
1995 Wis Eth Bd 1
BOARDS, COMMISSIONS AND AGENCIES; DISQUALIFICATION;
IMPROPER USE OF OFFICE

A member of an agency governing body who would receive an allocation of business opportunities regulated by the agency, whose spouse would receive an allocation, or whose business would use an allocation under a proposed rule should not participate, in an official capacity, in the rulemaking, even though, by statute, some members of the agency governing body must be active in the regulated business. OEB 95-1 (January 31, 1995)

Facts

- ¶ 1. This opinion is based upon these understandings:
- a. A state agency is considering a rulemaking for allocating business opportunities for businesses it regulates.
 - b. Two members of the agency's governing body would receive substantial allocations under the proposed rules.
 - c. These allocations would be transferable; that is, licensees holding these allocations could sell all or part of them to others.

Question

- ¶ 2. The Ethics Board understands your question to be:

Do laws administered by the Ethics Board restrict the participation in the rule making of the two members of the board who have a personal or family interest in the allocations.¹

Applicable Statute

- ¶ 3. The provision of the Ethics Code that applies to the situation about which you have asked is §19.45(2), *Wisconsin Statutes*. That section provides:

¹ Other questions you have asked concerning members' potential liability to third parties or the members' right to legal representation or indemnification by the State are outside the Ethics Board's jurisdiction.

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. 11.²

Discussion

¶ 4. Reduced to its elements, §19.45(2) provides

No state public official
May use public position or office
To obtain financial gain or anything of substantial value
For private benefit
Or the benefit of the official's immediate family or business.

¶ 5. Members of the board are state public officials. Participating in a rulemaking is a use of office. The business allocations have substantial value insofar as one could not participate in the regulated business without an allocation, and the allocations themselves apparently have a sale value. A member of the board who would receive an allocation, whose spouse would receive an allocation, or whose business would use an allocation would obtain a private benefit from the proposed business allocation system. Thus, the application of the statute to the circumstances about which you have asked appears straightforward.

¶ 6. The Ethics Board recognizes that the proposed rule may well be a reasonable and appropriate approach for allocating business opportunities. It also recognizes that the allocations are based on recent business history so that no business may be better off under an allocation system than under the current unregulated approach. Finally, the Ethics Board recognizes that the Legislature has delegated the allocation of business opportunities to the agency governing body and, in establishing that body, provided that five members must be active in the business. Nevertheless, the Ethics Board advises that a member of the board who would receive an allocation, whose

² Section 19.46(1)(a), *Wisconsin Statutes*, provides that no state 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.

However, this section is inapplicable here because the section further provides that it does not prohibit an official "from taking official action with respect to any proposal to modify state law or the state administrative code." §19.46(3), *Wisconsin Statutes*.

spouse would receive an allocation, or whose business would use an allocation under the proposed rule should not participate, in any official capacity, in the rulemaking. This means the member should neither vote on, nor participate in discussions of, the proposed rule.

¶ 7. The primary purpose of the Ethics Code is to “help [state officials] avoid conflicts between their personal interests and their public responsibilities [to] promote and strengthen the faith and confidence of the people of this state in their state public officials and employees.” §19.41, *Wisconsin Statutes*. You have indicated that there are a number of possible approaches to allocating the business opportunities in question and a number of options for establishing allocations among current businesses. While the approach currently proposed may be appropriate, two members of the agency governing body have a substantial and direct interest in the decision and, conceivably, would be adversely affected by a different approach. At the same time, there may be competing interests that would benefit from another approach.³ It is difficult to see how individuals with a direct interest in the allocations can make a decision based purely on public policy considerations, without regard to their personal financial stake in the outcome.⁴ Certainly, the public’s confidence that a governmental decision will be based solely on its own merits is lessened if public officials with a direct financial stake in the outcome of a decision are making those decisions, perhaps to the detriment of competing interests.

¶ 8. In the past, the Ethics Board has urged a legislative change to the current statutory scheme that creates a structure in which individual members of the agency governing body are called upon to participate in decisions in which they may have a substantial financial interest. We continue to believe that this would be an appropriate solution to the problems the agency has encountered.

Advice

¶ 9. The Board advises that a member of an agency governing body who would receive an allocation of business opportunities regulated by the agency, whose spouse would receive an allocation, or whose business would use an allocation under a proposed rule should not participate, in an official capac-

³ This was certainly true with respect to allocations that the agency established previously and that were the subject of a complaint filed with the Ethics Board.

⁴ A public official owes an undivided duty of loyalty to the public whom he or she serves. 14 Op. Eth. Bd. 41 (1993), 25, 21 (1992); 8 Op. Eth. Bd. 33 (1985); 63A Am. Jur. 2d, Public Officials and Employees §§321, 322.

ity, in the rulemaking, even though, by statute, some members of the agency governing body must be active in the regulated business.