

1. Agenda

Documents:

[1.-FINANCE-PERSONNEL-2022-06-01 \(AGENDA\).PDF](#)

2. Meeting Materials

Documents:

[FP-MEETING-PACKET-060122 \(MEETING PACKET\).PDF](#)



HERITAGE
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VILLAGE OF MOUNT HOREB

E. Main Street
Mount Horeb, WI 53572
Phone: (608) 437-6884 Fax: (608) 437-3190
Email: mhinfo@mounthorebwi.info Web: mounthorebwi.info

THE FINANCE AND PERSONNEL COMMITTEE MEETING WILL BE HELD IN PERSON WITH A VIRTUAL OPTION. YOU CAN VIEW THE MEETING LIVE BY CLICKING THE "WATCH LIVE" LINK UNDER THE TROLLWAY TV GRAPHIC ON THE HOME PAGE OF THE VILLAGE WEBSITE AT WWW.MOUNTHOREBWI.INFO. THE MEETING IS ALSO BROADCAST ON MHTC CHANNEL 181 AND CHARTER CHANNEL 981. YOU CAN ALSO JOIN THE MEETING USING THE FOLLOWING:

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FINANCE AND PERSONNEL COMMITTEE WEDNESDAY, JUNE 1, 2022

The Finance and Personnel Committee of the Village of Mount Horeb will meet at **5:30pm** on the above date in the Board Room of the Municipal Building, 138 E Main Street, Mount Horeb, WI. Agenda as follows:

- 1) Call to order-Roll call
- 2) Consider March 2 and May 4, 2022 minutes
- 3) Discussion/Recommendation on Board and Committee Ethics Policy
- 4) Consideration of 2023 Budget Calendar
- 5) Personnel Update
- 6) Future agenda items
- 7) Adjourn

A QUORUM OF THE VILLAGE BOARD/VILLAGE COMMITTEE MEMBERS MAY BE PRESENT AT THIS MEETING. ONLY NOTICED AGENDA ITEMS WILL BE ACTED ON BY THE GOVERNMENTAL BODY SPECIFIED ABOVE.

UPON REASONABLE NOTICE EFFORTS WILL BE MADE TO ACCOMMODATE THE NEEDS OF DISABLED INDIVIDUALS THROUGH APPROPRIATE AIDS OR SERVICES. TO REQUEST THIS SERVICE CONTACT ALYSSA GAFFNEY, CLERK, AT (608) 437-9404.



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**VILLAGE OF MOUNT HOREB
FINANCE/PERSONNEL COMMITTEE MINUTES
MARCH 2, 2022**

The Finance/Personnel Committee met in regular session in-person with a virtual option due to COVID-19.

Call to Order/Roll Call: Chair Scott called the meeting to order at 5:30pm. Present were Committee members Hoffman, Czyzewski, Monroe, and Nortman. Also present were Administrator Owen, Treasurer/Deputy Administrator Hall, and Village Clerk Gaffney.

Consider February 2, 2022 minutes: Czyzewski moved, Monroe seconded to approve the February 2, 2022 minutes. Motion carried by unanimous voice vote.

Review preliminary 2021 year-end financials and audit progress: Hall reviewed the financials and gave an update on the timing of the audit.

Review elected official orientation documentation: Owen explained this item. The committee members reviewed the documentation presented.

Discuss conflict of interest documentation and education for Village and Committee members: Czyzewski explained this item. He would like a policy put in place, in order to be consistent.

Future agenda items: Vendor review and ARPA funds discussion.

Adjourn: There being no further business before the Committee, Monroe moved, Czyzewski seconded to adjourn the meeting at 6:02pm. Motion carried by unanimous voice vote.

Minutes by Alyssa Gaffney, Village Clerk

**VILLAGE OF MOUNT HOREB
FINANCE/PERSONNEL COMMITTEE MINUTES
MAY 4, 2022**

The Finance/Personnel Committee met in regular session in-person with a virtual option due to COVID-19.

Call to Order/Roll Call: Chair Scott called the meeting to order at 5:30pm. Present were Committee members Dave Hoffman, Jason Fendrick, and Ben Jones. Ryan Czyzewski was absent. Also present were Administrator Owen and Village Clerk Gaffney.

New Member Welcome: Scott welcomed Ben Jones and Jason Fendrick to the committee.

Consider March 2, 2022 minutes: There was no quorum currently present who attended the March 2nd meeting, to approve the minutes.

Consider recommendation for Resolution 2022-06 "BUDGET AMENDMENT": Scott explained this item. Hoffman moved, Jones seconded to recommend approval of the resolution to the Village Board. Motion carried by unanimous voice vote.

Review 2021 spending by vendor: Scott explained this item to the new members, and stated this will be discussed at next month's meeting.

Discuss ARPA spending plan: Owen explained this item. The committee members voiced their opinions on ways to spend the funds.

Personnel Update: Scott explained this item. Owen and Scott gave an update on recent personnel changes.

Future agenda items: Items mentioned: Update from Human Resources Manager, Vendor Review, and ethics considerations.

Adjourn: There being no further business before the Committee, Fendrick moved, Jones seconded to adjourn the meeting at 5:57pm. Motion carried by unanimous voice vote.

Minutes by Alyssa Gaffney, Village Clerk

Ethics Code

1. Statement of Purpose.

- (a) The proper operation of democratic government requires that public officials and employees be independent, impartial and responsible to the people; that government decisions and policy be made in proper channels of the governmental structure; that public office not be used for personal gain; and that the public have confidence in the integrity of its government. In recognition of these goals, there is hereby established in this Code of Ethics for all Village of Mount Horeb officials and employees, whether elected or appointed, paid or unpaid, including members of boards, committees and commissions of the Village, as well as any individuals who are candidates for elective office as soon as such individuals file nomination papers with the Village.
- (b) The purpose of this Ethics Code is to establish guidelines for ethical standards of conduct for all such officials and employees by setting forth those acts or actions that are incompatible with the best interests of the Village of Mount Horeb and by directing disclosure by such officials and employees of private financial or other interests in matters affecting the Village. The Village Board believes that a Code of Ethics for the guidance of elected and appointed officials and employees will help them avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service and will promote and strengthen the faith and confidence of the citizens of this Village in their elected and appointed officials and employees. The Village Board hereby reaffirms that each elected and appointed Village official and employee holds his or her position as a public trust, and any intentional effort to realize substantial personal gain through official conduct is a violation of that trust. The provisions and purpose of this Ethics Code and such rules and regulations as may be established are hereby declared to be in the best interests of the Village of Mount Horeb.

2. Definitions.

The following definitions shall be applicable in this Chapter:

- (a) **Public Official.** Those persons serving in statutory elected or appointed offices provided for in Chapter 62 of the Wisconsin Statutes, and all members appointed to boards, committees and commissions established or appointed by the Village President and/or Village Board pursuant to this Code of Ordinances, whether paid or unpaid.
- (b) **Public Employee.** Any person excluded from the definition of a public official who is employed by the Village.
- (c) **Anything of Value.** Any gift, favor, loan, service or promise of future employment, but does not include reasonable fees and honorariums, or the exchange of seasonal, anniversary or customary gifts among relatives and friends.
- (d) **Business.** Means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual or any other legal entity which engages in profit-making activities.
- (e) **Personal Interest.** The following specific blood or marriage relationships:
 - (1) A person's spouse, mother, father, child, brother or sister; or
 - (2) A person's relative by blood or marriage who receives, directly or indirectly, more than one-half ($\frac{1}{2}$) support from such person or from whom such person receives, directly or indirectly, more than one-half ($\frac{1}{2}$) of his support.
- (f) **Significant Interest.** Owning or controlling, directly or indirectly, at least ten percent (10%) or Five Thousand Dollars (\$5,000.00) of the outstanding stock of at least ten percent (10%) or Five Thousand Dollars (\$5,000.00) of any business.

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- (g) **Financial Interest.** Any interest which shall yield, directly or indirectly, a monetary or other material benefit to the officer or employee or to any person employing or retaining the services of the officer or employee.
 - (h) **Staff.** Any full- or part-time employee of the Village.

3. Statutory Standards of Conduct.

There are certain provisions of the Wisconsin Statutes which should, while not set forth herein, be considered an integral part of any Code of Ethics. Accordingly, the provisions of the following sections of the Wisconsin Statutes, as from time to time amended, are made a part of this Code of Ethics and shall apply to public officials and employees whenever applicable, to wit:

- (a) **Sec. 19.59.** State Ethics Law.
- (b) **Sec. 946.10.** Bribery of Public Officers and Employees.
- (c) **Sec. 946.11.** Special Privileges from Public Utilities.
- (d) **Sec. 946.12.** Misconduct in Public Office.
- (e) **Sec. 946.13.** Private Interest in Public Contract Prohibited.

4. Responsibility of Public Office.

Public officials and employees are agents of public purpose and hold office for the benefit of the public. They are bound to uphold the Constitution of the United States and the Constitution of this State and carry out impartially the laws of the nation, state and municipality, to observe in their official acts the highest standards of morality and to discharge faithfully the duties of their office regardless of personal considerations, recognizing that the public interest must be their prime concern. Their conduct in both their official and private affairs should be above reproach so as to foster respect for government.

5. Dedicated Service.

- (a) Officials and employees should adhere to the rules of work and performance established as the standard for their positions by the appropriate authority.
- (b) Officials and employees should not exceed their authority or breach the law or ask others to do so, and they should work in full cooperation with other public officials and employees unless prohibited from so doing by law or by officially recognized confidentiality of their work.
- (c) Members of the Village staff are expected to follow their appropriate professional code of ethics. Staff members shall file a copy of such professional ethics codes with the Village Clerk. The Village Clerk may notify the appropriate professional ethics board of any ethics violations involving Village employees covered by such professional standards.

6. Fair and Equal Treatment.

- (a) **Use of Public Property.** No official or employee shall use or permit the unauthorized use of Village-owned vehicles, equipment, materials or property for personal convenience or profit, except when such services are available to the public generally or are provided as Village policy for the use of such official or employee in the conduct of official business, as authorized by the Village Board or authorized board, commission or committee.
- (b) **Use of Village Stationery.** No official or employee shall use, or permit the unauthorized use of, Village stationery for personal use.

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- (c) **Obligations to Citizens.** No official or employee shall grant any special consideration, treatment or advantage to any citizen beyond that which is available to every other citizen. No official or employee shall use or attempt to use his or her position with the Village to secure any advantage, preference or gain, over and above his rightful remuneration and benefits, for himself or for a member of his or her immediate family.
 - (d) **Political Contributions.** No official shall personally solicit from any Village employee, other than an elected official, a contribution to a political campaign committee for which the person subject to this Chapter is a candidate or treasurer.

7. Conflict of Interest.

(a) Financial and Personal Interest Prohibited.

- (1) No official or employee of the Village, whether paid or unpaid, shall engage in any business or transaction or shall act in regard to financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of official duties in the public interest contrary to the provisions of this Chapter or which would tend to impair independence of judgment or action in the performance of official duties.
- (2) Any member of the Village Board who has a financial interest or personal interest in any proposed legislation before the Village Board shall disclose on the records of the Village Board the nature and extent of such interest; such official shall not participate in debate or vote for adoption or defeat of such legislation. If the matter before the Board involves a member's personal interest with persons involved, the member may participate in debate or discussion and vote on the matter following disclosure, unless an ordinance or contract is involved; if an ordinance or contract is involved, such official shall not participate in debate or discussion and vote on the matter.
- (3) Any non-elected official who has a financial interest or personal interest in any proposed legislative action of the Village Board or any board, commission or committee upon which the official has any influence or input or of which the official is a member that is to make a recommendation or decision upon any item which is the subject of the proposed legislative action shall disclose on the records of the Village Board or the appropriate board, commission or committee the nature and extent of such interest. Such official shall not participate in debate or discussion or vote for adoption or defeat of such legislation.
- (4) Any Village employee who has a financial interest or personal interest in any proposed legislative action of the Village Board or any board, commission or committee upon which the employee has any influence of input, or of which the employee is a member, that is a make to recommendation or decision upon any item which is the subject of the proposed legislative action shall disclose on the records of the Village Board or the appropriate board, commission or committee the nature and extent of such interest.

- (b) **Disclosure of Confidential Information.** No official or employee shall, without proper legal authorization, disclose confidential information concerning the property, government or affairs of the Village, nor shall such information be used to advance the financial or other private interests of the official or employee or others.

(c) Gifts and Favors.

- (1) No official or employee, personally or through a member of his immediate family, may solicit or accept, either directly or indirectly, from any person or organization, money or anything of value if it could be expected to influence the employee's official actions or judgments or be considered a reward for any action or inaction on the part of the official or employee.
- (2) No official or employee personally, or through a member of his immediate family, shall accept any gift, whether in the form of money, service, loan, thing or promise, from any person which could reasonably be expected to impair his independence of judgment or action in the performance of his duties or grant in the discharge of his duties any improper favor, service or thing of value. However, it is not a

conflict of interest for any public official or employee to receive hospitality that is unsolicited and unrelated to government business, such as a meal, and that is not intended to influence the official.

- (3) An official or employee is not to accept hospitality if, after consideration of the surrounding circumstances, it could reasonably be concluded that such hospitality would not be extended were it not for the fact that the guest, or a member of the guest's immediate family, was a Village official or employee. Participation in celebrations, grand openings, open houses, informational meetings and similar events are excluded from this prohibition. This paragraph further shall not be construed to prevent candidates for elective office from accepting hospitality, as a properly reported political contribution, from citizens for the purpose of supporting the candidate's campaign. (The State Ethics Board has interpreted "hospitality" as it applies to state officials as including meals, beverages and lodging which a person offers at his residence and would have been offered if the recipient was not an official).
- (4) Gifts received by an official or employee or his immediate family under unusual circumstances shall be referred to the Village Board within ten (10) days of receipt for recommended disposition. Any person subject to this Chapter who becomes aware that he is or has been offered any gift, the acceptance of which would constitute a violation of this Subsection, shall, within ten (10) days, disclose the details surrounding said offer to the Village Board. Failure to comply with this reporting requirement shall constitute an offense under this Chapter.

(d) **Representing Private Interests Before Village Agencies or Courts.**

- (1) Non-elected Village officials and employees shall not appear on behalf of any private person (other than him or herself, his or her spouse or minor children) before any Village agency, board, commission or the Village Board if the official or employee or any board, commission or committee of which the official or employee is a member has any jurisdiction, discretion or control over the matter which is the subject of such representation.
- (2) Elected Village officials may appear before Village agencies on behalf of constituents in the course of their duties as representatives of the electorate or in the performance of public or civic obligations. However, the disclosure requirements of Subsection (a) above shall be applicable to such appearances.

(e) **Ad Hoc Committee Exceptions.** No violation of the conflict-of-interest restrictions of this Section shall exist, however, where an individual serves on a special ad hoc committee charged with the narrow responsibility of addressing a specific issue or topic in which that individual, or the employer or a client of that individual, has an interest so long as the individual discloses to the Village Board that such interest exists.

(f) **Contracts with the Village.** No Village official or employee who, in their capacity as such officer or employee, participates in the making of a contract in which he has a private pecuniary interest, direct or indirect, or performs in regard to that contract with some function requiring the exercise of discretion on his part shall enter into any contract with the Village unless, within the confines of Sec. 946.13, Wis. Stats.:

- (1) The contract is awarded through a process of public notice and competitive bidding or the Village Board waives the requirement of this Section after determining that it is in the best interest of the Village to do so.
- (2) The provisions of this Subsection shall not apply to the designation of a public depository of public funds.

(g) **Campaign Contributions.** Campaign contributions shall be reported by all candidates for Village office in strict conformity with the provisions of the Wisconsin Statutes. Any campaign contribution tendered to or accepted by a candidate subsequent to the final statutory report shall be reported to the Ethics Board.

8. Advisory Opinions.

When an official, employee or the Ethics Board has doubt as to the applicability of a provision of this Ethics Code to a particular situation or definition of terms used in this Chapter, he should apply to the Village Attorney for an advisory opinion and will be guided by that opinion when given. The official or employee shall have the opportunity to present his interpretation of the facts at issue and of the applicability provisions of this Chapter before such advisory decision is made. This Chapter shall be operative in all instances covered by its provisions except when superseded by an applicable statutory provision and statutory action is mandatory, or when the application of a statutory provision is discretionary, but determined by the Village Attorney to be more appropriate or desirable. Advisory requests and opinions shall be kept confidential, except when disclosure is authorized by the requestor, in which case the request and opinion may be made public.

9. Hiring Relatives.

- (a) This Section governs the proposed hiring of individuals for full-time or part-time work as Village employees who are members of the immediate family of Village employees or elected officials. "Immediate family" includes those relatives by blood or marriage defined in Section 2(e) as personal interests.
- (b) Hiring an immediate family member of any current Village employee or elected Village official will be considered only if that individual has the knowledge and skills, experience or other job-related qualifications that warrant consideration for the position. A person cannot be hired for either full-time or part-time employment in a position immediately supervised by a member of that person's immediate family.
- (c) This Section does not apply to non-elected officials who are asked to accept appointment as members of a Village Board, commission or committee; non-elected officials, however, will be expected to disqualify themselves from participation in matters under consideration which may affect the hiring, retention, classification or compensation of their immediate family if currently employed or being considered for employment by the Village.

10. Employees Covered by Collective Bargaining Agreements.

In the event an employee, covered under a collective bargaining agreement, is allegedly involved in an Ethics Code violation, the terms and conditions set forth in the applicable collective bargaining agreement shall prevail in the administration and interpretation of this Ethics Code Chapter.

11. Ethics Board.

- (a) **Appointment.** There is created a six (6) member Village of Mount Horeb Ethics Board. All members of the Ethics Board shall be appointed by the Village President, subject to confirmation by the Village Board, and who shall serve without compensation or compensatory time off.
- (b) **Membership.** The membership of the Ethics Board shall consist of three (3) citizen members; one (1) designee of the Village President; one (1) member of the Village Board; and one (1) Village employee. The Ethics Board shall elect its own chairman, vice-chairman and secretary. The Village Clerk shall provide needed staff assistance and the Village Attorney shall provide needed legal advice and assistance.
- (c) **Terms of Office.** Terms of office for members of the Ethics Board shall be three (3) years except that when initial appointments are made following the board's creation, two (2) of the members shall be appointed for three (3) years, two (2) members for two (2) years, and two (2) members for one (1) year. The term of a Board member appointed as the designee of the Village President shall expire with the expiration of the Village President's term in office; the term of a Board member representing the Village Board shall expire with the expiration of the member's term as a member of the Village Board; the term of a Board member

representing Village employees shall expire with the member's termination of employment as a Village employee.

- (d) **Rule Making Authority.** The Ethics Board shall develop and adopt reasonable rules of procedure.
- (e) **Responsibilities and Duties.** The Ethics Board shall:
 - (1) Administer and enforce the provisions of this Ethics Code.
 - (2) Make declarations of economic interest filed with the Board available for public inspection and copying during normal Village office hours and compile an index of all statements on file with the Board to facilitate public access.
 - (3) Issue advisory opinions regarding the propriety of any matter to which an individual subject to this Ethics Code is or may become a party. An advisory opinion may be requested by the individual or, in the case of an individual under consideration for appointment as a Village official or employee, by the appointing officer or authority with the consent of the prospective appointee. Village officials and employees shall be afforded an opportunity to appear before the Board and present facts at issue in the interpretation and administration of the Code of Ethics established by provisions in this Chapter before an advisory opinion is issued.
- (f) **Optional Powers.** The Ethics Board may:
 - (1) Issue subpoenas, administer oaths and investigate any violation of the ordinance on its own motion or upon complaint by any person.
 - (2) Develop and make recommendations to the Village Board with respect to amendments to this Chapter.
- (g) **Records Closed.** Records of the Board's opinions, requests for opinions and investigations of alleged ordinance violations may, at the Board's discretion, be closed in whole or in part to public inspection.

12. Sanctions.

- (a) A determination that a public official's or public employee's actions constitute improper conduct under the provisions of this Chapter may constitute a cause for removal from office, termination of employment, suspension, reprimand, or other appropriate disciplinary action. As an alternative or in addition to sanctions imposed herein, any individual violating the Ethics Code shall be subject to a non-reimbursable forfeiture of not less than Ten Dollars (\$10.00) nor more than Two Hundred Dollars (\$200.00) as determined by the Village of Mount Horeb Ethics Board.
- (b) Sanctions, including any disciplinary action, that may affect employees covered under a labor agreement will be consistent with the terms and conditions set forth in the labor agreement.
- (c) Sanctions, including any disciplinary action that may affect employees covered by the Police and Fire Commission jurisdiction, will be consistent with both applicable Police and Fire Commission statutes and Commission rules and regulations.

13. Employee Protection.

No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to initiate or administer, any retaliatory action against a Village employee following an employee's disclosure of information related to the violation of any federal or state law, rule or regulation, the mismanagement or abuse of authority, a substantial waste of public funds, or a danger to public health and safety. Nothing in this Section restricts the right of the Village as an employer to take appropriate disciplinary action against an employee who knowingly makes an untrue statement or discloses information, the disclosure of which is specifically prohibited by federal or state law, rule or regulation.

Ethics and Conflicts of Interest

Part 1: The State Ethics Code*

Maria Davis, Assistant Legal Counsel and Claire Silverman,
Legal Counsel, League of Wisconsin Municipalities



*Author's Note: *This is the first article in a 3-part series that will cover (1) the state ethics code applicable to local public officials, (2) the law prohibiting private interests in public contracts, and (3) the Compatibility of Offices doctrine and miscellaneous statutes prohibiting certain conduct.*

The state ethics code establishes minimum standards of ethical conduct that prohibit local public officials from using their public office to benefit or enrich themselves, their immediate families, or organizations with which they are associated. Local officials must understand these standards to avoid running afoul of the law. The state ethics code authorizes municipalities to adopt local ethics codes that are more stringent and expansive than the state law, so local officials must also be familiar with any existing local ethics laws.

Because the state code establishes minimum standards, there may be situations where the law does not clearly prohibit certain conduct but engaging in that conduct may cast the official in a bad light or serve to undermine public confidence in local government. In situations like these, local officials should balance the benefits of involvement (e.g., representing constituents, using the official's experience) against the potential drawbacks (e.g., adverse public perception, the risk of violating the law). An official who is uncertain about a situation may want to seek advice from the municipal

attorney. Local officials may also contact League attorneys with general questions about the state ethics law.

STATE CODE OF ETHICS FOR LOCAL OFFICIALS, EMPLOYEES, AND CANDIDATES

The state ethics code applicable to local government officials is found in Wis. Stat. § 19.59. Many of the terms used therein are defined in Wis. Stat. § 19.42. These definitions are key to understanding what behavior is prohibited.

Key Definitions

The law applies to “*local governmental units*,”¹ which includes counties, cities, villages, and towns, as well as special purpose districts, such as town sanitary districts. City redevelopment authorities or similar instrumentalities or subunits of city or village governments are also subject to the code.

Section 19.59 applies to “*local public officials*,” defined as individuals holding a “*local public office*.”² The definition of “*local public office*” includes elective offices; city and village managers; appointive offices and positions where the individual serves for a specified term; and also appointive offices or positions filled by the governing body or executive or administrative head where the appointee serves at the pleasure of the appointing authority.³ “*Local public office*” does not include independent contractors and persons who perform only ministerial (i.e., non-discretionary) tasks, such as clerical workers. The way “*local public*

office” is defined creates gaps in coverage. For example, police and fire chiefs appointed by police and fire commissions are not subject to the law because they do not serve for a specified term, and do not serve at the pleasure of the appointing authority since they may only be removed for cause.⁴ Municipal judges are considered state public officials and are governed by the ethics code applicable to state officials.

“*Organization*” includes any “corporation, partnership, proprietorship, firm, enterprise, franchise, association, trust or other legal entity other than an individual or body politic.”⁵ An official is “*associated*” with an organization for purposes of the state ethics code when the individual or a member of the individual’s immediate family is an officer, director or trustee, or owns at least 10% of the organization, or is an authorized representative or agent.⁶

“*Immediate family*” means an official’s spouse or relative by marriage, lineal descent or adoption who receives, directly or indirectly, more than one-half of their support from the official or from whom the official receives more than one-half of his or her support.⁷

“*Anything of value*” is broadly defined and includes money, property, favors or services but does not include campaign contributions reported as required by state law.⁸

Prohibited Conduct

The state ethics code prohibits local public officials from engaging in the following conduct:

► p.24

1. Using their office to obtain financial gain or anything of substantial value for the private benefit of themselves, their immediate families, or organizations with which they are associated.⁹

The restriction on “using” an office encompasses more than voting. The Wisconsin Ethics Commission (WEC) interprets this to prohibit a local official from accepting any item or service, including food or drink, and travel, of more than nominal value offered and available because the official holds public office.¹⁰ WEC guideline ETH-1219 suggests that officials ask themselves the following questions regarding any item or service being offered:

- a) Is it being offered because of my public position?
- b) Is it of more than nominal or insignificant value?
- c) Is it primarily for my personal benefit rather than for the benefit of my local unit of government?

If the answer to all 3 questions is yes, the official may not accept the item or service.

This provision does not prohibit a local public official from using the title or prestige of their office to obtain permitted campaign contributions that are reported as required by state law. It also does not prohibit a local public official from obtaining anything of value from the Wisconsin Economic Development Corporation or the department of tourism, as provided under Wis. Stat. § 19.56 (3)(f).

2. Receiving “anything of value” if it could reasonably be expected to influence the local public official’s vote, official action or judgment, or could reasonably be considered as a reward for any official action or inaction.¹¹

As noted earlier, “anything of value” is defined broadly. To analyze this, WEC guideline ETH-1219 suggests that officials ask themselves whether it would be reasonable for someone to believe that the item or service is likely to influence their judgment or that it is a reward for action. If the answer is yes, the official may not accept the item or service. Note that the standard for judging behavior is what is reasonable and not the official’s subjective belief.

3. Taking official action substantially affecting a matter in which the official, an immediate family member, or an organization with which the official is associated has a substantial financial interest or using his or her office in a way that produces or assists in the production of a substantial benefit for the official, an immediate family member, or an organization with which the official is associated.¹²

Wisconsin Stat. § 19.59(1)(d) provides a limited exception to the prohibition on taking official action for lawful payments of salaries, expenses, benefits, or reimbursements, or actions on proposals to modify an ordinance.

WEC guideline ETH 1232 suggests that local officials can take action in situations where they are part of a similarly situated class of interests and their interest is not significantly greater or less than other members of that class or where the law will have general application (e.g., like an ordinance). For purposes of this exception the guideline distinguishes between *making* policy and *applying* policy.

When Abstention is Necessary -

When a matter in which a local official should not participate comes before a body which the official is a member of, the official should refrain from discussion, deliberations, and votes related to the matter and request that

the body’s minutes reflect the member’s withdrawal.¹³

4. Offering or providing influence in exchange for campaign contributions.¹⁴

Enforcement and Penalties

Local officials may request in writing advisory ethics opinions from the municipal ethics board or, if there is none, from the municipal attorney. The municipal ethics board or attorney may issue a written advisory opinion. If the official follows the advice in the opinion, it is evidence of intent to comply with the law.¹⁵ Ethics opinions are confidential unless that confidentiality is waived.¹⁶

The state ethics code is enforced by the local district attorney upon verified complaint of any person.¹⁷ If the district attorney fails to commence an action within 20 days after receiving such complaint or refuses to commence an action, the person making the complaint may petition the attorney general to act on it.¹⁸

The ethics code provides civil and criminal penalties for violations. A local official who intentionally violates any part of § 19.59, except 19.59(1)(br), may be fined not less than \$100 nor more than \$5,000 or imprisoned not more than one year in the county jail or both.¹⁹ In the alternative, a civil forfeiture of up to \$1,000 may be imposed against a local official for violating any part of the state ethics code.²⁰ Intentional violation of § 19.59(1)(br) (offering or providing influence in exchange for campaign contributions) is a Class I felony.²¹

Local Ethics Codes

Municipalities may adopt local ethics codes governing local public officials, municipal employees, and candidates for municipal elective office. Local codes can be more stringent than state law but cannot be less restrictive.²² A local ethics

code must specify the positions to which it applies. The ordinance may apply to immediate family members of individuals who hold positions or who are candidates for positions to which the ordinance applies. Section 19.59(3) explicitly authorizes local ethics codes to contain the following provisions:²³

1. Financial disclosure requirement.
2. A provision directing the municipal clerk or board of election commissioners to omit from an election ballot the name of any candidate who fails to disclose economic interests as required by the ordinance.
3. A provision directing the treasurer to withhold payment of salary or expense to any local public official or other municipal employee who fails to disclose economic interests as required by the ordinance.
4. A provision vesting administration and civil enforcement of the ordinance with an ethics board appointed in a manner specified in the ordinance. Such a board may issue subpoenas, administer oaths and investigate any violation of the ordinance on its own motion or upon complaint by any person. The ordinance may empower the board to issue opinions upon request. Records of the board's opinions, opinion requests and investigations of violations of the ordinance may be closed in whole or in part to public inspection if the ordinance so provides.
5. Provisions prescribing ethical standards of conduct and prohibiting conflicts of interest on the part of current and former local public officials and other municipal employees.
6. A provision prescribing a forfeiture for violation of the ordinance in an amount not less than \$100 for each offense and not greater than \$1,000 for each offense.

This does not limit municipalities from including other provisions in a local ethics code provided the municipality has the authority to regulate that conduct under the constitution or other laws.²⁴

Hypothetical Ethics Code Problems

1. *You are a member of the common council. Your 20-year-old daughter who lives at home with you was arrested last night for underage drinking in your city and given a ticket with a fine of \$96. She is begging for your help with the ticket because she thinks an underage drinking conviction will ruin her chances of getting into law school. She says she was not drinking even though a breathalyzer result shows she*

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was. You call the city attorney and tell her that you believe your daughter and she should dismiss the ticket or amend it to a lesser violation. Have you violated the state ethics code for local officials?

Probably. Although you are a parent, it is difficult to remove your public official hat in this circumstance. Since dismissal or amendment of the underage drinking ticket will provide relief from the forfeiture and increased insurance rates, a financial gain, something of substantial value, or substantial benefit for you, your call to the city attorney could easily be construed as an attempt to use the influence of your public office contrary to Wis. Stat. § 19.59(1)(a) or 19.59(1)(c)2. Even if your action does not violate the state ethics code, if the contact produces a favorable result, the city attorney's prosecutorial integrity is severely compromised. Any favoritism by the city attorney would call the attorney's future prosecutions into question and expose the attorney and your municipality to charges of selective prosecution. In short, you should not make the call even if you think it does not violate the state ethics code.

If the person who got the ticket is not your daughter but the daughter of a friend, do you still have a problem with § 19.59(1)(a), or 19.59(1)(c) if you make the call?

No, unless the action produces a substantial direct or indirect benefit (e.g., campaign contribution, free food at your friend's restaurant, etc.) for you contrary to § 19.59(1)(b) or (c). Nonetheless, the problems regarding the prosecutorial integrity of the city attorney noted above are still implicated and you should not make the call even though it may not violate the state ethics code.

2. *You are a village trustee. While you and your spouse are attending a conference for local public officials, an engineering consulting firm offers to take you and your spouse to dinner. Your village's policy only authorizes meal reimbursement for you*

and not your spouse. Should you let the firm pay for you and your spouse?

No. A local public official should not accept an offer to purchase a meal or other item with more than nominal value. *If the Village's expense policy would clearly require the Village to reimburse you for your meal and the meal fits within the official guidelines, can you pay the costs for your spouse's meal and let the firm pay for yours without violating the state ethics code?* Although that arguably removes the private benefit element required for a violation under § 19.59(1)(a), being wined and dined by an engineering firm could possibly violate § 19.59(1)(b) if the firm has or will have business before the municipality and the meal can reasonably be viewed as something that could influence your judgment or be considered a reward for action or inaction under 19.59(1)(b). The better practice is for you to pay for you and your spouse and advise the firm that it can reimburse the village directly if it wishes.

3. *You are on the common council and serve on a committee reviewing bids the city received from several computer consulting firms. One of the firms is owned by your spouse. Can you participate in this matter?*

No. If you participate, you will be violating the prohibition in Wis. Stat. § 19.59(1)(c)1, against taking any official action affecting a matter in which you, a member of your immediate family or an organization with which you are associated has a substantial financial interest.

At what point should you withdraw from participation?

You should excuse yourself from participating in any discussion, deliberations or votes related to selecting a computer consultant for the city. The best way to proceed would be to remove yourself from the committee meeting

before the bids are discussed, reviewed, and evaluated and request that the minutes reflect your absence.

If the firm is owned by your father instead of your spouse, can you participate in the matter without violating the state ethics code?

Yes. Assuming you do not provide one-half of your father's support or he does not provide one-half of yours, there is no violation of § 19.59(1)(c)1 or any other provision of the state ethics code. However, your local code may be more restrictive and should be checked. You should also consider public perception even if your local ethics code does permit your participation since many, if not most, people will question your ability to place your public obligations over your familial connections.

4. *You are a member of a common council. The council is considering plans and specifications for a major street widening and repair project and a resolution authorizing special assessments to be levied against abutting property owners to pay for the project. Your home abuts the street that is going to be widened and repaired. Should you participate in the matter when it comes before the council?*

The state ethics code would probably not prohibit you from participating in this matter even though the action affects you and your property if the action will affect a whole class of similarly situated property owners abutting the street project and your interest is not significantly different than other members of the class.

What if the proposed project will greatly improve the value of a piece of commercial property you own but does not have a similar effect on most of the other properties? Can you still participate?

No. Under the ethics law, you may vote on the project only if your interest is

not significant relative to all the affected persons and the action's effect on your property is neither significantly greater nor less than that upon other property owners abutting the street project.

5. *You are a member of the village plan commission. The commission is considering a conditional use permit request by a person who owns property next door to your father-in-law. Do you participate in the matter?*

If your father-in-law does not receive more than 50% of his support from you

or vice versa, then the state ethics law does not preclude you from voting on the zoning change. However, the state and federal constitutional guarantees of due process require quasi-judicial decisions such as this to be made by an impartial decision maker. If you cannot be impartial, then you should not participate. Even if you believe that you can be impartial, you should advise the applicant that your father-in-law lives next door to the property and determine whether the applicant has any objection to your participation.

6. *You are a common council member and are also on the library board. Can you participate in council discussions that will affect the library?*

Yes. The state ethics code does not prohibit this. Because the library board is a governmental body or body politic, it is not an "organization" as defined by the law.

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1. Wis. Stat. § 19.42(7u).
2. Wis. Stat. § 19.59(7x).
3. *Id.*
4. See Wis. Stat. § 62.13(3).
5. Wis. Stat. § 19.42(11).
6. Wis. Stat. § 19.42(2).
7. Wis. Stat. § 19.42(7).
8. Wis. Stat. § 19.42(1).
9. Wis. Stat. § 19.59(1)(a).

10. Wisconsin Ethics Commission Guideline ETH-1219: Receipt of Food, Drink, Favors and Services, available online at <https://ethics.wi.gov/Resources/1219-ReceiptOfItemsAndServicesByLocalOfficials.pdf>.
11. Wis. Stat. § 19.59(1)(b).
12. Wis. Stat. § 19.59(1)(c).
13. Wisconsin Ethics Commission Guideline ETH-1232: Mitigating Conflicting Interests: Private Interest vs. Public Responsibility, available online at <https://ethics.wi.gov/Resources/ETH-1232.pdf>.
14. Wis. Stat. § 19.59(1)(br).

15. Wis. Stat. § 19.59(5)(a).
16. Wis. Stat. § 19.59(5)(b).
17. Wis. Stat. § 19.59(8)(a).
18. Wis. Stat. § 19.59(8)(c).
19. Wis. Stat. § 19.58.
20. Wis. Stat. § 19.59(7).
21. Wis. Stat. § 19.58(1)(b).
22. Wis. Stat. § 19.59(1m).
23. Wis. Stat. § 19.59(3).
24. Wis. Stat. § 19.59(4).



Welcome League Law Clerk Kristen Smith

The League welcomes Kristen Smith, who joined the League as a law clerk in May. Kristen is a third-year law student at the University of Wisconsin-Madison. Previously, she served as a Judicial Intern with the Wisconsin Court of Appeals. Kristen has an interest in municipal and property law and is excited at the chance to work with our members. She looks forward to the opportunity to aid our state's communities through the League's legal services. Additionally, Kristen holds a B.A. in history from Boston University. Prior

to attending law school, she worked in the pharmaceutical industry in the compliance field. Aside from legal work, Kristen enjoys hiking, skiing, and watching hockey.



Congratulations!

Assistant Legal Counsel Maria Davis and her husband are the proud parents of a beautiful baby boy, born May 17. While Maria is out on maternity leave, we will have just one attorney in the office. We thank you for your patience and understanding if it takes us longer than usual to respond to legal inquiries.



Ethics and Conflicts of Interest Part 2: Private Interest in Public Contracts*

Claire Silverman, Legal Counsel, League of Wisconsin Municipalities

*Author's Note: *This is the second article in a 3-part series covering (1) the state ethics code applicable to local public officials, (2) the law prohibiting private interests in public contracts, and (3) the Compatibility of Offices doctrine and miscellaneous statutes prohibiting certain conduct.*

Last month's article focused on the state ethics code which sets minimum standards of ethical conduct for local public officials. This month we turn our attention to Wis. Stat. § 946.13, often referred to as the "pecuniary interest" statute. "Pecuniary" means relating to money. With limited exceptions, § 946.13 prohibits public officials and public employees from having a *private* pecuniary interest in *public* contracts.¹

There are two important reasons why public officials and employees need to understand and avoid violating § 946.13. First, it is a felony criminal statute. Second, it is a strict liability statute which means that conviction does not require the state to prove knowledge of wrongdoing or criminal intent.² According to the Wisconsin Supreme Court, § 946.13 "is directed not at corruption but at conduct presenting an opportunity for corruption."³

Prohibited Conduct

Section 946.13(1) contains two subsections that apply when an official or employee has a private pecuniary interest in a public contract. Subsection (1)(a)

prohibits a public official or employee from acting in a private capacity. Subsection (1)(b) prohibits them from acting in their official capacity. To better understand the prohibitions, it is helpful to examine their component parts.

Private capacity prohibition

Section 946.13(1)(a) prohibits public officials and employees, in their *private* capacity, from engaging in the following conduct:

- Negotiating, bidding for or entering into;
- a contract in which the official or employee has a direct or indirect private pecuniary interest;
- if the official or employee is *authorized* or required by law to participate in their capacity as officer or employee in the making of the contract.

Significantly, this private capacity prohibition does not require that an official or employee actually take any official action in regard to the contract. The statute imposes liability simply when an official or employee is authorized to participate in the making of the contract and takes any of the prohibited actions in their private capacity. Abstaining from voting on or refraining from acting with regard to the contract does not prevent a violation. Additionally, violation of § 946.13(1)(a) does not require that a contract be executed. Negotiation or bidding for the contract is enough to violate the restriction.⁴

Understanding this prohibition on private action is key because this is the part of the pecuniary statute most likely to be inadvertently violated. However, as noted earlier, inadvertent violations are still violations given that § 946.13 is a strict liability statute.

A public official or employee with a private pecuniary interest in a public contract cannot avoid violating § 946.13(1)(a) by having someone else negotiate or bid for the contract on their behalf. The law "forbids a public officer or employee from accomplishing through an agent that which the law prohibits [the officer or employee] from doing directly."⁵ This means that if another person or entity is acting as agent for the public official or employee, then the actions of that person or entity will be deemed those of the official or employee for purposes of § 946.13(1).

Official capacity prohibition

Section 946.13(1)(b) prohibits a public official or employee from engaging in the following conduct:

- Participating in the making of a municipal contract in his or her official capacity or performing some function requiring the exercise of discretion in regards to a municipal contract;
- if the official has a direct or indirect financial interest in the contract.

In contrast to (1)(a), (1)(b) requires some affirmative act such as a vote or some other participation in the making or execution of the contract in order

for there to be a violation. Accordingly, refraining from acting in all official or authorized capacities on the contract will prevent violation.

Exceptions

There are a number of statutory exceptions to § 946.13(1).⁶ This article does not review them all. Probably the most important exception is for contracts in which any single public officer or employee is privately interested that do not involve receipts and disbursements by the municipality aggregating more than \$15,000 in any year.⁷ Another important exception provides that the prohibition on official action (946.13(1)(b)) does not apply to a public officer or public employee by reason of his or her holding not more than 2% of the outstanding capital stock of a corporate body involved in the contract.⁸

These exceptions should not be viewed as authorizations. They remove the conduct from the scope of § 946.13, but do not immunize the behavior from other applicable restrictions such as the state ethics code for local officials, common law rules, or local ordinances and rules.

Enforcement and Penalties

A contract entered into in violation of § 946.13 is void and the municipality in whose behalf the contract was made incurs no liability thereon.⁹ Violation of Wis. Stat. § 946.13 is a Class I felony and subjects the person to a fine of not more than \$10,000, imprisonment for not more than three years and six months, or both.¹⁰ A conviction would also lead to an automatic vacation of an elective office since the official would be constitutionally and statutorily barred from holding public office.¹¹

Hypothetical Pecuniary Interest Statute Problems¹²

1. *You are a member of the city council and are employed by a local engineering firm. Your city recently decided to solicit bids from qualified engineering firms to study its municipal water system. The council appropriated \$50,000 for the contract. You are not involved in any management decisions at your engineering firm, but a major portion of your work with the firm relates to design and operation of municipal water systems. In fact, you are the firm's expert on municipal water systems. Your firm intends to submit a bid for the water system study contract with your city and you intend to work on the contract if it is awarded to your firm. Do you have a problem with Wis. Stat. § 946.13(1)?*

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No case law or legal authority provides a clear answer, but given your employment by the firm and your status as the firm's expert on municipal water systems, you likely have an indirect private pecuniary interest in the contract. To avoid violating § 946.13(1)(b), you should not participate in your official capacity. If any evidence suggests that the engineering firm is acting as your agent for purposes of the contract, then an attempt by the firm to negotiate or bid for or enter into the contract to study the city's water system would violate § 946.13(1)(a).

What if you do not do any work on the contract?

If you do not do any work on the contract, it seems less likely that the firm is acting as your agent.

What if, instead of employment, you are a senior partner in the firm but will do not do any work on the contract?

If being a senior partner means you have a say in the firm's management decisions, the firm is likely to be viewed as acting as your agent and the firm's submission of a bid likely violates § 946.13(1)(a).

2. *You are a nominee for a position on a city's redevelopment authority. You are also director of a local nonprofit organization which received a \$25,000 development loan from the authority one year ago. Can you serve on the authority?*

Yes. Since the loan was negotiated, bid for, and entered into before appointment to the redevelopment authority and before you had any authority to participate as a public official in the making of the loan, there is no violation of § 946.13(1). However, if your organization attempts to renegotiate the terms of the existing loan or seeks a new loan while you serve on the authority,

that would violate § 946.13(1)(a). Moreover, § 946.13(1)(b) prohibits you from taking any action regarding the current administration of the existing loan while you serve on the authority.

3. *Two years ago you were elected as a village trustee. You are a mechanic and own the only vehicle repair shop within 60 miles of the village. As long as anyone can remember, village vehicles have been serviced at your shop. As a trustee, you always abstain from voting on bills and any claims or other matters relating to your store. Last year, total sales to the village amounted to \$12,000. Did you violate § 946.13(1) last year?*

No. Contracts involving receipts and disbursements taken all together and less than \$15,000 in any year do not violate § 946.13(1).

This year, sales to the village are approaching \$17,000 dollars. Are you in violation of § 946.13(1) this year?

Yes. The sales transaction that pushed you over the \$15,000 limit of § 946.13(2)(a) was an impermissible contract under § 946.13(1)(a). While abstention protected you from violating the prohibition on official action on a contract where you have a financial interest, it does not prevent you from violating the provision prohibiting private involvement in a contract where you have official authority to act.

4. *You are a city council member. The city's human resources director is retiring and the position will be vacant in the near future. The position pays an annual salary of \$68,000. Can you apply for the position before you resign from the city council?*

No. Submission of an application for employment is a bid for a contract. Since

the position will pay an annual salary in excess of \$15,000, you must resign from the city council before you can apply for the position so that you have no authority to take action on the contract when you throw your hat in the ring.

You intend to resign from office before you submit your application. However, you know the mayor will nominate the new director to the city council for approval and want to talk to her about your options. Can you talk to the mayor while you are still a member of the city council and let her know that you are interested in the position?

No. Such discussion probably constitutes negotiation or bidding for the employment and would violate § 946.13(1)(a). The discussion with the mayor is also arguably an improper use of your office under § 19.59(1)(a) of the state ethics code for local government officials.

Would you violate § 946.13(1) if you applied before resigning but withdrew your application before the city acted on it?

Yes. Section 946.13(1)(a) prohibits a public official, in his or her private capacity, from negotiating or bidding for a contract in which the official has a financial interest if the official is authorized to participate in his or her official capacity in the making of the contract. Applying for the position in your private capacity while authorized to exercise official discretion regarding the contract technically violates the statute; it does not matter that you have withdrawn your application before it was acted on. However, withdrawing your application may reduce the risk of being prosecuted for the violation.

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1. Contract includes a conveyance, which is a transfer of property from one owner to another. Wis. Stat. § 946.13(4).

2. *Id.*

3. *State v. Stoeck*, 134 Wis. 2d 66, 79, 396 N.W.2d 177, 182 (1986).

4. *State v. Venema*, 2002 WI App 202, 257 Wis. 2d 491, 650 N.W.2d 898.

5. 75 Op. Att'y Gen. 172, 174 (1986).

6. See Wis. Stat. § 946.13(2), (5), (6), (7), (8), (9), (10), and (11).

7. Wis. Stat. § 946.13(2)(a).

8. Wis. Stat. § 946.13(5).

9. Wis. Stat. § 946.13(3).

10. Wis. Stat. § 939.50(3)(i).

11. Wis. Const. art. XIII, sec. 3(3) and Wis. Stat. § 17.03(5).

12. These hypotheticals are only intended to educate how we believe the law would apply to certain fact situations. We emphasize that League attorneys' interpretations are educated guesses; they do not carry the weight of authority.



Ethics and Conflicts of Interest Part 3: The Incompatibility Doctrine and Miscellaneous Conduct Provisions*

Claire Silverman, Legal Counsel, League of Wisconsin Municipalities

Author's Note: *This is the third article in a 3-part series covering (1) the state ethics code applicable to local public officials, (2) the law prohibiting private interests in public contracts, and (3) the Incompatibility doctrine and miscellaneous statutes prohibiting certain conduct

Incompatibility Doctrine

The incompatibility doctrine is a court-created doctrine that prohibits a public official from simultaneously holding dual offices or an office and a position of public employment where the two are incompatible.¹ A general treatise quoted in a 1985 Wisconsin Attorney General Opinion elaborates on incompatibility:²

“[Offices] are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. Two offices or positions are incompatible if there are many potential conflicts of

interest between the two, such as salary negotiations, supervision and control of duties, and obligations to the public to exercise independent judgment. ... Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when the one is subordinate to, or subject to audit or review by, the second; obviously in such circumstances, where both posts are held by the same person, the design that one act as a check on the other would be frustrated. ...

An incompatibility exists whenever the statutory functions and duties of the office conflict or require the officer to choose one obligation over another.”

Incompatibility determinations are made by reviewing the duties and responsibilities of the two offices or the office and position involved, not by examining the character of the person holding the offices or position.³ A leading municipal law treatise explains:⁴

“Public policy demands that an officeholder discharge his or her duties with undivided loyalty. The doctrine of incompatibility is intended to assure performance of that quality. Its applicability does not turn upon the integrity of the person concerned or his or her individual capacity to achieve

impartiality, for inquires of that kind would be too subtle to be rewarding. The doctrine applies inexorably if the offices come within it, no matter how worthy the officer's purpose or extraordinary his or her talent.”

In *Compatibility of Offices 581*, the League opined that the incompatibility doctrine probably does not apply to an individual who holds a public position and provides a service to a governmental entity as an independent contractor.⁵

Because the governing body exercises control over such matters as salaries, duties, and removal or discipline of many municipal officers and employees and often has appointment authority or confirmation authority, the League has long opined that governing body members cannot hold other public offices or positions of employment unless the arrangement is specifically authorized. We have opined that this is true even where a department is under the control of a board or a commission, like the police and fire commission or a utility commission, since the governing body still exercises budgetary and general supervisory control over the departments and appoints board or commission members.⁶

► p.23

1. *State v Jones*, 130 Wis. 572 (1907); *Martin v. Smith*, 239 Wis. 314 (1941); *Otradovec v. City of Green Bay*, 118 Wis. 2d 393 (Ct. App. 1984). In *Otradovec*, the court held the incompatibility doctrine extends to positions of public employment as well as public offices and that an appraiser employed in the City Assessor's office could not also serve as an alderperson because as alderperson he had power to vote on contracts setting the terms of his employment and could also vote on appointment of the city assessor in whose office he worked. The possibility of abstention did not make the two compatible.

2. 74 Op. Att'y Gen. 50 (1985), quoting 63A Am. Jur. 2d Public Officers and Employees § 78 (1984).

3. *State v Jones*, 130 Wis. 572 (1907); *Martin v. Smith*, 239 Wis. 314 (1941); and *Otradovec v. City of Green Bay*, 118 Wis. 2d 393 (Ct. App. 1984).

4. 3 McQuillin, Mun. Corp., § 12.67 (3d ed.).

5. “An independent contractor is one who is employed to do a piece of work without restriction as to the means to be employed, and who employs his own labor and undertakes to do the work in accordance with his own ideas or under plans furnished by the person for whom the work is done, to produce certain results required by such person. The mere reservation by a municipality of the privilege of inspecting and generally supervising the work, and making changes in the plans, does not destroy or impair the character of independent contractor. Whether one is an employee or an independent contractor generally should be determined from the facts of the particular case, and from a proper construction of the contract as a whole.” *Weber v. Hurley*, 13 Wis. 2d 560, 568, 109 N.W.2d 65 (1961), quoting 18 McQuillin, Mun. Corp. (3d ed.), p. 343, § 53.75.

6. *Compatibility of Offices 583*.

Incompatibility Exceptions

Statutory exceptions to the incompatibility doctrine include a significant new provision that allows a village trustee serving as a village employee to be paid an hourly wage not exceeding a total of \$15,000 per year.⁷ A similar provision allows a town supervisor to perform a limited amount of work as a town employee; note that no similar provision exists for city governing body members. That amount may be paid *in addition* to any salary paid to trustees under Wis. Stat. § 61.32, and *in addition* to amounts paid under Wis. Stat. § 66.0501(4) (explained below). Of note, this provision does not amend or reference the pecuniary interest statute, § 946.13, a criminal statute prohibiting public officials and employees from having private interests in public contracts over which they have authority⁸ and containing an exception for contracts which, in the aggregate, do not involve receipts and disbursements exceeding \$15,000 in one year. However, courts assume that lawmakers know the laws in effect when they create legislation.⁹ Presumably, the legislature would not authorize a trustee to receive these cumulative amounts but make receiving them a felony.

Another important exception is § 66.0501(4), which allows volunteer fire fighters, emergency medical services practitioners, or responders in a city or village to also hold an elective office in that municipality if their annual compensation from one or more of those positions, including fringe benefits, does not exceed a certain amount – \$25,000 if the city or village has a population of 5,000 or less, or \$15,000 if the city or village has a population of more than 5,000.

Another exception, § 66.0501(2), provides that the governing body may be represented on city or village boards

and commissions where no additional compensation, except a per diem, is paid to the governing body representatives. A representative of a governing body who is a member of a city or village board or commission may receive a per diem only if the remaining members of the board or commission may receive a per diem.

Finally, additional statutory exemptions allow a governing body member to also serve as a county supervisor¹⁰ and allow a local public official to serve as an election official and be compensated for that service.¹¹

Enforcement/Consequences

Under the incompatibility doctrine, a public official who takes a second office that is incompatible with an existing office is deemed to have vacated the first office.¹² The law is less clear regarding the holding of an incompatible office and position. In *Otradovec v. City of Green Bay*,¹³ the court of appeals allowed the

alderperson employed as an appraiser in the city assessor's office to choose between the office and employment.

The incompatibility doctrine is not self-enforcing. Quo warranto actions are a means to challenge someone's right to hold office.¹⁴

Miscellaneous Conflict of Interest/ Misconduct Provisions

Conflict of Interest

Because the legal article in the June 2021 issue of this magazine focused on the state ethics code applicable to local officials, those provisions are not covered here. Briefly highlighted below are other conflict of interest and conduct provisions local officials and employees should be aware of.

An 1879 Wisconsin Supreme Court decision holds that members of a legislative body are disqualified to vote on propositions in which they have a

► **p.24**

7. See 2021 Wis. Act 69, effective July 10, 2021.

8. Section 946.13 was explained in greater detail in an article on p. 28 of the July 2021 issue of *The Municipality* (Pecuniary Interest 395).

9. *City of Milwaukee v. Kilgore*, 193 Wis. 2d 168, 183, 532 N.W.2d 690, 695 (1995).

10. Wis. Stat. § 59.10(4) and Compatibility of Office 604.

11. Wis. Stat. § 66.0501(4)(b).

12. See *Martin v. Smith*, 239 Wis. 314, 326, 1 N.W.2d 163, 169 (1941).

13. See footnote 1.

14. See Wis. Stat. § 784.04

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direct pecuniary interest adverse to the municipality. *Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208, 2 N.W. 291 (1879). It is unclear whether the rule announced in *Hall* extends to legislative decisions of a governmental body.¹⁵

Robert's Rules of Order

Many municipalities have adopted Robert's Rules of Order. Robert's says no member should vote on a question in which the member has a direct personal or pecuniary interest not common to other members of the organization. However, Robert's says this does not prevent a member from voting for himself for an office or other position to which members are generally eligible, nor from voting when other members are included with him in a motion.

The Wisconsin court of appeals cited Robert's and the *Hall* decision in a case where the employee of an entity seeking a rezoning abstained from voting as a county board supervisor on the matter. The court concluded that had the employee-supervisor voted, his vote would have been disqualified.¹⁶

Eligibility for Other Public Positions

Under Wis. Stat. § 66.0501(2), except as expressly allowed by law, governing body members are ineligible, during the term for which elected, for any office or position created by the governing body during that term, even if they resign first. They are also ineligible for any office or position if the selection for it is vested in the governing body unless the member resigns before the selection is made. However, governing body members are eligible for any elective office.

Misconduct in Office Statute

Under Wis. Stat. § 946.12, any public officer or employee who does any of the following is guilty of a Class I felony, punishable by a fine not to exceed \$10,000 or imprisonment not to exceed three years and six months or both:¹⁷

- Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of his or her office or employment within the time or in the manner required by law.
- In his or her official capacity does an act which he or she knows exceeds his or her lawful authority or which he or she knows is forbidden by law to do in his or her official capacity.
- In his or her official capacity, by commission or omission, exercises a discretionary power in a manner inconsistent with the duties of the office or employment or the rights of others with intent to obtain a dishonest advantage personally or for another.
- In his or her official capacity intentionally and materially falsifies an entry in an account or record book or return, certificate, report or statement.
- Under color of the office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which the officer or employee knows is greater or less than is fixed by law.

Bribery

Wisconsin Stat. § 946.10 prohibits public officers or employees from directly or indirectly accepting or offering to accept any property or personal advantage they are not authorized to

receive, based on an understanding that the officer or employee will act in a certain manner regarding any matter pending or that might come before the officer or employee in his or her official capacity or do or omit to do any act in violation of the officer's or employee's lawful duty. Bribery is a Class H felony, punishable by a fine not to exceed \$10,000, or imprisonment not to exceed six years or both.¹⁸

Another provision relating to bribery is found in Article XIII, sec. 11 of the Wisconsin Constitution, which prohibits municipal incumbents and candidates from soliciting or accepting any free pass or frank, or any privilege withheld from any person, for the traveling accommodation or transportation of any person or property, or the transmission of any message or communication. Violation is bribery and results in vacation of the office.¹⁹

Discounts at Certain Stadiums

The state ethics code prohibits any person serving in a local elective office from accepting any discount on the price of admission or parking charged to members of the general public, including any discount on the use of a sky box or private luxury box, at a stadium that is tax exempt from general property taxes under sec. 70.11(36).²⁰

Liquor Licensee Relations

No member of a municipal governing body may hold an alcohol beverage wholesalers permit under sec. 125.54 or, with respect to the issuance or denial of retail licenses under sec. 125.51, do any act in violation of sec. 19.59(1).²¹

15. See 63 Op. Att'y Gen. 545 (1974), citing 133 A.L.R. 1257; 62 C.J.S., Municipal Corporations, § 402 (rule may not extend to legislative decisions).

16. *Ballenger v. Door County*, 131 Wis. 2d 422, 388 N.W.2d 624 (Ct. App. 1986).

17. Wis. Stat. § 939.50(3)(i).

18. Wis. Stat. § 939.50(3)(h).

19. Wis. Const. Art. XIII, § 11. See also 77 Op. Att'y Gen. 237, 244 (1988).

20. Wis. Stat. § 19.451.

21. Wis. Stat. § 125.51(1)(b). Section 19.59(1) is part of the state ethics code.

Rules of Professional Conduct

Some public officials and employees are also subject to special conflict of interest rules imposed pursuant to professional rules of conduct related to the profession or position (e.g., municipal attorneys and municipal judges).²²

Assessors and Board of Review Members

Wisconsin Stat. §§ 70.501 and 70.502 prohibit misconduct by assessors and board of review members.

Compatibility of Office 609 Pecuniary Interest 396

About the Author:

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22. See Supreme Court Rules (SCR) Chapters 20 and 60 and also 60.01(8).



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Village of Mount Horeb 2023 Budget Calendar

No later than July 2022: Department heads meet with their respective committees to discuss and recommend capital purchase requests for the 2023-2027 budget years.

July 29, 2022: Department requests for Capital Improvement purchases for years 2023-2027 due to the Village Administrator.

August 10, 2022: Village Administrator provides preliminary 2023 operating budget to department heads for review.

August 22-26, 2022: Department heads meet with Village Administrator and Treasurer to discuss 2022 operating and capital budgets.

Finance & Personnel Meetings – Proposed; FP Committee to approve 7/7/2021:

- September 28, 2022: 5:00 p.m. Finance and Personnel Committee meets to discuss 2023 budget and 2023 – 2027 Capital Improvement Plan (data for review to be distributed by September 16, 2021)
- October 5, 2022: 4:00 p.m. Finance and Personnel Committee meeting, with department heads in attendance, to present 2023 budget requests
- October 12, 2022: 5:00 p.m. Finance and Personnel Committee meeting to continue budget work (if necessary)
- October 19, 2022: 5:00 p.m. Finance and Personnel Committee meeting to continue budget work (if necessary)

November 2, 2022: Village Administrator presents 2023 budget and 2023-2027 Capital Improvement Plan to Village Board. Village Board sets a public hearing for November 16, 2022.

November 16, 2022: Village Board holds public hearing on 2023 budget and 2023-2027 Capital Improvement Plan followed by budget adoption.

Village of Mount Horeb

Personnel Update

May 24, 2022

OPEN POSITIONS:

Deputy Clerk/Office Assistant

- Currently in the interview phase

Economic Development Director

- Job posting soon

RECENTLY FILLED POSITIONS:

60/40 Water/Electric Worker, Bo Schult, start date 5/23/2022

Finance Director/Treasurer, Joan Stuessy – start date 6/06/2022