
2004 Wis Eth Bd 06
**DISQUALIFICATION; EMPLOYMENT CONFLICTING WITH OFFICIAL
DUTIES; IMPROPER USE OF OFFICE**

A legislator should not accept money from a private organization to affect the laws of other states and simultaneously participate in legislative discussions, consideration, or votes in Wisconsin on the same issues. The legislator may cure the conflict between the private employment and governmental responsibilities by forgoing one of those relationships. Short of eliminating the conflict, the legislator may mitigate it by withdrawing from legislative discussions, consideration, or votes on public policy issues in Wisconsin which the legislator is being paid to affect elsewhere.

Facts

- ¶1 This opinion is based upon these understandings:
- a. You are a member of Wisconsin's Legislature.
 - b. An organization that promotes a specific public policy issue in states around the country, wants to hire you to help the organization develop public support for its position in states other than Wisconsin.

Question

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

How, if at all, do laws administered by the Ethics Board restrict your ability to accept the proposed employment?

Advice

¶3 The Ethics Board affirms that statutes that the Ethics Board administers do not preclude your employment by the organization, as long as you can clearly demonstrate that the employment does not arise from your holding a public office. Even so, your accepting that employment presents a conflict of interests. Therefore, the Ethics Board further advises that you not participate in legislative discussions, consideration, or votes in Wisconsin on the public policy issues the organization advocates while the organization simultaneously pays you to promote changes in laws in other states affecting those very type of issues.

Discussion

¶4 Several provisions of the Ethics Code are pertinent to your request. Of particular importance are §§19.45 (2), 19.45 (3), and 19.46 (1) (b), *Wisconsin Statutes*. Those sections provide:

19.45 Standards of conduct; state public officials. (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.

(3) No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official. This subsection does not prohibit a state public official from engaging in outside employment.

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:

(b) 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.

Accepting the employment

¶5 The Legislature has specifically recognized that the Ethics Code that we administer “does not prevent any state public official from accepting other employment or following any pursuit which in no way interferes with the full and faithful discharge of his or her duties to this state.”¹ The Ethics Code reminds us 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

¹ §19.45 (1), *Wisconsin Statutes*.

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, or 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.”²

¶6 This statutory recognition of the appropriateness and even desirability of elected officials engagement in the economy is not without limitation. The Ethics Code that we administer has great tolerance for conflicts that are “minor and inconsequential” and “unavoidable” and much less tolerance for conflicts that are “substantial and material” and that an official can avoid.

¶7 Notice that the Legislature intends not to foreclose a state public official’s acceptance of employment that “in no way interferes with the full and faithful discharge of his or her duties to the state”. The natural corollary is that if employment would interfere with an official’s faithful discharge of duties, even in a modest way, state law may prohibit or curtail that arrangement. Thus, state law forbids a legislator’s employment by an organization that pays a lobbyist to try to influence the Legislature’s actions.³ Moreover, sections 19.45 (2) and 19.46 (1) (b), *Wisconsin Statutes*, prohibit a legislator from using public office or position to obtain the legislator’s employment.

¶8 Although the law does not preclude your accepting employment offered because of your general political skills and experience, it does forbid your trading on the title or prestige of your office to obtain employment and precludes you from accepting work offered because of your position as a legislator.⁴ You should accept employment only if you can clearly demonstrate that the employment does not arise from your holding a public office.

¶9 Section 19.45 (3), *Wisconsin Statutes*, forbids a public official to accept anything of value, including employment that could reasonably be expected to influence the official’s judgment or actions. Accepting compensation from an organization advocating a particular public policy position could, in most instances, reasonably be expected to influence an official’s actions on issues of interest to the organization if the issues come before the official.

² §19.45 (1), *Wisconsin Statutes*.

³ §13.625 (1)(b), *Wisconsin Statutes*.

⁴ *E.g.*, 2003 Wis Eth Bd 15, ¶1; 1994 Wis Eth Bd 09, ¶6; 1994 Wis Eth Bd 02.

¶10 If this were all that the statute said, we would have told you that you could not accept the job offer. However, §19.45 (3) goes on to say: “This subsection does not prohibit a state public official from engaging in outside employment.” Thus, the statute does not require you to reject the proffered employment from the organization even though it might reasonably be expected to influence your judgment on public policy issues advocated by the organization that come before the Wisconsin Legislature.

¶11 Because we understand that the organization’s employment of you is not dependent upon your holding or having held a government position, we think that the Ethics Code does not forbid it; but, as discussed below, we believe that you should not simultaneously be paid to promote a specific public policy issue, in a private capacity, while, in a government capacity, participating in the actions of our state’s government pertaining to the same subject matter.

Participating in the Legislature’s consideration of issues for which you are a paid advocate in other states

¶12 You should not accept payment from the organization to promote changes in specific laws in other states while you simultaneously participate in legislative discussions, consideration, or votes on those issues in Wisconsin.

¶13 We recognize that legislators are part-time officials who have financial interests in various aspects of the economy. Thus, a farmer-legislator may generally vote on legislation affecting agriculture, a lawyer-legislator may usually vote on court reform and tort reform, a teacher-legislator may reasonably be expected to vote on educational issues; but a farmer generally derives income from farming, a lawyer from providing legal counsel or representation, a teacher from teaching. None is normally paid to promote changes to laws and public policy. Should the farmer, the lawyer, or the teacher take money to try to change states’ laws and, simultaneously, in a governmental capacity, use his or her office to change those laws in Wisconsin? No.

¶14 In the past, we have advised a lawyer-official that he could participate in the promulgation of rules affecting lawyers of which more than 15,000 are licensed in this state. We advised an official with a financial interest in a business that he could participate in actions that affect businesses generally. Similarly, a farmer appointed to a part-time board could act on rules establishing or implementing general agricultural policy, and a revenue official could act on tax policy except in the rare instance in which a provision affects a small number of taxpayers including the official in a way that differs

from its effect on a large segment of Wisconsin's residents.⁵ Each draws on life experiences. Each is an example of the “representative democracy” to which the Ethics Code refers. None is paid to advocate specific laws and policies.⁶

¶15 If the question were directly put, “May an organization pay a legislator and may a legislator take money to try to affect the laws of Wisconsin?” the answer, “No,” would be so obvious that we are confident that the question would not even be posed. Here the question is asked, “May an organization pay a legislator, and may a legislator take money to try to affect the laws of Minnesota, Iowa, and Illinois while remaining unfettered to act on identical or similar proposals in Wisconsin?” Again, the obvious answer must be “no.”⁷

¶16 The Ethics Code declares that “ethical standards . . . are essential to the conduct of free government; that the legislature believes that a Code of Ethics for the guidance of state public officials . . . will help them avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service and will promote and strengthen the faith and confidence of the people of this state in their state public officials and state employees.”⁸

¶17 By accepting employment as an advocate of legislative issues while participating in the Legislature’s consideration of those same topics, a government official, who owes an undivided duty of loyalty to the public whom he or she serves⁹ undermines and weakens citizens’ faith and confidence in government. The duty of undivided loyalty speaks to a legislator’s abstaining from participating in a matter if a private interest

⁵ See 8 Op. Eth. Bd. 33, 39.

⁶ The Board recognizes that an official may be employed by an organization that tries to influence governmental decisions at a different level of government than that in which the official serves or that an official may serve in a position other than as an advocate for an organization that tries to influence public policy. This opinion does not address those circumstances.

⁷ We have said on a number of occasions that an official who holds employment should not vote on quasi-judicial matters that affect the official’s employer. 2003 Wis Eth Bd 08, ¶7; 1994 Wis Eth Bd 05, ¶9; 1993 Wis Eth Bd 04, ¶7.

⁸ Section 19.41, *Wisconsin Statutes*.

⁹ 1993 Wis Eth Bd 04, ¶5; 1992 Wis Eth Bd 33; 1992 Wis Eth Bd 32; 8 Op. Eth. Bd. 33 (1985); 63A Am. Jur. 2d, Public Officials and Employees §§321, 322.

could materially affect the legislator's judgment or adversely affect the image or effectiveness of the legislative process.¹⁰

¶18 As one legal treatise has put it:

Public confidence in the performance of government officials is of paramount importance. A public office is a public trust, and the holder thereof may not use it directly or indirectly for a personal profit, or to further his or her own interests, since it is the policy of the law to keep an official so far from temptation as to insure his or her unselfish devotion to the public interest. Officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. Where a conflict of interest arises, the office holder is disqualified to act in the particular matter and must withdraw.

* * *

In the discharge of his or her duties the officer must be disinterested and impartial, and may not at the same time act in an official capacity and as the agent of one of the public whose interests are adverse to those of another.

67 *Corpus Juris Secundum*, Officers §244, p.477, 479 (footnotes omitted).

¶19 You may cure the conflict between your private employment and your governmental responsibilities by your divesting yourself of one of those relationships.¹¹ Short of eliminating the conflict, you may mitigate it by withdrawing¹² from legislative discussions, consideration, or votes on public policy issues in Wisconsin while the organization simultaneously pays you to promote changes in laws in other states affecting those very type of issues.

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¹⁰ See 2000 Wis Eth Bd 1, ¶14.

¹¹ 8 Op. Eth. Bd. 33, 41 (1985); 7 Op. Eth. Bd. 21, n. 15 (1983); 7 Op. Eth. Bd. 5, 6 (1983).

¹² We note that Assembly Rule 77 provides:

When a question is put every member present shall vote either "aye" or "no" unless paired with another member who is absent with leave, or unless the assembly for special cause excuses the member from voting.

In *Wrzeski v. City of Madison*, 558 F. Supp. 664 (W.D. Wis. 1983), the Court held that a rule requiring a legislator to vote on every matter before the legislative body unconstitutionally infringes a legislator's First Amendment right of free speech.