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April 29, 2011

Wisconsin Department of Justice
Attn: Attorney General J.B. Van Hollen
P.O. Box 7857
Madison, WI 53707-7857

Re: Request for an Informal Opinion

Dear Attorney General Van Hollen:

Question: Can a person deputized by Shawano County, but who is employed by an Indian Tribe and not Shawano County, serve as a member of the county board; or are the positions not compatible?

Facts, law and my analysis:

Facts:

In our case, there is an employee of the Stockbridge-Munsee Tribe law enforcement department, who was deputized by the Shawano County Sheriff, who inquires if he is eligible for election to the office of county board supervisor. More specifically, the Stockbridge-Munsee employee is deputized by the Shawano County Sheriff under a cooperative law enforcement agreement between the Stockbridge-Munsee Tribe and Shawano County. The purpose of deputizing the employee is to allow the Stockbridge-Munsee Tribe and Shawano County to work together when it comes to joint law enforcement efforts. Under the agreement, the Shawano County Sheriff's Department retains the right to administer the daily supervision and control of the deputized employee as it pertains to joint law enforcement efforts. However, the employee is considered an employee of the Tribe and is paid and disciplined by the Tribe.

Law:

Section 59.10(4) of the Wisconsin Statutes states: "no county officer or employee is eligible for election or appointment to the office of supervisor . . ."

Although an old case, and from Rhode Island, State ex rel. Metcalf, Atty. Gen., v. Goff, 15 R.I. 505, 9 A. 226 (1887) states that the rule of incompatibility is the character and relation of the offices, as, where one is subordinate to the other, and subject, in some degree, to its revisory power; or where the functions of the two offices are inherently inconsistent and repugnant.

Consistent with State ex rel. Metcalf, the Wisconsin Supreme Court in State v. Jones, 130 Wis. 572, 110 N.W. 431 (1907) stated that if one office was superior in some respect to another, so that the duties exercised under each might conflict to the public detriment, the offices were incompatible.

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In Otradovec v. City of Green Bay, 118 Wis.2d 393, 347 N.W.2d 614 (1984), the public detriment in having one person hold incompatible public offices can also exist when one person holds a public office and a position of public employment with duties that might conflict.

28 Op. Atty. Gen. 32 (1939) states that a county board member may not serve as deputy sheriff even though he is willing to serve without pay. The Attorney General noted that sec. 59.03(3) the statutes established a legislative incompatibility, with no exception because the deputies or officers are willing to serve without pay. The sheriff is the superior officer, and when the county board supervisor passes upon claims or matters relating to the sheriff, he would be placed in a position of trying to serve two masters.

16 Op. Atty. Gen. 139 (1927) indicates that deputy sheriff and undersheriff are prohibited from holding office of supervisor. The laws of 1919 amended the statutes by taking out the words "and no undersheriff or deputy shall at any time act as a member of the county board of any county" but those restrictions and prohibitions were again incorporated into sec. 59.03(3) of the statutes, making a deputy or undersheriff ineligible to the office of supervisor.

10 Op. Atty. Gen. 783 (1921) indicates that since the town chairman is also a member of the county board, he is ineligible to the office of deputy sheriff.

61 Op. Atty. Gen. 79 (1972) indicates that law enforcement personnel acting outside the territorial limits of their municipality are subject to the command of the sheriff. Deputies are deputized by the sheriff on a cooperative basis so that they may at all times act throughout the county if necessary.

As noted above, the Agreement between Shawano County and Stockbridge-Munsee Tribe says that the Shawano County Sheriff's Department will act as the responsible party in daily supervision and control as to law enforcement duties carried out by the Tribe's employees who have a deputy card, except for matters relating to tribal law enforcement and tribal courts.

Analysis:

It seems clear that a deputy sheriff employed by the Shawano County Sheriff's Department could not serve as a County Board Supervisor under Section 59.10(4) of the Wisconsin Statutes and the other law set forth above.

However, the complicating factor in our case is that the deputized person is employed not by Shawano County, but by a cooperative Indian Tribe who has been deputized by the Shawano County Sheriff. The Agreement does provide that the Tribe's deputized law enforcement employees are under the supervision of the Sheriff, except for matters relating to tribal law enforcement and tribal courts. Additionally, if the employee of the Stockbridge-Munsee Tribe is deputized by the Shawano County Sheriff, he is able to act throughout the county if necessary under the supervision of the Sheriff. Since the deputy sheriff is under the supervision of the Sheriff, the duties of deputy sheriff and county board supervisor may likely conflict under Section 59.10(4), AG's opinions and case law cited above.

Nonetheless, the deputized Stockbridge-Munsee Tribal employee and other citizens are very interested in having the employee explore the opportunity to run for County Board Supervisor and I want to be sure of my response.

My request:

It would be much appreciated to have an informal opinion answering this question on or before June 1, 2011.

If you have any questions, please let me know.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tony A. Kordus', with a long horizontal flourish extending to the right.

Tony A. Kordus
Corporation Counsel