

State of Wisconsin\Government Accountability Board

Post Office Box 7984
212 East Washington Avenue, Third Floor
Madison, WI 53707-7984
Voice (608) 266-8005
Fax (608) 267-0500
E-mail: gab@wisconsin.gov
<http://gab.wi.gov>



JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

DATE: October 19, 2011

TO: Robert Marchant, Senate Chief Clerk
Patrick Fuller, Assembly Chief Clerk

FROM: Kevin J. Kennedy, Director and General Counsel
Government Accountability Board

SUBJECT: Legislative Redistricting: Effective Date and Use of State Funds

On September 6, 2011, Jonathan Becker, Nathaniel Robinson and I from the Government Accountability Board ("G.A.B.") met with you and staff of the Legislative Council to discuss the impact of redistricting on incumbent legislators. Prior to this meeting, you and Legislative Council staff received a number of inquiries about the impact of 2011 Wisconsin Act 43 with respect to the ability of incumbent legislators to communicate with constituents and to run for and hold legislative office. Because these were not new issues, we agreed to review past decisions of the former Elections and Ethics Boards and guidance from the Department of Justice.

On October 10, 2011, I received copies of past guidance from the Department of Justice. G.A.B. staff forwarded this information to Legislative Council staff and you. We had a brief meeting on October 12, 2011, in which you asked whether a 1982 Attorney General Opinion, OAG 48-82, 71 Wis. Op. Atty. Gen. 157 (Wis. A.G. 1982), resolved the issues on the use of state funds by incumbent legislators to communicate with constituents and travel in legislative districts created by 2011 Wisconsin Act 43, as well as the conduct of special or recall elections. At the time of that meeting, I believed it did, but I noted that the G.A.B. staff had not fully analyzed the material.

After reviewing all of the material, the G.A.B. staff believes that the 1982 Attorney General Opinion to Senator Risser (71 Wis. Op. Atty. Gen. 157 (Wis. A.G. 1982)) is not directly on point with the current issue. That opinion was based on a federal court finding that existing legislative districts were unconstitutional. As a consequence of that finding, the federal district court specifically ordered that the then-existing legislative districts could not be used for purposes of nomination and election after June 17, 1982, at which time and by the same court order new legislative district lines became effective. In the present situation, unlike 1982, there has been no judicial determination that the existing legislative districts are unconstitutional, and the Legislature has specifically addressed the initial applicability of 2011 Wisconsin Act 43 for various purposes.

Although the 1982 Attorney General Opinion is not directly on point, some of its language, as well as subsequent opinions including a 1983 Attorney General Opinion (OAG 47-83, 72 Wis. Op. Atty. Gen. 172 (Wis. A.G. 1983)), and the language of 2011 Wisconsin Act 43 itself all provide helpful analysis and application to the current situation, as affected by 2011 Wisconsin Act 43.

At the October 12, 2011 meeting, I promised to provide the G.A.B. staff position as quickly as possible. Below are the G.A.B. staff opinions and analyses regarding the initial applicability of

2011 Wisconsin Act 43 with respect to 1) elections, and 2) communication and representation of constituents.

1. Initial Applicability Date with Respect to Elections: November 6, 2012

a. Opinion

It is the G.A.B. staff's position that the legislative districts created by 2011 Wisconsin Act 43 are not in effect for the purpose of "special or recall elections to offices filled or contested" prior to the General Election on November 6, 2012.

b. Analysis

The Legislature enacted legislation reapportioning the legislative districts and members, 2011 Wisconsin Act 43, as required by the state constitution. Wis. Const. art. IV, § 3. The legislation was signed by the Governor and published on August 23, 2011. Unless specified in the legislation, every act is effective on the day following publication. WIS. STAT. § 991.11. However, 2011 Wisconsin Act 43 specifically provided for the initial applicability of the act for certain purposes. The Act "first applies, with respect to regular elections, to offices filled at the 2012 general election." 2011 Wis. Act 43, § 10 (1). In addition, the Act "first applies, with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election." 2011 Wis. Act § 10 (2).

"First applies" historically means that an act is in effect for the first time on a certain date or occurrence and remains in effect after that date or occurrence. *Dettwiler v. Wisconsin Dept. of Revenue*, 2007 WI App 125, ¶6 n.3, 301 Wis. 2d 512, 517, 731 N.W.2d 663, 666 (Wis. Ct. App. 2007).

Wisconsin Stats. s. 5.02 (5) defines "general election" as the election held in even-numbered years on the Tuesday after the first Monday in November conducted to elect, among other offices, state senators and representatives to the assembly. WIS. STAT. §5.02 (2011). The next general election will occur on November 6, 2012.

By the specific terms of 2011 Wisconsin Act 43, any recall election or special election to fill a vacancy conducted before November 6, 2012 shall be conducted in the legislative districts in effect prior to the enactment of 2011 Wisconsin Act 43. For example, the special election to fill the vacancy in the 95th Assembly District was ordered by the Governor on September 2, 2011 to be conducted under the district lines in effect before the passage of 2011 Wisconsin Act 43. 2011 Executive Order 41.

This differs significantly from the situation presented in 1982 when the Attorney General Opinion (71 Wis. Op. Att. Gen. 157) was issued. As noted above, in 1982, a federal court had found that existing legislative districts were unconstitutional and ordered all subsequent elections to be conducted under a reapportionment plan set out in the court order and beginning on the specific date of June 17, 1982. *The Wisconsin State AFL-CIO et al. v. Elections Board et al.*, No. 82-C-0112 (E.D. Wis. 1982). In the 1982 Attorney General Opinion to Senator Risser (71 Wis. Op. Att. Gen. 157), the Attorney General interpreted and applied this specific court order and opined that the former districts were not in effect for the conduct of elections or the use of public funds by incumbent legislators after June 17, 1982. The Attorney General's opinion was released on August 19, 1982,

and therefore the language in the opinion assumes that the new court-ordered legislative districts were already in place and effective.

The meaning and effect of the initial applicability provisions of 2011 Wisconsin Act 43 are better understood in the context of the October 4, 1983 Attorney General Opinion to Representative Loftus (72 Wis. Op. Atty. Gen. 172). Here, the Attorney General offered an opinion on the effective dates of the redistricting described in 1983 Wisconsin Act 29, the Act adopted to replace the federal district court's redistricting plan that had been effective since June 17, 1982.¹ This Attorney General's opinion concluded that the effective date of the Act is also the effective date for new legislative districts unless the legislature specifically provided other exceptions to the initial applicability of the Act for certain purposes. The Attorney General opinion concluded that, by reason of Wisconsin Stats. s. 991.11, the publication date of the Act, July 20, 1983, was also the effective date of the Act except for specific statutory exceptions. The only exception in the Act was related to specific language setting the initial applicability of sections 8.15(9) and 8.20(10) of the statutes, which related to the Election Board's duty to provide new district maps to candidates.

The language of 2011 Wisconsin Act 43 is very clear as to the initial applicability exceptions from the Wisconsin Stats. s. 991.11 effective date of the Act (August 24, 2011). The Act initially applies for the purposes of regular elections to offices filled at the 2012 general election and to special or recall elections to offices filled or contested concurrently with the 2012 general election. Therefore, for purposes of any elections in 2012, the new legislative districts found in Act 43 do not apply to special or recall elections to offices filled or contested prior to the November 6, 2012 general election.

2. Initial Applicability Date with Respect to Communication and Representation of Constituents: August 24, 2011

a. Opinion

It is the G.A.B. staff's position that beginning on August 24, 2011, neither this legislation nor any provisions of the Code of Ethics for Public Officials and Employees, Wisconsin Stats. Ch 19, Subchapter III, restricts the use of public funds by incumbent legislators to send mail or travel within the boundaries set forth in 2011 Wisconsin Act 43 for the purpose of conducting legislative business.

b. Analysis

- i. 2011 Wisconsin Act 43 is effective as of August 24, 2011 for representation purposes.

The effective date of 2011 Wisconsin Act 43 with respect to representation differs from its effective date for election purposes. The 1982 Attorney General Opinion to Senator Risser (71 Wis. Op. Att. Gen. 157) specifically provides that with respect to the former legislative districts, the "vitality

¹ The 1982 redistricting plan was found unconstitutional in 1992, following the 1990 census. See *Prosser et al. v. Elections Board, et al.*, 793 F. Supp. 859, 865 (W.D. Wis. 1992). In 1992, a three-judge panel created a redistricting plan that was effective for all elections held after June 2, 1992. *Prosser v. Elections Board*, 793 F. Supp. at 871. The 1992 redistricting plan was held unconstitutional in 2002, following the 2000 census. See *Baumgart et al. v. Wendelberger*, Case No. 01-C-0121; see *Jenson et al. v. Wendelberger*, Case No. 02-C-0366. The federal district court created a redistricting plan that was effective for all elections held after May 30, 2002. *Id.* However, 1983 Wisconsin Act 22, first held unconstitutional in the context of the 1990 census, was not challenged as unconstitutional between its effective date of July 29, 1983 and the 1990 census. *Prosser v. Elections Board*, 793 F. Supp. at 871

depends upon the purpose being inquired into.” OAG 48-82, 71 Wis. Op. Att. Gen. 157 (Wis. A.G. 1982). The 1983 Attorney General Opinion to Representative Loftus (72 Wis. Op. Atty. Gen. 172) emphasized that even though the Elections Board did not need to provide new district maps to candidates until the 1984 primary and general elections, this did not mean that the “the new districts [we]re not effective before 1984.” 72 Wis. Op. Atty. Gen. 172. Thus, even though the new districts do not take effect for election purposes until November 6, 2012, this does not mean that 2011 Wisconsin Act 43 is not effective for other purposes before that date.

It appears that it is constitutionally permissible, per the 1983 Attorney General Opinion, for the Legislature to enact redistricting legislation that will “apportion and district anew the members of the senate and assembly,” Wis. Const. art IV, Section 3, upon publication of an act, while at the same time the act provides exceptions for initial applicability of the act for specific purposes. In 2011 Wisconsin Act 43, it seems the Legislature intended to effectuate the Act on the Wis. Stats. s. 991.11 date (August 24, 2011) for purposes of representation.

ii. 2011 Wisconsin Act 43 does not affect the current status of elected officials.

Even though the new districts took effect on August 24, 2011, this does not affect the current status of elected senators and representatives. The 1982 Attorney General Opinion to Senator Risser (71 Wis. Op. Att. Gen. 157) and the 1983 Attorney General Opinion to Representative Loftus (72 Wis. Op. Atty. Gen. 172) also provide applicable guidance on the treatment of the residence of incumbent legislators with respect to retaining their current office and running for election under the new district plan. The former Elections Board applied these opinions in response to inquiries with respect to the 2002 redistricting. Correspondence to Representative David Travis, April 25, 2002. In the response to Representative Travis, the Elections Board noted that for purposes of representation (and absent contrary language in the act or statute), redistricting takes effect with the adoption of the new plan. Representation is based on a previous election and holding office, not on a future reelection. Seeking reelection is not relevant to representation and is only relevant to campaigning for the office to which a candidate seeks election.

iii. 2011 Wisconsin Act 43 does not change how current elected officials may use state funds.

The new legislation does not affect the laws governing how currently sitting elected officials who seek reelection or election to another office may use state funds. The guidance from the Attorney General in 1983 discussed the use of state funds by incumbent legislators with respect to the former and new districts under the judicial and legislative plans. 72 Wis. Op. Atty. Gen. 172. The opinion noted that the restrictions of Wis. Stats. s. 11.33, limiting the use of public funds after the first day for circulating nomination papers, are still applicable. It also provided that a legislator may not use funds for a purely private, non-public, purpose. However, a legislator may expend funds which have been appropriated for the legislator’s use for mailings and travel within or outside the legislator’s district if connected with the legislator’s representation of his or her constituents subject to legislative rules and applicable statutes. 72 Wis. Op. Atty. Gen. 172.

The G.A.B. and the former Ethics Board have consistently found that great deference should be given to the Legislature’s determination of public purpose consistent with other statutes such as the restriction on the distribution of 50 or more substantially similar items or communications after the first date for circulating nomination papers, see Wis. Stats. s. 11.33, the use of public office to obtain a private benefit, see Wis. Stats. s. 19.45 (2), or the use of public office to obtain an unlawful benefit

or advantage, see Wis. Stats. s. 19.45 (5). In light of the discussion in the 1983 Attorney General opinion, the use of public funds to communicate or travel in districts related to the legislator's initial election or subsequent re-assignment by 2011 Wisconsin Act 43 does not appear to be actively designed to obtain a private benefit or unlawful benefit or advantage as restricted under the Code of Ethics for Public Officials.

The Legislature appears to have developed fiscal and policy restraints on the use of public funds by legislators with respect to constituent communication and travel. The proposed policy that permits the use of public funds within those constraints to communicate and travel within the district from which a legislator was elected and the related district under 2011 Wisconsin Act 43 does not contravene provisions in Wis. Stats. s. 19.45. Such communications are, however, also subject to the limitation in Wis. Stats. s. 11.33.

This does not mean that a legislator may use public funds for communications or travel to obtain a private benefit or unlawful benefit or advantage, including for campaign purposes. The G.A.B. would investigate a complaint that set forth facts alleging such activity.

3. Conclusion

This is an opinion of the G.A.B. staff. It is not an opinion issued pursuant to Wis. Stats. s. 5.05 (6a). As we discussed in our initial meeting, the staff plans to present its conclusions to the Board in the form of recommended guidance to share with legislators and the public.

Sincerely,

GOVERNMENT ACCOUNTABILITY BOARD

A handwritten signature in black ink that reads "Kevin J. Kennedy". The signature is written in a cursive, flowing style.

Kevin J. Kennedy
Director and General Counsel