

**El. Bd. Op. 95-1** (Reaffirmed 12/17/08)

**Summary:**

**A vacancy on the Milwaukee Board of Election Commissioners is filled by appointment from a list of nominees submitted by the political party of whom the vacating member was a representative. (Issued to Mark E. Sostarich, May 22, 1995)**

This opinion was reviewed by the Government Accountability Board pursuant to 2007 Wisconsin Act 1 and was reaffirmed on December 17, 2008.

**Opinion:**

You have requested that the State Elections Board issue an opinion pursuant to §5.05(6), Stats., regarding the filling of a vacancy on the City of Milwaukee Board of Election Commissioners under §7.20 of the Wisconsin Statutes.

The facts regarding which you have requested our opinion and upon which this opinion is based, are as follows. Because of a change in his residency, Dennis Murphy, a commission member whose term of office was to expire in July of 1997, resigned from the commission effective August 1, 1994. Mr. Murphy had been one of two appointees chosen from the list of nominees submitted to the Mayor of Milwaukee by the Democratic Party of Milwaukee County (MCDC). The Democratic Party had received two appointees because of the provisions of §7.20(2), Stats., and because MCDC was the political party receiving the most votes for governor in the City of Milwaukee, in the 1990 gubernatorial election.

After being informed of Mr. Murphy's resignation, the Milwaukee County Democratic Party notified its members that, according to MCDC, an "election would be held on September 28, 1994, for the selection of the requisite names to be forwarded to the mayor's office" for appointment to fill the unexpired portion of Mr. Murphy's term. MCDC held an election on September 28, 1994, and selected three nominees whose names, including that of Mr. Al Campos, were forwarded to the Mayor's office.

After having received MCDC's nominations, but before the November 8, 1994 election, the mayor's office began and completed interviews of MCDC's nominees. In a letter dated November 10, 1994, the mayor's office notified the City of Milwaukee Common Council of the mayor's appointment of Mr. Al Campos to fill the vacancy on the board of election commissioners, created by the resignation of Dennis Murphy.

Subsequently, a question arose as to the validity of an appointment of a Democratic Party nominee - as opposed to appointment of a Republican Party nominee - to fill the unexpired term. The question was raised because of the intervention of the November, 1994 Gubernatorial Election between the date of the resignation and the filling of the vacancy. The contention has been made that the vacancy should be filled on the basis of the last gubernatorial election as of the date of filling of the vacancy, rather than as of the effective date of the resignation. Because the Republican Party candidate had received the most votes for the office of governor in the 1994 general election in the City of Milwaukee, the contention is that the appointee should be based on that election and, therefore, should be a nominee of the Republican Party.

On January 5, 1995, an opinion regarding filling the vacancy on the commission was obtained from the Milwaukee City Attorney's office. The city attorney opined that the appointment to fill the vacancy on the city's board of election commissioners was controlled by §17.23, Stats., and that §17.23, Stats., provides "that vacancies in appointive offices shall be filled by appointment for the residue of the unexpired term by the appointing power and in the manner prescribed by law for making full term appointments thereto". The city attorney concluded that, therefore, "this provision makes it clear that in making the appointment, the mayor shall select the third commissioner from the majority party as reflected by the votes cast for governor in the city in the last general election."

According to your letter, the Democratic Party's reading of the city attorney's opinion is that "the City Attorney's office came to the erroneous conclusion that the November, 1994 gubernatorial elections in some way changed the qualification and party classification for the replacement of Mr. Murphy to the City Election Commission. In short, in MCDC's view, the city attorney's office came to the inexplicable conclusion that the position had somehow been changed to a Republican appointee position."

The position of the Milwaukee County Democratic Party, as set forth in your letter, is that "the appropriate election which establishes the party affiliation for the position vacated by Mr. Murphy is the November, 1990 gubernatorial election results. As a result, Mr. Al Campos, who was in fact appointed by the mayor on November 10, 1994, should be properly approved and seated on the commission."

## **Discussion**

1. The composition of the City of Milwaukee Board of Election Commissioners is specifically provided by statute. Sub.(1) of §7.20, Stats., was enacted by the legislature to establish "A municipal board of election commissioners and a county board of election commissioners ... in every city and county over 500,000 population. The City of Milwaukee is currently the only Wisconsin municipality with a population over 500,000.

2. Composition of the board of election commissioners is provided by §7.20(2), Stats., as follows:

### **7.20 Board of election commissioners.**

(2) Each board of election commissioners shall consist of 3 members, each member being chosen from lists of at least 3 names each, selected and approved by the county committee of the 2 political parties receiving the most votes for governor ... in the city in the case of the city board of election commissioners, in the last general election. ... The mayor, for the city board of election commissioners, shall select from the list 2 persons from the majority party and one person from the next highest party in the city.

3. The term of office of commission members and the appointment of successors is provided in s.7.20(7), Stats., as follows:

(7) The term of office shall be 4 years, and until successors have been commissioned and qualified, beginning on July 1 each year following a presidential election. Successors shall be appointed the same way.

4. Although the statutes do not specifically provide that the mayor's selection of each new slate of commission members shall be made in the odd-numbered year following the presidential election, that conclusion follows from the overall structure of the statutory provisions. In other words, some time before July 1 of the year following the presidential election, the two political parties receiving the most votes for governor in "the last general election" submit lists of nominees from which the mayor "shall select 2 persons from the majority party and one person from the next highest party in the city". Again, the statute does not define the term "last general election," but the clear implication is that the legislature is referring to the gubernatorial election most recently preceding the year in which the mayor's selection is made. And although the statutes don't define "majority party" or "next highest party," the implication is that the majority party is the political party receiving the most votes in the referred-to gubernatorial election and the next highest party is the political party receiving the second most votes in that election.

5. The Elections Board believes that §7.20, Stats., establishes the political party composition of the board of election commissioners for the term - the entire 4 year term - to which each new board is selected commencing July 1 of the year following the presidential election through June 30 of the year following the succeeding presidential election. Nothing in §7.20, Stats., or elsewhere evidences any legislative intent to change that composition because of events occurring during that 4-year term - whether those events consist of the resignation of one or more board members or the establishment of a new majority party or both of those events.

Thus, for the period July 1, 1993 through June 30, 1997, the composition of the board was fixed based on the results of the 1990 gubernatorial election in the City of Milwaukee and not on the results of the 1994 gubernatorial election (regardless of however many vacancies on the board have to be filled in the interim, for whatever reasons). Similarly, the composition of the board of commissioners, for the term July 1, 1997 through June 30, 2001, will be predicated on which parties received the most votes in the City of Milwaukee in the 1994 gubernatorial election and that composition will be fixed for all of that term regardless of the results in the 1998 gubernatorial election and regardless of any intervening resignations.

The Board's conclusion is premised on the following:

a. As discussed above, when all the provisions of the statute are read together, the term "last general election," in sub.(2) - the votes at which determine party representation - refers to the gubernatorial election immediately preceding the year in which began the term of office for the current board. Neither the year in which the term of office commenced nor the gubernatorial election immediately preceding it can change - ever. They are fixed by law and time. The term commenced in 1993 and the last general election preceding 1993 was 1990.

b. Nothing in the statute says that the term "last general election" changes or is re-determined upon the occurrence or filling of a vacancy. The only thing that the statute (sub.(7) of §7.20, Stats.) might be found to say about filling vacancies is that "Successors shall be appointed the same way." Unlike elected successors who are appointed on the basis of selection for a new term, a successor filling a vacancy must be appointed from the same party as that of the person whom he or she succeeds, or the successor is not appointed in the same way - if this language applies.

Although the statutory phrase "the same way" could be construed to mean that the party composition is redetermined or recomputed at the time a vacancy is filled on the basis of the gubernatorial election next preceding the date of the vacancy, redetermination or recomputation would have to be read into the statute. Other than the words "the same way," nothing in the statute suggests that a redetermination occurs in the event of a vacancy any more than redetermination would occur because of a change in majority party.

Actually, statutory research shows that this language in the statute applied to appointment of successors at each new term, not to appointments to fill a vacancy. Until 1919, the statute had both the language regarding successors and specific language providing for filling vacancies, but the vacancy language was consolidated (by the Laws of 1919, c.362, s.35) into a new statute, §17.23, Stats., regarding filling vacancies in city offices. After 1919, vacancies in appointive city offices were filled "by appointment for the residue of the unexpired term by the appointing power and in the manner prescribed by law for making regular full term appointments thereto."

c. Even if a redetermination were found to have been intended, it would take effect as of the date of the vacancy, August 1, 1994. The gubernatorial election preceding that date is the 1990 general election. Under a general doctrine of "relation back," the power to fill a vacancy relates back to the date the vacancy is created; i.e., the law applicable on the date a vacancy is created is the law applicable to filling the vacancy. An appointing authority must not be able to delay an appointment for the purpose of changing the representation on the commission.

6. The provision of the statutes governing filling vacancies in city offices supports the conclusion that vacancy appointments must be made consistent with the appointments made at the time of the regular term. Sub.(d) of §17.23(1), Stats., governs filling vacancies in appointive city offices and reads as follows:

17.23 Vacancies in city offices; how filled. (1) GENERAL AND SPECIAL CHARTER CITIES. Vacancies in offices of cities operating under the general law or special charter shall be filled as follows:

(d) In appointive offices, by appointment for the residue of the unexpired term by the appointing power and in the manner prescribed by law for making regular full term appointments thereto.

Because the statute says that vacancies are filled in "the manner prescribed by law for making regular full term appointments thereto," the provisions of §7.20, Stats., "for making regular full term appointments" are incorporated into §17.23. Regular full term appointments, during the 1993 - 1997 term, were made on the basis of the 1990 gubernatorial election. That no change in the party representation on the commission was intended by the legislature, until the new term for appointments, is evidenced by the fact that if Mr. Murphy had not resigned, party representation would not have been affected by the results of the 1994 gubernatorial election.

Consistent with this interpretation are the provisions of §17.28, Stats., that "When no different provision is made in respect thereto, any officer who is elected or appointed to fill a vacancy shall qualify in the manner required by law of the officer in whose stead the officer is appointed or elected." No different provision in respect to filling vacancies in city offices is made in §17.23, Stats., because that section says, effectively, the same thing that §17.28, Stats., says: that appointments shall be made "in the manner prescribed by law for making regular full term

appointments thereto." Both provisions are consistent in saying that a vacancy on the commission is filled with someone who would have qualified as an appointee when the regular appointments were made by the mayor in 1993.

Section 17.28, Stats., is legislative recognition of the general doctrine that an appointee stands in the shoes of the officer that the appointee was named to succeed. In this case, the outgoing member was not just a member of the commission, he was a representative of the Democratic Party to the commission. To stand in the same shoes, his successor ought also to be a representative of the Democratic Party.

7. The opinion of the Milwaukee City Attorney's office is consistent with the conclusion that successors appointed to fill vacancies on the board of election commissioners are appointed from the same political party as the member they succeed. The city attorney's opinion is based on the provisions of §17.23(1), Stats., above. In the city attorney's opinion, "this provision makes it clear that in making the appointment, the mayor shall select the third commissioner from the majority party as reflected by the votes cast for governor in the City in the last general election." The opinion does not make clear which general election - the 1990 or 1994 gubernatorial election - is the last general election for purposes of making the appointment. The last general election, either at the time the appointing power made regular full term appointments to the board in 1993 or, at the time that the vacancy occurred - August 1, 1994,-is the 1990 general election, not the 1994 general election.

Although the opinion says that "§17.28, Stats., is rendered inapplicable by the provisions of §17.23, Stats., which is on point," the analysis above shows that §17.23, Stats., alone, does not resolve the ultimate issue: which is the applicable "last general election" for appointment purposes? Only by reading §17.23, Stats., together with §17.28, Stats., does the legislature provide some direction on that issue. Generally, a statutory construction which harmonizes statutes, rather than puts them in opposition, is preferred. (See State v. Fouse, 120 Wis.2d 471,477, (Ct.App.1984)

Therefore, the Board concludes that the appointment of Mr. Campos was consistent with §7.20, Stats.