
DISQUALIFICATION

The Government Accountability Board advises:

Under the facts described, three members of a citizen board that oversees a state agency who participate in an agency program may also take part in discussions and votes related to rules for that program.

Facts

You have submitted a request for advice on behalf of a citizen board (the Board) which directs and supervises a state agency pursuant to Wisconsin Statutes. As stated in your correspondence, three of the seven board members are also participants in an agency program that provides property tax benefits to landowners who participate in the program. The Board is responsible for setting program rules related to eligibility and application requirements, application fees, and the manner of calculating harvest values that are a factor in the program's tax benefits and penalties.

You indicate that the three Board members have enrolled acreage in the program of 50, 100, and 400 acres, respectively, and that the program has approximately 44,000 participants and three million acres enrolled statewide. Based on your subsequent telephone conversation with our office, we also understand that the amount of the property tax benefit is set by the Legislature, while the amount of the tax penalty imposed for noncompliance with program rules is set by the Board. In addition, decisions regarding whether an individual property owner qualifies for the program are made by agency staff, not the Board.

Question

You ask whether the three Board members whose property is enrolled in the agency program may participate in debates or votes regarding the rules for the program.

Discussion

Two provisions of the Ethics Code for State Public Officials are applicable to your question. Section 19.45 (2), *Wisconsin Statutes*, provides, in relevant part, that no state public official may use his or her public position or office to obtain financial gain or anything of substantial value for private benefit.¹ Also, Section 19.46 (1)(a), *Wisconsin Statutes*,

¹ Section 19.45 (2), *Wisconsin Statutes*, provides:

19.45 (2) No state 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 subsection does not prohibit a state public official from using the title or prestige of his or her office to obtain contributions permitted and reported as required by ch. 11.

provides, in relevant part, that a state public official may take no official action substantially affecting a matter in which the official has a substantial financial interest.²

Members of the Board are state public officials by virtue of their appointment by the governor. Wis. Stats. §§15.07(1)(a), 19.42(13)(a). Participating in debate and voting on rules governing the agency program are “uses” of that public office and are “official actions” that potentially could implicate sections 19.45(2) and 19.46(1)(a). For the reasons described below, however, in the opinion of the Government Accountability Board the affected members of the Board may participate in debate and votes regarding rules for the agency program.

The preamble to the Ethics Code for state public officials, in Section 19.45(1) states, in part:

19.45 Standards of conduct; state public officials. (1) The legislature further recognizes that in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government, that citizens who serve as state public officials retain their rights as citizens to interests of a personal or economic nature; that standards of ethical conduct for state public officials need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts which are substantial and material; and that state public officials may need to engage in employment, professional or business activities, other than official duties, in order to support themselves or their families and to maintain a continuity of professional or business activity, or may need to maintain investments, which activities or investments do not conflict with the specific provisions of this subchapter.

Consistent with the public policy statements articulated in this preamble, the Government Accountability Board (and previously the Ethics Board) has previously concluded that the prohibitions in Sections 19.45(2) and 19.46(1)(a) do not apply when the official action is (a) a legislative decision that affects a large class of people; (b) the official’s presence in the class is not significant when compared to the number of similarly situated people in the class; and (c) the effect of the proposed legislation on the official is not significantly different than on other members of the class.³

² Section 19.46 (1) (a), *Wisconsin Statutes*, provides:

19.46 Conflict of interest prohibited; exception. (1) Except in accordance with the board’s advice under sub. (2) and except as otherwise provided in sub. (3), no state public official may:

(a) 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.

³ See, *e.g.*, 2003 Wis Eth Bd 9 and 9A; 1999 Wis Eth Bd 8.

Applying this formulation to the facts you described, we note that the nature of the decisions that are made by the Board with regard to the agency program are quasi-legislative in nature. The Board establishes rules which set policy parameters, as contrasted with quasi-judicial decisions, which determine who is accepted into the program. The rules have their basis in statutes enacted by the Legislature, and they apply equally to each applicant.

The Board decisions on program rules satisfy the second prong of the three-part test described above, as program rules affect a large class of people when measured by both the number of participants -- 44,000 property owners statewide -- and the total amount of land -- approximately three million acres. Furthermore, the interest of each individual member described in your correspondence (and even of all three members combined) is not significant in comparison to the total participation in the program, and the effect of each member's participation in the program is the same as it is for all other participants.

In short, it appears that the Board does not control many of the key aspects of the agency program, and those quasi-legislative decisions that it does make apply equally to a large number of participants, and therefore, the Board members do not personally benefit from their own decisions. A Board member may have a financial interest in participating in the program, but whether any financial gain is realized is not determined by the Board. In addition, setting program rules does not appear to create a significant competitive advantage for the Board members involved in relation to other property owners.⁴

For these reasons, the Government Accountability Board believes that the inclusion of the three members you described in the agency program does not preclude them from participating in debates or votes regarding rules for that program. However, the Board cautions that its conclusion is based upon both the nature of the decisions made by the Board as well as the degree of the members' financial interests as compared to the total program participants.

The Board's conclusion may be different if a Board member's financial gain from the agency program was significantly greater, or if a specific decision regarding program rules would have a relatively large impact on that member's participation in the program as compared to other property owners. A Board member then may need to reconsider whether participating in discussion or voting on specific rules is appropriate, and we would certainly be glad to provide further guidance in such cases. Of course, Board members are also free to refrain from participating in decisions if they believe that their personal inclusion in the agency program creates a substantial conflict of interest with their public responsibilities, notwithstanding the guidance offered in this correspondence.

Advice

The Government Accountability Board advises:

- 1) Under the facts you have described, the three members of a Board which oversees a state agency who participate in an agency program may also take part in discussions and votes related to rules for that program.

⁴ In contrast, see 2008 GAB 09