MEMO

Date: January 24, 2018

From: Ann S. Jacobs

Re: Analysis of Effect of Senate Confirmation Vote

Question Presented: What happens under §15.61 (1) if the senate does not "advise and consent" to the appointment of the interim administrator to the position of permanent administrator?

> **Answer: "Advice and Consent" of the senate does not cause the termination of the interim administrator. Only a vote of the majority of the commissioners can effect the termination of the interim administrator. The interim administrator *remains* interim *until* the senate confirms his/her appointment.**

Analysis:

Generally: The Wisconsin Elections Commission is organized as an "Independent Agency" under Ch. 15 of the Wisconsin Statutes.

§15.61(1)(b)1. Provides that the administrator is the appointee of the commission. He/she is not appointed by the legislature or the governor.

§15.61(1)(b)2. Provides that only the vote of a majority of the commissioners can remove the administrator.

The only other statute which could possibly govern removal of the administrator would be Ch. 17, "Resignations, Vacancies, Removals." This statute governs how persons in various positions throughout state government can be removed and/or how vacancies are filled after a resignation occurs.

§17.03 states that a vacancy is created when the person holding the position dies, resigns, is removed, ceases to be a resident of the applicable location in the state, commits treason, is adjudicated incompetent, neglects to take their oath, refuses to execute a bond, declines the office or dies, term expires, failure to elect a school board, creating of a new county and town, or any other legal provision which creates a vacancy.

None of §17.03 potentially applies to the question presented except removal pursuant to §17.03(3).[1]

Thus, the analysis must turn to the question of how an interim administrator is removed.

Removals are governed by §17.07: Removals: legislative and appointive state officers. (1) does not apply because the administrator is not elected by the Legislature. (2) does not apply because the administrator is not appointed by the Legislature or the Governor. (3) does not apply because the administrator is not appointed by the Governor. (3m) applies only to the parole commission. (4) does not apply because the administrator is not appointed by the governor with the advice and consent of the senate. (5) does not apply because the administrator is not appointed by the governor.

§17.07(6) is the only applicable section. It reads:

> Other state officers serving in an office that is filled by appointment of any officer or body without the concurrence of the governor, **by the officer or body having the authority to make appointments to that office, at pleasure**, except that officers appointed according to merit and fitness under and subject to ch. 230 or officers whose removal is governed by ch. 230 may be removed only in conformity with that chapter. (emphasis added)

In other words, the only way the interim administrator can be removed is through the "body having the authority to make appointments to that office." That is the commission itself.

Of note, §17.07 is expressly consistent with §15.61(1)(b)2., as referred to above. This is an axiomatic part of statutory construction. (Conflict in statutes should not be found if statutes can otherwise be reasonably construed. State v. Zawistowski, 95 Wis. 2d 250, 263, 290 N.W.2d 303, 310 (1980).)

Thus, only the Commission can remove the administrator.

So what is the effect of the Senate's vote to not confirm?

Consider the express language of the statute. It states that the interim administrator remains interim ***"Until"*** approved by the senate to become permanent.

In reviewing statutory language, courts "must give words their ordinary and accepted meanings and try to give effect to every word so as to not render any part of the statute superfluous." State v. Petty, 201 Wis. 2d 337, 355, 548 N.W.2d 817, 823-24

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[1] Although §17.03(13) refers to other provisions, there are no other legal provisions applicable to the Elections Commission administrator which could create a vacancy. In comparison, see §17.15, which lists other specific removals for differing commissions.

(1996) quoting Benjamin Plumbing, Inc. v. Barnes, 162 Wis. 2d 837, 856, 470 N.W.2d 888 (1991). The difference between "Until" and "Unless" is straightforward. The legislature chose "Until."

"If the language of a statute is clear on its face, we need not look any further than the statutory text to determine the statute's meaning." *See* Bruno v. Milwaukee County, 2003 WI 28, ¶¶ 18-22, 260 Wis.2d 633, 660 N.W.2d 656.

Additionally, a review of Ch. 15 with regard to the appointment of various other persons to various positions, does not reveal similar language indicating interim status "until" senate approval.

The statute uses the word "until" and provides no other statutory mechanism to remove the interim administrator other than those analyzed above. This does not nullify the vote of the senate. The vote of the senate has the effect of maintaining the interim status of the administrator. However, that vote does not usurp the right of the commission to make its own decision on whether or not to fire the administrator, or to maintain the administrator in an interim position.

Review of Wisconsin Legislative Council Memo of 1/18/18:

The memo rests in large part on the claim that §17.20, which governs rejection of governor's appointees, would address this matter. Such a claim flies in direct contradiction to proper statutory analysis.

When the legislature enacts a new statute, it is presumed to know the new statute's relationship with existing and contemporaneously created statutory provisions, especially those directly affecting the statute. See City of Milwaukee v. Kilgore, 193 Wis.2d 168, 183–84, 532 N.W.2d 690 (1995). ("When determining legislative intent, we must assume that lawmakers knew the law in effect at the time they acted.")

In this case, §17.20 existed prior to the creation of §15.61, thus the legislature is presumed to have knowledge of it. It expressly chose **not** to include that clause in §15.61. It is improper to read into §15.61 clauses from §17.20 when the tenets of statutory construction require the opposite.

One can also question why the clause found in §17.20 is necessary, if the failure of the senate to consent effectuated a vacancy. It would be superfluous. Its express delineation of what occurs under that situation makes clear that absent that clause, there would **not** be a vacancy. This is consistent with §17.03(13) - §17.20 is a statute that expressly creates a vacancy. "Any other event occurs which is declared by any special provision of law to create a vacancy." If, in fact, the failure of the senate to approve an appointed person created a vacancy, §17.20's clause would not be necessary. It is necessary precisely because §17.03 does NOT hold that the senate's failure to approve creates a vacancy.

Additionally, one cannot read into §17.03 a new, un-listed clause: that the failure of the senate to approve an interim administrator creates a vacancy. To do so literally re-writes the statute to create this new exception.

Further, it belies the rules of statutory analysis, "*expresio unius est exclusio alterius*" (the expression of one is the exclusion of another). *See* State ex rel. Harris v. Larson, 64 Wis. 2d 521, 527 (1974) ("The enumeration of the specific alternatives is evidence of legislative intent that any alternative not specifically authorized is to be excluded.").

Case Law Analysis:

Moses v. Board of Veterans Affairs, 80 Wis.2d 411, 259 N.W.2d 102 (1977).

This case addressed the removal of petitioner Moses as the Secretary of Veterans Affairs (an agency also formed under Ch. 15 of the statutes).

The Wisconsin Supreme Court held:

> Most of the issues raised on this appeal deal with the manner of removal of the petitioner by the board of veterans affairs. But, before we can get to the HOW of the removal, we must first determine WHO had the right to remove him from the secretaryship. Certainly, in this case, although not in the dictionary, WHO comes before HOW. The threshold question is who had the statutory right and authority to remove the petitioner as secretary of veterans affairs.
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> **In this state the right to remove legislative or appointive state officers is given by statute to the person or body that made the appointment of such officer. This is codified in a removal statute creating certain categories of officers.** These categories relate the right to remove an officer with the person or body that made the appointment. One such category is "state officers appointed by the governor by and with the advice and consent of the senate, or appointed by any other officer or body, subject to the concurrence of the governor." State officers in this category can be removed from office only "by the governor at any time, for cause." Another category is "(o)ther state officers appointed by any officer or body without the concurrence of the governor." State officers in this category can be removed from office "by the officer or body that appointed them, at pleasure." If the petitioner is in the first category, he can be removed only by the governor for cause. But if the second applies, he is removable by the board, at its pleasure.
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> Id. 414-415 (emphasis added / citations removed)

The Supreme Court went on to explain that "It is not the nature of the duties performed that determines who can remove. Rather, the determinative question is who made the appointment." Id. at 418.

Governing Statutes:

§15.61(1):
(b) 1. The elections commission shall be under the direction and supervision of an administrator, who shall be appointed by a majority of the members of the commission, with the advice and consent of the senate, to serve for a 4−year term expiring on July 1 of the odd−numbered year.

Until the senate has confirmed an appointment made under this subdivision, the elections commission shall be under the direction and supervision of an interim administrator selected by a majority of the members of the commission.

If a vacancy occurs in the administrator position, the commission shall appoint a new administrator, and submit the appointment for senate confirmation, no later than 45 days after
the date of the vacancy. If the commission has not appointed a new administrator at the end of the 45−day period, the joint committee on legislative organization shall appoint an interim administrator to serve until a new administrator has been confirmed by the senate but for a term of no longer than one year. If the administrator position remains vacant at the end of the one−year period, the process for filling the vacancy described in this subdivision is repeated until the vacancy is filled.

2. The administrator may be removed by the affirmative vote of a majority of all members of the commission voting at a meeting of the commission called for that purpose

17.07 Removals; legislative and appointive state officers.

Removals from office of legislative and appointive state officers may be made as follows:

(1) Officers elected by either house of the legislature, by the house that elected them, at pleasure.

(2) State officers appointed by the legislature, by that body, at pleasure; or by the governor during the recess of the legislature, for cause.

(3) State officers serving in an office that is filled by appointment of the governor for a fixed term by and with the advice and consent of the senate, or serving in an office that is filled by appointment of any other officer or body for a fixed term subject to the concurrence of the governor, by the governor at any time, for cause.

(3m) Notwithstanding sub. (3), the parole commission chairperson may be removed by the governor, at pleasure.

(4) State officers serving in an office that is filled by appointment of the governor with the advice and consent of the senate to serve at the pleasure of the governor, or serving in an office that is filled by appointment of any other officer or body for an indefinite term subject to the concurrence of the governor, by the governor at any time.

(5) State officers serving in an office that is filled by appointment of the governor alone for a fixed or indefinite term or to supply a vacancy in any office, elective or appointive, except justices of the supreme court and judges and the adjutant general, by the governor at pleasure; the adjutant general, by the governor, at any time, for cause or for withdrawal of federal recognition of his or her commission under 32 USC 323; and all officers appointed by the governor during the recess of the legislature whose appointments are required to be later confirmed by the senate shall be deemed to be appointed by the governor alone until so confirmed.

17.07(6) (6) Other state officers serving in an office that is filled by appointment of any officer or body without the concurrence of the governor, by the officer or body having the authority to make appointments to that office, at pleasure, except that officers appointed according to merit and fitness under and subject to ch. 230 or officers whose removal is governed by ch. 230 may be removed only in conformity with that chapter.