an appropriation bill by reducing the amount of money appropriated by striking a number ***and writing in a smaller one***. This power however, was to extend only to monetary figures and is not applicable outside the context of reducing appropriations.

Wisconsin governors long enjoyed extremely broad veto powers, due to the interpretation of the State Constitution's description of the power to veto appropriation bills "in whole

or in part," usually considered to be similar to the often-discussed federal "line item veto," allowing an executive to eliminate only parts of a spending bill, rather than having to accept or veto it in its entirety. Article V, Section 10 ¶ 1(b) of the Wisconsin Constitution, permits this "whole or in part" veto.

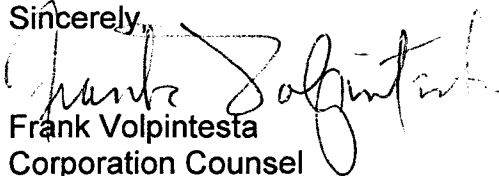
Wisconsin governors liberally interpreted this provision. Governor Tommy Thompson was challenged for his use of what was dubbed the "Vanna White veto," crossing out individual letters and numbers within a bill to change the effect or intent of legislation. His ability to do so was upheld in *Wis Senate v. Thompson*, 144 Wis.2d 429, 424 N.W.2d 385 (1988), so long as what remained was a "complete, entire, and workable law." In response to this decision, the legislature initiated an amendment to the constitution, approved by the voters in 1990, which prohibited creating new word by rejecting individual letters in the words. Article V, Section 10, ¶ 1(c), Wisconsin Constitution.

Following this amendment, governors sought to comply with the letter of the amendment by rejecting individual words in order to "stitch-together" parts of a longer piece of legislation to create new sentences, sometimes referred to as the "Frankenstein veto." This practice was ended in 2008, with the passage of an additional amendment prohibiting the creation of new sentences by the combining of parts of two or more sentences in the bill. Article V, Section 10, ¶ 1(c), Wisconsin Constitution. This apparently still leaves the possibility of crossing out words within a single sentence, removing full sentences, or eliminating digits to change the intent of legislation.

The County Executive is provided with veto powers under Article IV, Section 23a, Wisconsin Constitution, and Sec. 59.17 (6) Wis. Stats., with wording which provides that "Appropriations may be approved in whole or in part by the County Executive and the part approved shall become law..." This language is "substantially identical" in both places, 73 Op. Att'y Gen 92, 92 (1984) as well as being identical to the un-amended language in the Constitution dealing with gubernatorial vetoes. It is further the opinion of the Attorney General that the county executives have "power to approve any part of a resolution or ordinance containing an appropriation...not dissimilar to that of the Governor," *ibid*. Again, the language authorizing these vetoes is identical to the original and un-amended gubernatorial authority. Accordingly, it is this office's opinion that the County Executive currently wields sweeping veto authority over appropriation matters, unaffected by the aforementioned constitutional amendments.

This opinion would seem to be shared by the State Legislature, which introduced, in the last session, a proposed constitutional amendment to introduce identical language to limiting the veto power of a county executive in the same manner that the veto power of the Governor has been limited. [Exhibit "C," 2009 Joint Senate Resolution 11]

Sincerely,


Frank Volpintesta
Corporation Counsel