
2013 GAB 01
LOCAL OFFICIALS – IMPROPER USE OF OFFICE

You are a City Attorney. One member of the City Council is an employee of a local business. That member prepares documentation on the business's product for use by customers. A second member's spouse is also an employee of the business. The spouse is a trainer for the business's customers. The business is currently planning a major expansion that could involve the construction of a number of new office buildings that could accommodate thousands of new employees. The business's plans will likely require the city council to grant rezoning and conditional use permits. You ask what, if any, restrictions do the Code of Ethics for Local Public Officials place on the council members' participation in city decisions affecting the business.

Analysis

Section 19.59, *Wisconsin Statutes*, generally prohibits a local public official (1) from using his or her office to obtain anything of substantial value or a substantial benefit for himself or herself or for an organization with which the official is associated or (2) from taking any official action substantially affecting a matter in which the official or an organization with which the official is associated has a substantial financial interest.¹ In addition, the statute prohibits a local public official from accepting anything of value "if it could reasonably be expected to influence the local public official's vote, official actions or judgment."² A member of a city council is a local public official subject to §19.59.³

Use of Office

Under the terms of the statute, an official is deemed associated with an organization if the official or a member of the official's immediate family

"is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% 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), *Wisconsin Statutes*.

¹ Section 19.59(1) (a) and (c), *Wisconsin Statutes*, provides:

19.59 Codes of ethics for local government officials, employees and candidates. (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. This paragraph 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 ch. 11.

* * *

(c) Except as otherwise provided in par. (d), no local public official may:

1. 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.
2. 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.

² Section 19.59(1)(b), *Wisconsin Statutes*.

³ Under section 19.42(7u) (7w) and (7x), *Wisconsin Statutes*, a local public official includes an individual that holds an elective town office.

In the present case, neither city council member is associated, within the meaning of the statute, with the business. Thus, unless the individual's or spouse's employment or compensation would be affected by the city's decisions regarding the business's planned expansion, §19.59(1) (a) and (c) are unlikely to serve as a bar to the city council members' participation in those decisions.

Influencing Judgment

Section 19.59(1) (b) provides that an official may not accept anything of value if it could reasonably be expected to influence the official's vote, actions, or judgment.⁴ In addition, a public officer owes an undivided duty of loyalty to the public whom he or she serves.⁵

City council member employed by the business

You have opined that “a reasonable person could conclude that the judgment of the Council members would not be influenced by continued employment with [the business].”

In the past, our predecessor agency, the Wisconsin Ethics Board repeatedly found that it is reasonable to expect an individual's judgment to be affected when acting on a matter in which the individual's employer has a demonstrated financial interest.⁶ We agree with that conclusion. Indeed, common sense tells us this.⁷ Employees generally have a natural loyalty to their employers and issues of promotion, retention, and compensation are likely always to be present. It is reasonable to conclude that such loyalty can conflict with the duty of undivided loyalty to the city, even if in any given instance both entities may benefit. And certainly, such considerations cannot be entirely cleaned from official decision-making. Our opinion is consistent with the view of the courts expressed in several cases that if a local official votes on a contract in which the official's employer has an interest, the contract is void.⁸ There may, of course, be matters that come before the city council that would have only a minor impact on the business and it may be fine for the council member to participate in those matters. But a zoning issue of significant impact, such as that here, is not minor.

City council member whose spouse is employed by the business

In our view, §19.59 does not, by its terms, apply to the city council member whose spouse is employed by the business. That is because the city council member is not receiving anything of value directly from the business so as to trigger application of the statute. Although the official is not accepting anything from the business—the official's spouse is accepting her salary from the

⁴ Section 19.42(1), *Wisconsin Statutes*, defines “anything of value,” in relevant part, as

[A]ny money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment

⁵ 14 Op. Eth. Bd. 41 (1993); 14 Op. Eth. Bd.25 (1992); 14 Op. Eth. Bd. 21 (1992); 8 Op. Eth. Bd. 33 (1985); 63A Am. Jur. 2d, Public Officials and Employees §§321, 322.

⁶ 2003 Wis Eth Bd 08; 2002 Wis Eth Bd 02; 1994 Wis Eth Bd 05. *See also, e.g., Zagoreos v. Conklin*, 491 N.Y.S.2d (A.D. 1985); *Sokolinski v. Woodbridge Township Municipal Council*, 469 A.2d 96 (N.J. Super. A.D. 1983).

⁷ *See, e.g., Zagoreos v. Conklin*, 491 N.Y.S.2d (A.D. 1985); *Sokolinski v. Woodbridge Township Municipal Council*, 469 A.2d 96 (N.J. Super. A.D. 1983).

⁸ *Heffernan v. City of Green Bay*, 266 Wis. 534 (1954) (if alderperson who voted to approve contract had been employee of individual's company when another company owned by the individual bid for the contract, the contract would have been illegal and void); *Edward E. Gillen Co. v. City of Milwaukee*, 183 N.W. 679 (Wis. 1921); *Ballenger v. Door County*, 131 Wis. 2d 422 (Ct. App. 1986).

business. The city council member benefits from that salary. For this reason, a spouse's employment could reasonably affect the city council member's judgment. Therefore, we caution that member to be mindful of the common law duty of undivided loyalty to the city when acting in an official capacity.

Advice

The Government Accountability Board advises that the city council member employed by the local business not vote on the zoning or conditional use permit matters associated with the business's current expansion plans. The Board further advises that the city council member whose spouse is employed by the business be mindful of the common law duty of undivided loyalty to the city when acting in an official capacity.