
2020 ETH 05**LOCAL CODE OF ETHICS - VILLAGE CONTRACTING WITH COMPANY EMPLOYING
DEPARTMENT HEAD'S SPOUSE**

You are an attorney who represents a Village. You are seeking advice as to whether a Village department head may enter into a contract with a Company that employs the department head's spouse if the spouse is not an owner or manager of the company and will not benefit financially from the contract. You also ask whether the spouse is "associated," as defined in [WIS. STAT. § 19.42\(2\)](#), the spouse's employer. Finally, you ask whether hypothetical or potential benefits or financial gain are prohibited by the Local Code of Ethics.

Summary:

The Commission first advises, based on the known facts provided in your request, that the department head may take enter into the contract on behalf of the Village with the Company. The Commission also advises that the department head exercise caution and be mindful of the common law duty of undivided loyalty to the Village when acting in their official capacity related to the contract with the Company. If any of the facts described herein change, this advice may no longer be applicable.

Second, the Commission advises that, under the facts of your inquiry, the spouse is not "associated" with her employer as that term is defined in [WIS. STAT. § 19.42\(2\)](#). The term "associated" requires more than mere employment. It requires an individual to be a director, officer, trustee, have a certain ownership interest, or to be an authorized representative or agent. The Spouse in this case does not have any of those roles.

Lastly, the Commission advises that hypothetical or potential benefits are not generally prohibited by the Local Code of Ethics. The precedent established by the Commission's predecessor agencies requires more than mere conjecture or speculation. The Local Code of Ethics restricts substantial benefits and financial gain that are measurable and demonstrable. It does not prohibit hypothetical or potential benefits or financial gain.

Analysis

You advised that the head of the Village department is a local public official under [WIS. STAT. § 19.42\(7w\)\(d\)](#), and that the department head has the authority to enter into contracts for professional services, which are not subject to bidding procedures. The head of the department's spouse ("Spouse") is an employee of a private company ("Company"), which has more than 60 employees and several office locations across Wisconsin. The Spouse has no ownership interest in the Company. The Spouse is not an officer, director, or trustee of the Company. The Spouse is not in a managerial or supervisory position. The Spouse's compensation is driven solely by the projects to which the Spouse is assigned, which are generally projects for a state agency in other counties. You further advise that the Spouse does not have any supervisory role in the projects they are assigned to or on the job sites of such projects. The Spouse has a supervisor that the Spouse reports to for each assigned project and has no authority to bind the Company. The Company pays the Spouse wages and benefits, but the Company is reimbursed in full for those wages and benefits by

the state agency, as part of their contracts with the state agency. You advise that there is no profit sharing plan or bonus system which would result in the Company's revenue from a contract entered into with the Village accruing to the Spouse, and that the Spouse's compensation is determined solely on the basis of the contracts and projects to which the Spouse is assigned.

You also advise that the department head believes that the Company and certain employees of the Company (other than the Spouse) are best suited to provide services to the Village for certain projects. The Spouse would not be providing the services and neither the department head nor their Spouse are aware of any financial gain or benefit that the Spouse would receive if the Village contracted with the Company.

The department head is a local public official under [WIS. STAT. § 19.42\(7w\)\(d\)](#). As such, the department head is subject to the restrictions set forth in the Local Code of Ethics, [WIS. STAT. § 19.59](#). The department head, by entering into a contract on behalf of the Village, will be taking official action. The relevant provisions of the Local Code of Ethics are as follows:

[WIS. STAT. § 19.59\(1\)\(a\)](#) provides in relevant part:

No local 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.

[WIS. STAT. § 19.59\(1\)\(b\)](#) provides:

No person may offer or give to a local public official, directly or indirectly, and no local public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the local 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 local public official. This paragraph does not prohibit a local public official from engaging in outside employment.

[WIS. STAT. § 19.59\(1\)\(c\)](#) provides:

Except as otherwise provided in par. (d), no local public official may:

1. 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.
2. 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.

Further, the terms "immediate family" and "associated," are specifically defined in Chapter 19:

[WIS. STAT. § 19.42\(7\)](#) provides:

"Immediate family" means:

- (a) An individual's spouse; and

(b) An individual's relative by marriage, lineal descent or adoption who receives, directly or indirectly, more than one-half of his or her support from the individual or from whom the individual receives, directly or indirectly, more than one-half of his or her support.

[WIS. STAT. § 19.42\(2\)](#) provides:

“Associated,” when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is a director, officer, or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10 percent of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.

Application of WIS. STAT. §§ 19.59(1)(a) and 19.59(1)(c)

These provisions in the Local Code of Ethics prohibit a local public official from:

- using 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; [WIS. STAT. § 19.59\(1\)\(a\)](#).
- taking any official action substantially affecting a matter in which the official, an immediate family member, or an organization with which the official is associated has a substantial financial interest, or [WIS. STAT. § 19.59\(1\)\(c\)](#).
- using 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, his or her immediate family, or an organization with which the official is associated. [WIS. STAT. § 19.59\(1\)\(c\)](#).

As the department head is not associated with the company, the only way in which these provisions will apply to this case would be if the Spouse, an immediate family of the local official, is “associated” with the Company as defined in [WIS. STAT. § 19.42\(2\)](#). You advise that the Spouse is an employee of the Company, not an officer, director, or trustee, and does not own or control any equity in the Company. The only question then is whether the Spouse is an authorized representative or agent. These terms are not defined in Chapter 19 of the Wisconsin Statutes. The courts direct that statutory interpretation begin with the language of the statute; if the meaning is plain, the inquiry does not go further. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially defined words or phrases are given their technical or special definitional meaning. *Id.* Statutory language is interpreted in the context in which it is used; not in isolation but as a whole; in relation to the language of surrounding or closely related statutes; and reasonably, to avoid absurd or unreasonable results. *Id.* at ¶ 46. A common and accepted meaning can be determined by reference to a dictionary definition. *Id.* at ¶ 53.

A definition found in the dictionary for agent is “one who is authorized to act for or in place of another.” Merriam Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/agent> (last visited July 31, 2020). Authorized and authority are defined as “one endowed with authority.” Merriam Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/authorized> (last visited July 31, 2020). Representative is defined as “one that represents another or others, such as one that represents a business organization or one that

represents another as an agent, substitute, or delegate usually being invested with the authority of the principal.” Merriam Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/representative> (last visited July 31, 2020). Together, authorized representative, could be considered to mean one endowed with authority to represent another, for example an individual given the authority to represent a business organization.

While the Spouse may have some degree of decision-making authority with respect to their assigned tasks, they do not act in a supervisory or managerial role and have no authority to bind the Company in things such as contractual matters or major decision making. The Spouse does not fit within the general definitions of agent or authorized representative, meaning that they have been granted some type of authority to act on behalf of the Company. Your interpretation of “authorized representative or agent” is that, at a minimum, it means that an individual has a supervisory or managerial type position and that any broader reading of the phrase would encompass any employee and result in nearly anyone with a connection to the organization being deemed “associated.” This is a correct interpretation. The Legislature explicitly included a definition of associated and as part of this definition specifically referenced ownership, equity interest, leadership roles, and roles with authority to represent the organization, as that which makes an individual “associated” with an organization. As you state in the request, any broader interpretation would render the statutory definition meaningless.

Neither the department head nor their Spouse is associated, within the meaning of the statute, with the Company. Therefore, WIS. STAT. § [19.59\(1\)\(a\)](#) or [\(c\)](#) does not restrict the department head from taking official action where only the interests of the Company are implicated. However, as the Spouse is a paid employee of the Company, the remaining question is whether the department head’s official action would result in the Spouse receiving financial gain, anything of substantial value or benefit, directly or indirectly.

The department head’s Spouse’s compensation is something of substantial value and personal benefit, therefore, the Local Code of Ethics would restrict the official from taking official action that would affect the Spouse’s compensation. You advise that there is no financial gain or substantial benefit, value, or financial interest that the Spouse will receive as a result of the Village contracting with the Company, because the Spouse’s compensation is only based on the contracts and projects that the Spouse is assigned and there is no profit sharing or bonus plans that would result in the Company’s revenue from a contract with the Village indirectly accruing to the Spouse. If these facts are true, and there is not financial gain or substantial benefit as a result of the contract, then the department head could take official action to enter into the contract.

In addition to these known facts, you ask whether the Local Code of Ethics prohibits official action if a benefit or value is speculative in nature and provided a hypothetical scenario for the Commission’s consideration. In this hypothetical, the Spouse’s supervisor oversees the Spouse and has responsibility related to the contract with the Village. While there is no evidence that this will take place, the hypothetical posits that the office manager could see the Spouse as a more valuable employee because of the relationship with the Village department head. Opinions of our predecessor agencies found that measurable and demonstrable, not speculative benefits or financial interests or gain, are to be considered when determining if conflicts of interest exist and if a local official may participate and take official action. [2002 Wis Eth Bd 01](#), [2005 Wis Eth Bd 05](#).

Under the hypothetical posited, the potential effect is only speculative in nature. Without more, it is mere conjecture. Therefore, the department head would not be prohibited from taking official action. However, if the Spouse were to receive a substantial benefit or financial gain as a result of the contract between the Village and Company, the department head would be restricted from taking official action and entering into the contract with the Company.

One other hypothetical to consider is, if the contract with the Village were to establish a basis or precedent for other contracts that the Spouse may be assigned and that precedent would be of substantial value, provide financial gain to the Spouse, or substantially benefit the spouse the department head should refrain from entering into the contract. If the effect of the contract remains merely conjecture or is inconsequential, as demonstrated in the facts provided, then the official may enter into the contract. See [2002 Wis Eth Bd 04](#).

Application of WIS. STAT. § 19.59(1)(b)

The final question is whether the compensation that the Spouse receives as an employee of the Company may reasonably influence the department head's official action of entering into the contract with the Company and, therefore, present a potential conflict under [WIS. STAT. § 19.59\(1\)\(b\)](#).

Subsection 19.59(1)(b) prohibits the official from:

- Soliciting or accepting, directly or indirectly, anything of value if it could be reasonably expected to influence the official's vote, official actions, or judgment, or
- Solicit or accept, directly or indirectly, anything of value if it could reasonably be considered a reward for the official action or inaction of the local official.
- This subsection does not include a restriction on the official's immediate family or an organization with which the official or their immediate family are associated.

You cite [2013 GAB 01](#)¹ in the request for advice as a somewhat analogous set of facts, a city council member participating in official action with a business which employed their spouse. The GAB opined that [WIS. STAT. § 19.59\(1\)\(b\)](#) did not apply to that particular circumstance because the official was not receiving anything of value directly from the business. Unlike WIS. STAT. § [19.59\(1\)\(a\)](#) or [\(c\)](#), subsection [\(1\)\(b\)](#) does not include restrictions on substantial benefit or financial gain for the local official's immediate family. Consistent with that opinion, [WIS. STAT. § 19.59\(1\)\(b\)](#) does not apply in this case. The only thing that could possibly be considered to be received here is the Spouse's salary. However, as was the case in [2013 GAB 01](#), it is Spouse that is receiving the thing of value (e.g., her salary) not the department head. Therefore, [WIS. STAT. §19.59\(1\)\(b\)](#) is inapplicable.

¹ At the June 16, 2020, Commission Meeting, the Commission withdrew 2013 GAB 01. While the advice contained in the opinion reached the correct answer based on the facts presented, that opinion was withdrawn because it incorrectly applied WIS. STAT. § 19.59(1)(b) by conflating the Commission's role regarding the common law duty of undivided loyalty with the statutory analysis. The Commission decided to convert this informal opinion to a formal opinion to replace 2013 GAB 01 because of its correct application of WIS. STAT. § 19.59(1)(b) while appropriately advising caution as to the common law duty of undivided loyalty.

Common Law Duty of Undivided Loyalty

As noted in [2013 GAB 01](#), a local public official owes a common law duty of loyalty. While the Commission does not have jurisdiction to opine on or enforce this common law duty, it and its predecessors have both advised caution when it appears that that duty may be implicated. As noted above, in that opinion the official was not accepting anything. The spouse was accepting salary from the business they were employed by, and for this reason the GAB included in the opinion a note of caution. The city council member benefited from their spouse's salary and GAB opined that this could reasonably affect the city council member's judgment. As such GAB cautioned that the city council member be mindful of the common law duty of undivided loyalty to the city when participating in official action.

The Commission advises the same caution for the department head of the Village as their Spouse is employed by the Company that the Village wishes to engage with in business. The department head should be mindful of the common law duty of undivided loyalty to the Village when acting in their official capacity. They may wish to recuse from any official action or not enter into the contract if they feel that they may have conflicting loyalties.

Conclusion

The Commission first advises, based on the known facts provided in your request, that the department head may take enter into the contract on behalf of the Village with the Company. The Commission also advises that the department head exercise caution and be mindful of the common law duty of undivided loyalty to the Village when acting in their official capacity related to the contract with the Company. If any of the facts described herein change, this advice may no longer be applicable.

Second, the Commission advises that, under the facts of your inquiry, the spouse is not "associated" with her employer as that term is defined in [WIS. STAT. § 19.42\(2\)](#). The term "associated" requires more than mere employment. It requires an individual to be a director, officer, trustee, have a certain ownership interest, or to be an authorized representative or agent. The Spouse in this case does not have any of those roles.

Lastly, the Commission advises that hypothetical or potential benefits are not generally prohibited by the Local Code of Ethics. The precedent established by the Commission's predecessor agencies requires more than mere conjecture or speculation. The Local Code of Ethics restricts substantial benefits and financial gain that are measurable and demonstrable. It does not prohibit hypothetical or potential benefits or financial gain.

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DEC 23 2019

Wisconsin Ethics Commission

Daniel A. Carlton, Jr., Administrator
Wisconsin Ethics Commission
P.O. Box 7125
Madison, WI 53707-7125

Re: Wis. Stat. § 19.59(6) Request for Advisory Opinion
CONFIDENTIAL

Dear Administrator Carlton:

Our firm serves as the Village Attorney for the Village [REDACTED]. In that capacity, we have encountered a situation where we believe the Commission's interpretation of the Wisconsin Ethics Code is appropriate.

The questions we have for the Commission are:

1. May a department head enter into a contract with a company that employs the department head's spouse, if the spouse is not an owner or manager of the company and will not benefit financially from the contract?
2. Is being employed by a company sufficient to be "associated" with a company under Wis. Stat. § 19.42(2)?
3. The law prohibits, among other things, a public official or spouse receiving "substantial benefit" or "financial gain." Are hypothetical or potential benefits also prohibited?

The factual situation concerns the head of a Village department, who is a "local public official." Wis. Stat. § 19.42(7w)(d). The department head has authority to enter into contracts for professional services, which are not subject to bidding procedures.

The department head's spouse ("Spouse") is an employee of a private company ("Company.") Company has more than 60 employees and has several office locations across Wisconsin. Spouse has no ownership or management interest in Company. Spouse's compensation is driven solely by the projects to which Spouse is assigned, which have generally been [REDACTED] projects in another county. So, while Company pays Spouse wages and benefits, the Company is reimbursed in full for those wages and benefits by [REDACTED] as part of [REDACTED] contract(s) with Company.

The department head believes Company and, more specifically, certain Company employees (other than Spouse) are best suited to provide professional services to the Village with respect to certain discrete projects. These services would not be provided by Spouse. Neither the department head nor Spouse are aware of any financial gain or benefit that would inure to Spouse's benefit if the Village contracted with the Company. For example, there is no profit sharing plan or bonus which would result in Company's revenue from the Village indirectly accruing to Spouse's benefit.

Our tentative conclusion is that Department Head contracting with Company would not violate the Ethics Code.

The state ethics law prohibits a local public official from using "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." Wis. Stat. § 19.59(1)(a). The law further prohibits a local public official from "[t]ak[ing] 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." § 19.59(1)(c)(1). The law further prohibits a local public official from "[u]s[ing] 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." § 19.59(1)(c)(2).

From these facts, it is evident that there is no financial gain to the local public official themselves. The threshold questions, as we see it, are whether (a) the Department Head is "associated" with Company under the statutory definition, and (b) whether Spouse will receive "financial gain or anything of substantial value" (§ 19.59(1)(a)), a "substantial financial interest," (§ 19.59(1)(c)(1)) or a "substantial benefit, direct or indirect" (§ 19.59(1)(c)(2)).

"Associated"

A public official is "associated" with an organization if the public official, or a member of the official's immediate family, is "a director, officer, or trustee, or owns or controls, directly or indirectly...at least 10% of the outstanding equity" of the organization, or if the official or official's immediate family member "is an authorized representative or agent" of the organization. Wis. Stat. § 19.42(2).

It is clear from the facts presented that Spouse is not a director, officer, or trustee of Company, and does not have any ownership or controlling interest in Company. Thus, the first part of § 19.42(2) is not violated. The Commission's guidance in the the precise meaning of the term "authorized representative or agent" is welcomed. Our interpretation is that "authorized representative or agent" connotes, at a minimum, a supervisory or managerial type of position. We assume that Spouse—like most any employee of any company—has *some* degree of decision

making authority with respect to their assigned tasks. However, Spouse is not in a managerial or supervisory position. A broader reading of the phrase, such as encompassing any employee, would result in nearly anyone with a connection to the organization being deemed “associated.” Such a reading would also render meaningless the statute’s language related to ownership or equity interest. Therefore, we conclude that if the Legislature intended such a broad reading, the Legislature would have so indicated.

Financial Gain/Substantial Value/Substantial Financial Interest/Substantial Benefit

Regardless of whether Spouse is “associated” with Company as a result of Spouse’s employment, the second question is whether the Village contracting with Company would result in Spouse receiving financial gain, anything of substantial value, substantial financial interest, or a substantial benefit, direct or indirect. Wis. Stats. §§ 19.59(1)(a), (c)(1), (c)(2). We conclude that there is no financial gain or substantial benefit, value, or financial interest to Spouse as a result of Village contracting with Company. Spouse’s compensation is determined solely on the basis of the other, non-Village contracts to which Spouse is assigned. Our principal question to the Commission is whether a benefit or value can be speculative in nature. For example, the office manager who Spouse reports to is also the person who would oversee the Company employee or employees providing services to the Village. Although there is no evidence that this will take place, one could speculate or argue that the office manager would see Spouse as a more valuable employee because of Spouse’s relationship with the Village department head responsible for these types of contracting decisions. However, the Village interprets the ethics code to mean that there must be an actual benefit to Spouse, and not merely one that is speculative or theoretically possible.

The facts here are somewhat analogous to those found in 2013 GAB 01. There, the Commission’s predecessor reviewed a situation where a local elected official’s spouse was the employee of a business, and the elected official was potentially to hear and decide whether to grant the business rezoning and permits necessary to expand. *Id.* The GAB opined that “the [official] is not receiving anything of value directly from the business so as to trigger application of the statute.” *Id.* at 1. Because the official’s spouse draws a salary from the business, the GAB cautioned the official “to be mindful of the common law duty of undivided loyalty to the city when acting in an official capacity.” *Id.* at 2.

For all of the foregoing reasons, we believe that a department head may enter into a contract with a company that employs the department head’s spouse, so long as the spouse does not receive any gain, benefit, or value from the contract and the spouse has no ownership or controlling interest in the company. We welcome any further guidance from the Commission.

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Wisconsin Ethics Commission/**CONFIDENTIAL**

December 20, 2019

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Very truly yours,

[REDACTED]

Village Attorney

[REDACTED]

[REDACTED]