

Ethical Conduct in Public Office

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Wisconsin has a long tradition of emphasizing clean government dating back to initiatives of the 1880's. Wisconsin voters wanted a change from local party machines and wanted more responsive government not tied to government favor. Wisconsin saw a rapid growth of its cities and a shift of power. Change was demanded by reformers as well as Wisconsin businesses all wanting better, more efficient and honest government.¹

1885 saw Wisconsin's first civil service law establishing a merit system for Milwaukee's police and fire departments. To this day, police and fire discipline decisions are overseen on a large scale by Commissions versus elected officials. In the same year, Wisconsin enacted legislation forbidding bribery and other corrupt practices in state and local government.

In 1905, civil service reforms were extended to state government. Unusual for the time, the legislature delegated great authority to a civil service commission. The laws in Wisconsin insisting upon open and clean government have continued to develop ever since.

Today, Wisconsin remains a model to others with leading edge legislation such as open meetings law, public records laws, a state ethics code for state and local officials, limitations of contractual relations for public officials, penalties for misconduct in office, prohibitions against bribery and receipt of certain things of value, and construction bidding requirements to name a few.

Aside from legislation, case law and the development of common law have also expanded Wisconsin's insistence on clean government. Doctrines such as Incompatibility of Office coupled with clarification through case law and Opinions of the Wisconsin Attorney General, demand a separation of positions.

In total, Wisconsin has a strong history of clean government a responsibility each of us lives up. It is a tradition each of you are part of, help continue and strengthen every day.

I. Chapter 19.59 – Codes of Ethics for Local Governmental Official, Employees and Candidates.

1. Local Public Officials

- a) an elective office of a local governmental unit;
- b) a city or village manager position;
- c) an appointive office or position of a local governmental unit in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor; and
- d) an appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative

head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action or a position filled by an independent contractor.

2. Key Definitions

- a) "Anything of value" means "any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the state, fees and expenses which are permitted and reported under s. 19.56, political contributions which are reported under chapter 11, or hospitality extended for a purpose unrelated to state business by a person other than an organization." § 19.42(1).
- b) "Associated," when used with reference to an organization, "includes any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10 percent of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent." § 19.42(2).
- c) "Immediate family" means: (a) an individual's spouse; and (b) an individual's relative by marriage, lineal descent or adoption who receives, directly or indirectly, more than one-half of his or her support from the individual or from whom the individual receives, directly or indirectly, more than one-half of his or her support. § 19.42(7).
- d) "Local governmental unit" means "a political subdivision of this state, a special purpose district in this state, an instrumentality or corporation of such a political subdivision or special purpose district, a combination or subunit of any of the foregoing or an instrumentality of the state and any of the foregoing." § 19.42(7u).

3. Conduct Prohibited By Statute

- a) Using Office for Financial Gain. § 19.59(1)(a). No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. Section 19.59(1)(a) does not prohibit a local public official from using the title or prestige of his or her office to obtain campaign contributions that are permitted and reported as required by chapter 11.
- b) Illegal Influence: Offer or Receipt of Thing of Value. § 19.59(1)(b). No person may offer or give to a local public official, directly or indirectly, and no local public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the local public official's vote, official actions or judgment, or could

reasonably be considered as a reward for any official action or inaction on the part of the local public official. Section 19.59(1)(b) does not prohibit a local public official from engaging in outside employment.

- c) No local public official or candidate for local public office may, directly or by means of an agent, give, or offer or promise to give, or withhold, or offer or promise to withhold, his or her vote or influence, or promise to take or refrain from taking official action with respect to any proposed or pending matter in consideration of, or upon condition that, any other person make or refrain from making a political contribution, or provide or refrain from providing any service or other thing of value, to or for the benefit of a candidate, a political party, any committee registered under ch. 11, or any person making a communication that contains a reference to a clearly identified local public official holding an elective office or to a candidate for local public office.
- d) Taking Action to Affect Private Financial Interest. § 19.59(1)(c)1. No local public official may take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.
- e) Using Office or Position for Private Benefit. § 19.59(1)(c)2. No local public official may use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

EXCEPTION: Sections 19.59(1)(c)1 and 2 do not prohibit a local public official from taking any action concerning the lawful payment of salaries or employee benefits or reimbursement of actual and necessary expenses, or prohibit a local public official from taking official action with respect to any proposal to modify a county or municipal ordinance. § 19.59(1)(d).

II. Local Ethics Ordinances Section 19.59(1m)

- 1. A local ethics ordinance may contain the following provisions:
 - a) Financial disclosure requirement.
 - b) 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.
 - c) 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.

- d) 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.
- e) 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.
- f) A provision prescribing a forfeiture for violations of the ordinance in an amount not less than \$100 for each offense and not greater than \$1,000 for each offense.

III. Private Financial Interests in Public Contracts (§ 946.13)

1. Prohibited Conduct

a) Prohibition on Private Action.

- i. Section 946.13(1)(a) prohibits a public official or employee, in his or her private capacity, from negotiating, bidding for or entering into a contract in which the officer or employee has a private pecuniary interest, direct or indirect, if at the same time the officer or employee is authorized or required by law to participate in the officer's or employee's capacity as such officer or employee in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on the officer's or employee's part.
- ii. Because the § 946.13(1)(a) prohibition relates to negotiating, bidding or entering into a contract, a violation does not require a successful agreement/contract. And, while unclear, merely discussing the opportunity with a person involved in the agreement process might be sufficient "negotiation" for a violation. In addition, because 946.13(1)(a) prohibits private action when an officer is simply authorized by law to participate in an official capacity, abstention cannot cure a violation, although it may be that one of the exceptions set forth below applies.

b) Prohibition on Acting in Official Capacity in Private Contract

- i. Section 946.13(1)(b) prohibits a public official or employee, in his or her private capacity from participating in the making of a contract in which the officer or employee has a private pecuniary

interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on the officer's or employee's part.

2. Exceptions:

- a) Contracts that do not involve receipts and disbursements aggregating more than \$15,000 in any year.
- b) Contracts involving the deposit of public funds in public depositories.
- c) Contracts involving loans made pursuant to § 67.12 (temporary borrowing and borrowing on promissory notes).
- d) Contracts for the publication of legal notices required to be published, provided such notices are published at a rate not higher than that prescribed by law.
- e) Contracts for the issuance to a public officer or employee of tax titles, tax certificates, or instruments representing an interest in, or secured by, any fund consisting in whole or in part of taxes in the process of collection, provided such titles, certificates, or instruments are issued in payment of salary or other obligations due such officer or employee.
- f) Contracts for the sale of bonds or securities issued by a political subdivision of the state; provided such bonds or securities are sold at a bona fide public sale to the highest bidder and the public officer or employee acquiring the private interest has no duty to vote upon the issuance of the bonds or securities.
- g) Contracts with, or tax credits or payments received by, public officers or employees for wildlife damage claims or abatement, farmland preservation, soil and water resource management, soil erosion control, animal waste management, and nonpoint source water pollution abatement.
- h) Any public officer or public employee, who receives compensation for the officer's or employee's services as such officer or employee, exclusive of advances or reimbursements for expenses, of less than \$10,000 per year, merely by reason of his or her being a director, officer, employee, agent or attorney of or for a state or national bank, savings bank or trust company, or any holding company thereof. However, this exception shall not apply to any such person whose compensation by such financial institution is directly dependent upon procuring public business. Compensation determined by longevity, general quality of work or the overall performance and condition of such financial institution is not deemed compensation directly dependent upon procuring public business.
- i) Others.

3. Contracts Involving Employers, Spouses or Others

- a) Action Through Agents - Even though Wis. Stat. §§. 946.13(1)(a) and (b) only specifically prohibit direct involvement by an official or employee in the making of a public contract, it can also be violated indirectly if another person acts as an agent or otherwise on the individual's behalf since "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." 75 Op. Att'y Gen. 172, 174 (1986) citing 52 Op. Att'y Gen. 367, 370 (1963). So, in the right circumstances, actions of an employer or other third party can trigger a violation even though the public official or employee did not act directly. See 76 Op. Att'y Gen. 178 (1987); 76 Op. Att'y Gen. 90 (1987); 75 Op. Att'y Gen. 172(1986).
- b) Ownership Interest - If a municipal official or employee has an ownership interest in a company that is pursuing a public contract that interest might support the conclusion that the company is acting as an agent for the public official or employee. However, the § 946.13(1)(b) prohibition on official action does not apply to a public officer or public employee solely by reason of his or her holding not more than 2 percent of the outstanding capital stock of a corporate body involved in such contract. § 946.13(5), Stats.
- c) Not Voting - In general, a public official or public employee who works for but has no ownership interest in a company that is pursuing a public contract can avoid violating § 946.13(1)(a) or (b) by not participating in his or her private or official capacity. However, lack of ownership interest is not the only criteria that might be considered and is not an absolute defense to a § 946.13(1) violation since other factors are relevant to determining whether an employer or other party has acted as an agent for a public official or employee contrary to § 946.13(1)(a) or (b). See 75 Op. Att'y Gen. 172(1986).
- d) Contracts Involving Spouse. The attorney general has opined that § 946.13 is not violated when a governmental body member's spouse is employed by that governmental body and that the enactment of the marital property law does not change the conclusion if the public officer or employee abstains from official involvement and is not personally involved in bidding or negotiating the contract. See 63 Op. Att'y Gen. 44 (1974); 52 Op. Att'y Gen. 367 (1963) and 76 Op. Att'y Gen. 15 (1987).

4. Effect of a Violation

- a) Contract is Void - A contract entered into in violation of Wis. Stat. § 946.13 is void and the state or the political subdivision in whose behalf the contract was made incurs no liability thereon. However, this does not apply to contracts creating a public debt, as defined in § 18.01(4), if the requirements of § 18.14(1) have been met. No evidence of indebtedness, as defined in § 18.01(3), shall be invalidated on account of a violation of this section by a

public officer or public employee, but such officer or employee and the surety on the officer's or employee's official bond shall be liable to the state for any loss to it occasioned by such violation. § 946.13(6).

- b) Felony Violation - An officer or employee who violates § 946.13 is guilty of a Class I felony, which is punishable by a fine not to exceed \$10,000 or imprisonment not to exceed 3 years and 6 months, or both.

IV. Bribery of Public Officers and Employees.

1. Prohibited Conduct - Any public officer or public employee who directly or indirectly accepts or offers to accept any property or personal advantage, which the officer or employee is not authorized to receive, pursuant to an understanding that the officer or employee will act in a certain manner regarding any matter which is pending or might come before the officer or employee in the officer's or employee's capacity as such officer or employee or that the officer or employee will do or omit to do any act in violation of the officer's or employee's lawful duty is guilty of a Class H felony, punishable by a fine not to exceed \$10,000 or imprisonment not to exceed 6 years, or both.

V. Sale to Employees Prohibited.

1. Conduct Prohibited - No municipal department, member or officer of any village board or common council shall sell or procure for sale or possess or have under its control for sale to any municipal employees any article, material, product or merchandise of whatsoever nature, excepting meals, public services and such specialized appliances and paraphernalia as may be required for the safety or health of the employees. § 175.10(1). This section does not apply to any municipality nor to any municipal officer or employee while engaged in any recreational, health, welfare, relief, safety, or educational activities furnished by the state or any political subdivision thereof. § 175.10(3). Violation of this provision is a misdemeanor, punishable by a fine of not less than \$100 nor more than \$500 or by imprisonment in the county jail not less than 30 days nor more than 90 days, or both. § 175.10(2).

VI. Incompatibility of Offices – Common Law.

1. The Common-Law Doctrine of Incompatibility
 - a) This doctrine recognizes a conflict of interest in some situations where a public official holds two public offices or holds a public position and a public office.
 - b) The Wisconsin Attorney General cited approvingly in a formal opinion, 74 Op. Att'y Gen. 50 (1985), a summary of common law incompatibility principles discussed in 63A Am. Jur. 2d Public Officers and Employees § 78 (1984):

Incompatibility is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions, which attach to them. They 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. If the duties of the two offices are such that when placed in one person they might disserve the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompatible.

- c) Violations of the doctrine of incompatibility are not punished by fines or jail. Instead, case law establishes that a person taking a second, incompatible office is deemed to have vacated the first office. But, it is not clear what the result of holding an incompatible office and position is since the only appellate court addressing this circumstance to date declined to decide whether a person taking an incompatible office would be deemed to have vacated the position or would be able to choose which to keep.
- d) Statutorily Compatible Positions
 - i. Other elected Offices
 - ii. Position Created During term
 - iii. Representing Body on other Boards
 - iv. EMT's and Volunteer Firefighters
 - v. Local Governing Elected Official and County Board

VII. CONCLUSION

¹ See “*Civil Service Reforms and the Beginning of Wisconsin’s Tradition of Clean Government*,” Joseph A. Ranney.