

# NOTICE OF OPEN MEETING

## **Wisconsin Ethics Commission**

212 East Washington Avenue, Third Floor  
Madison, Wisconsin  
Thursday, January 25, 2018, 4:30 p.m.

### **Open Session Agenda**

- A. Call to Order
- B. Report of Appropriate Meeting Notice – Staff Counsel
- C. Appointment of Interim Administrator
- D. Adjourn

#### Future Ethics Commission Meetings Scheduled:

- Tuesday, February 27, 2018 at 9:00 AM
- Tuesday, April 24, 2018 at 9:00 AM
- Tuesday, June 19, 2018 at 9:00 AM
- Tuesday, August 21, 2018 at 9:00 AM
- Tuesday, December 4, 2018 at 9:00 AM

## MEMO

Date: January 24, 2018  
From: Ann S. Jacobs  
Re: Analysis of Effect of Senate Confirmation Vote

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**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).<sup>1</sup>

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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<sup>1</sup> 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.

**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.

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.



Memorandum

Date: January 23, 2018

To: Wisconsin Elections Commission members

From: Dean Knudson

I want to provide my fellow members with my thoughts and my proposal regarding the administrator position on the agenda for the meeting today.

Our top priority should be to insure continuity and stability with the agency so that the Commission can effectively administer and enforce Wisconsin election laws.

Wisconsin Statute 15.61 empowers the Commission members to:

- a) nominate an administrator to a four year term ending on July 1 of the odd numbered year
- b) appoint an interim administrator to serve until confirmation of administrator
- c) remove the administrator

The Senate yesterday voted to reject the nomination of Michael Haas as administrator. The Commission members clearly have the power to remove the administrator; however some members have held the position that only the Commission may remove the administrator. This position is unlikely to be upheld in court and I fear litigation would become a distraction leading to unnecessary disruption and uncertainty. I have provided members with a memo written by Deputy Director Jessica Karls-Ruplinger of Wisconsin Legislative Council stating "Although the statutes do not expressly address what happens if the Senate rejects confirmation of the administrators, it appears likely that a court would find that such action removes the administrators and results in vacancies in the administrator positions."

When a vacancy occurs in the administrator position, state law requires the Commission to appoint a new administrator, and submit the appointment for confirmation, within 45 days after the date of the vacancy. It is my belief that courts will be likely to deem the administrator position vacant as of today. The 45 day period would end on Friday, March 16<sup>th</sup>. **If the commission has not appointed a new administrator within 45 days, state law requires the legislature to name an interim administrator.**

I believe the administrator position is vacant today. I further believe that the mission of the Wisconsin Elections Commission will be seriously compromised by an effort to prove that the Commission could ignore the Senate vote and retain Michael Haas as Administrator. For example, in our annual Delegation Memo the Commission delegated authority to the Administrator to certify candidates, to implement determinations regarding sufficiency of nomination papers and qualifications of candidates, and to sign contracts. In each of these areas the Commission risks creating instability and uncertainty by attempting to retain Haas. No other staff is empowered to fulfill these functions. Candidates could challenge Commission decisions and actions taken by Haas during the period of litigation that would follow such action.

By attempting to retain Haas the Commission itself would immediately create the uncertainty and instability in our elections that Commission members and staff work so hard to avoid.

I propose a two-part process for consideration by the Commission. First, we should appoint a new interim administrator from within existing Commission staff. Second, we should conduct a nationwide search to recruit our new administrator. The interim administrator would serve on a temporary basis while the Commission evaluates candidates for the position and would be eligible to compete for the position. I propose the following motion for consideration at the meeting today.

Motion:

1. Appoint Deputy Administrator Meagan Wolfe to serve as Interim Administrator until the completion of a search process to be conducted over not more than 6 months. Wolfe shall immediately assume all the duties and authority of the Administrator and Chief Election Official pursuant to Wis. Stats 5.05 (3d) and (3g).
2. Direct the chairman to advertise the administrator position for 60 days, followed by a Commission meeting to narrow the field to three applicants. Schedule a Commission meeting to interview applicants not more than 90 days from today.
3. Direct the chairman to inform the Senate that Wolfe has been named Interim Administrator pending a nationwide search for the next Administrator. Her name will be submitted for confirmation as required by law, however the Commission's intention will be to replace her with the individual chosen during the search process. Ms. Wolfe will be eligible to compete for the administrator position along with other applicants.

Attachments:

Legislative Council Memo to Speaker Vos regarding Senate rejection of Administrator

2018 Delegation Memo regarding delegation of powers to the Administrator

# WISCONSIN ELECTIONS COMMISSION

212 EAST WASHINGTON AVENUE, 3RD FLOOR  
POST OFFICE BOX 7984  
MADISON, WI 53707-7984  
(608) 261-2028  
ELECTIONS@WI.GOV  
ELECTIONS.WI.GOV



COMMISSIONERS

BEVERLY R. GILL  
JULIE M. GLANCEY  
ANN S. JACOBS  
JODI JENSEN  
DEAN KNUDSON  
MARK L. THOMSEN, CHAIR

ADMINISTRATOR MICHAEL HAAS

## MEMORANDUM

**DATE:** For the January 9, 2018 Commission Meeting  
**TO:** Members, Wisconsin Elections Commission  
**FROM:** Michael Haas, Interim Administrator  
**SUBJECT:** Delegation of Authority to Administrator

At its October 14, 2016 meeting, the Elections Commission approved a Delegation of Authority document to clarify actions and decisions that the Administrator could implement without prior Commission action. The Delegation of Authority was intended to maintain and improve the agency's administrative efficiencies for routine decisions and transactions, and also required the Administrator to report actions to the Commission after the fact and, in some cases, to consult with the Chair prior to taking action. This memorandum recommends that the Commission continue to delegate the same authority regarding various agency responsibilities.

By statute, the Wisconsin Elections Commission has general authority over the state's election laws. In various provisions of the election laws, the Commission is given a series of specific powers in addition to its general authority. Pursuant to Wis. Stat. § 5.05(3g), the Administrator of the Commission serves as the State's chief election officer, and pursuant to Wis. Stat. § 5.05(3d), the Administrator shall perform such duties as the Commission assigns to him or her in the administration of the election laws. Both the State Elections Board and the Government Accountability Board delegated certain authority to their administrative heads in order to facilitate the agency's day-to-day management and to clarify the scope of staff's authority to act without prior specific approval of the oversight body. Given the nature of the Commission's oversight of the agency and its meeting schedule, the Delegation of Authority aims to permit the Administrator to effectively manage the daily responsibilities of the agency while maintaining the Commission's role in making policy determinations, setting agency priorities, and directing significant staff initiatives.

The Commission previously indicated that it wished to review the Delegation of Authority on an annual basis. The recommended Delegation of Authority below is identical to that approved by the Commission in October 2016, except for the last bullet point under Section 2, which was not previously included simply due to an oversight.

### **Recommendation**

Consistent with the Delegation of Authority previously adopted by the Wisconsin Elections Commission, I recommend the Commission delegate the authority described below to the

Administrator, pursuant to the Administrator's role as agency head and chief state election official. In exercising all delegated authority, the Administrator should be required to report, at the Commission meeting immediately following the delegated action, the specifics of the action taken, the basis for taking the action, and the outcome of that action.

1. The following authority should be delegated to the Administrator subject to the requirement that before it is exercised, the Administrator consult with the Commission Chair to determine whether Commission members should be polled or a special meeting conducted before action is taken:
  - To issue compliance review orders under the provisions of Wis. Stat. § 5.06;
  - To certify and sign election related documents including candidate certifications, certificates of election, and certifications of election results on behalf of the Commission;
  - To accept, review, and exercise discretion to approve applications for voting system modifications characterized as engineering change orders (ECOs) for systems previously approved for use in Wisconsin;
  - To implement the Commission's determinations regarding sufficiency of nomination papers or qualifications of candidates;
  - To communicate with litigation counsel representing the Commission in order to make timely necessary decisions regarding Commission litigation;
  - To make a finding pursuant to Executive Order #50, Sec. IV(8), that a proposed administrative rule does not have an economic impact.
  - To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), subject to the further provisions of this paragraph. The Administrator is required to request approval from the Commission for contracts involving a sum exceeding \$100,000, or for purchases from a statewide contract over \$100,000. The Administrator is required to request approval from the Commission prior to posting a Request for Proposal or Request for Bid. In addition, the Administrator may enter into a sole source contract only after obtaining approval from Commission Chair and providing five days' prior notice to the Commission regardless of the dollar amount.
2. The following authority should be delegated to the Administrator without the requirement for prior consultation with the Commission Chair before action is taken:
  - To exempt municipalities from polling place accessibility requirements pursuant to the provisions of Wis. Stat. § 5.25(4)(a);
  - To exempt municipalities from the requirements for the use of voting machines or electronic voting systems pursuant to the provisions of Wis. Stat. § 5.40(5m);

- To authorize the non-appointment of an individual who is nominated to serve as an election official under the provisions of Wis. Stat. § 7.30(4)(e);
- To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), for contracts involving a sum not exceeding \$100,000, or for purchases from a statewide contract involving sums not exceeding \$100,000.
- To issue written informal advisory opinions pursuant to Wis. Stat. §5.05(6a) related to recurring issues or issues of first impression for which no formal advisory opinion has been issued.

In making the above recommendations, I would note the following. Applications for exemption from accessibility requirements are rare and generally involve last minute construction issues. Permitting a municipality to use paper ballots instead of electronic voting equipment is a fairly routine decision that is predicated on unique circumstances such as the cost of programming electronic voting equipment when there is only one race on the ballot. Post-election certifications are generally administrative in nature, time sensitive and necessary to ensure an orderly transition of leadership following an election. These election-related certifications cannot be completed while a recount or litigation challenging a recount is pending. Wis. Stat. § 7.70 (5)(a). Regarding contract authority, agency purchases are governed by state procurement requirements, and very few contracts involve an amount exceeding \$100,000.

Finally, Wis. Stat. §5.05(6a) specifically permits the Commission to authorize the Administrator to issue informal written advisory opinions subject to any limitations the Commission deems appropriate. Every informal advisory opinion shall be consistent with applicable formal advisory opinions issued by the Commission or applicable statutes or case law. Requests for such informal advisory opinions are rare and the Administrator is required to review any such opinions issued at the next meeting of the Commission. The Commission may choose to issue a formal advisory opinion adopting or modifying the informal advisory opinion. If the Commission disagrees with an opinion issued by the Administrator, it may withdraw the opinion or request an opinion of the Attorney General.

A proposed motion is set out below.

**Recommended Motion:**

Pursuant to the Commission Administrator's role as agency head and the State's chief election official, the Wisconsin Elections Commission delegates the authority described below to its Administrator. In exercising all delegated authority, the Administrator is required to report, at the Commission meeting immediately following the delegated action, the specifics of the action taken, the basis for taking the action, and the outcome of that action.

1. The following authority is delegated to the Administrator subject to the requirement that before it is exercised, the Administrator consult with the Commission Chair to determine

whether Commission members should be polled or a special meeting conducted before action is taken:

- To issue compliance review orders under the provisions of Wis. Stat. § 5.06;
  - To certify and sign election related documents including candidate certifications, certificates of election, and certifications of election results on behalf of the Commission;
  - To accept, review, and exercise discretion to approve applications for voting system modifications characterized as engineering change orders (ECOs) for systems previously approved for use in Wisconsin;
  - To implement the Commission's determinations regarding sufficiency of nomination papers or qualifications of candidates;
  - To communicate with litigation counsel representing the Commission in order to make timely necessary decisions regarding Commission litigation;
  - To make a finding pursuant to Executive Order #50, Sec. IV(8), that a proposed administrative rule does not have an economic impact.
  - To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), subject to the further provisions of this paragraph. The Administrator is required to request approval from the Commission for contracts involving a sum exceeding \$100,000, or for purchases from a statewide contract over \$100,000. The Administrator is required to request approval from the Commission prior to posting a Request for Proposal or Request for Bid. In addition, the Administrator may enter into a sole source contract only after obtaining approval from Commission Chair and providing five days' prior notice to the Commission regardless of the dollar amount.
2. The following authority is delegated to the Administrator without the requirement for prior consultation with the Commission Chair before action is taken:
- To exempt municipalities from polling place accessibility requirements pursuant to the provisions of Wis. Stat. § 5.25(4)(a);
  - To exempt municipalities from the requirements for the use of voting machines or electronic voting systems pursuant to the provisions of Wis. Stat. § 5.40(5m);
  - To authorize the non-appointment of an individual who is nominated to serve as an election official under the provisions of Wis. Stat. § 7.30(4)(e);
  - To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), for contracts involving a sum not

exceeding \$100,000, or for purchases from a statewide contract involving sums not exceeding \$100,000.

- To issue written informal advisory opinions pursuant to Wis. Stat. §5.05(6a) related to recurring issues or issues of first impression for which no formal advisory opinion has been issued.



## WISCONSIN LEGISLATIVE COUNCIL

*Terry C. Anderson, Director*

*Jessica Karls-Ruplinger, Deputy Director*

TO: SPEAKER ROBIN VOS

FROM: Jessica Karls-Ruplinger, Deputy Director

RE: Senate Action on the Appointments of the Elections Commission Administrator  
and Ethics Commission Administrator

DATE: January 18, 2018

This memorandum responds to your question about whether the interim administrators of the Elections Commission and the Ethics Commission are removed from their positions if the Senate votes “no” on confirmation of the administrators. Although the statutes do not expressly address what happens if the Senate rejects confirmation of the administrators, it appears likely that a court would find that such action removes the administrators and results in vacancies in the administrator positions.

### BACKGROUND

The Elections Commission and the Ethics Commission are each under the direction and supervision of an administrator who serves for a four-year term expiring on July 1 of the odd-numbered year. The administrator of the Elections Commission is “appointed by a majority of the members of the [Elections Commission], **with the advice and consent of the [S]enate.**” Similarly, the administrator of the Ethics Commission is “appointed by a majority of the members of the [Ethics Commission], **with the advice and consent of the [S]enate.**” “Until the [S]enate has confirmed an appointment ..., [each] commission shall be under the direction and supervision of an interim administrator selected by a majority of the members of the commission.” [ss. 15.61 (1) (b) 1. and 15.62 (1) (b) 1., Stats. (emphasis added).]

### DISCUSSION

The statutes do not expressly address whether an interim administrator of the Elections Commission or the Ethics Commission is removed if the Senate votes “no” on confirmation of the administrator. If a court were asked to determine whether an interim administrator is removed if the Senate rejects his or her confirmation, it would likely apply rules of statutory



construction to “ascertain the intent of the legislature.” Rules of statutory construction include harmonizing the parts of the statute, considering the legislative history of the statute, and giving effect to each word, clause, and sentence.<sup>1</sup> [*In re Estate of Walker*, 75 Wis. 2d 93 (1977).]

The statute requires the “advice and consent” of the Senate for the appointment of an administrator for the Elections Commission and the Ethics Commission, but allows an interim administrator to direct the commission until the Senate confirms the appointment of an administrator. To give meaningful effect to Senate “advice and consent,” a court is likely to find that the Legislature intended to allow an interim administrator to serve temporarily until the Senate acts on confirmation rather than to allow an interim administrator to continue to serve indefinitely as administrator after Senate rejection of that administrator’s confirmation. If the Legislature intended to allow an administrator to continue to serve in the position regardless of the Senate rejection, it would be unnecessary to include Senate confirmation as an element of the appointment process.

Further, a court may look to another statute relating to interim appointments for guidance. Under s. 17.20 (2), Stats., if an interim appointment nominated by the Governor is later rejected by the Senate, the effect of the Senate rejection is a vacancy in the position. Specifically, the statute provides:

Vacancies occurring in the office of any officer normally nominated by the governor, and with the advice and consent of the senate appointed, may be filled by a provisional appointment by the governor for the residue of the unexpired term, if any, subject to confirmation by the senate. Any such appointment shall be in full force until acted upon by the senate, and when confirmed by the senate shall continue for the residue of the unexpired term, if any, or until a successor is chosen and qualifies. ... **Any appointment made under this paragraph which is withdrawn or rejected by the senate shall lapse. When a provisional appointment lapses, a vacancy occurs.** ... [Emphasis added.]<sup>2</sup>

This statute gives effect to a principle that Senate rejection of the confirmation of a Governor’s appointee terminates the lawful status of the appointee. Similarly, if a court is asked to determine the effect of Senate rejection on the status of the administrators of the Elections Commission and the Ethics Commission, it would likely apply this same principle by

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<sup>1</sup> Generally, all words and phrases in the statutes must be construed according to common and approved usage. [s. 990.01 (1), Stats.]

<sup>2</sup> In the absence of this specific language about Senate rejection, the Wisconsin Supreme Court recognized that Senate rejection of the confirmation of an interim appointee terminates the lawful status of the appointee. [*State ex rel. Reynolds v. Smith*, 22 Wis. 2d 516 (1964) and *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275 (1964), which were decided before s. 17.20 (2), Stats., included specific language about Senate rejection. The statute instead stated: “Any such appointment subject to confirmation by the [S]enate shall be in full force until acted upon by the [S]enate, and when confirmed by the [S]enate shall continue for the residue of the unexpired term.”]

concluding that rejection results in a vacancy, in order to give meaningful effect to the role of Senate confirmation.

In contrast, it could be argued that removal of the administrator of the Elections Commission requires action by the Elections Commission, and that removal of the administrator of the Ethics Commission requires action by the Ethics Commission, because the statutes: (1) allow each commission to be under the direction and supervision of an interim administrator “[u]ntil the [S]enate has confirmed an appointment” of an administrator; and (2) provide that removal of an administrator is by “affirmative vote of a majority of all members of the commission” and does not specifically allow the Senate to remove an administrator. [ss. 15.61 (1) (b) and 15.62 (1) (b), Stats.] However, this reading makes the requirement for “advice and consent” of the Senate superfluous and is likely not consistent with legislative intent.

First, the statutes provide that the Elections Commission and the Ethics Commission are each under the direction and supervision of an interim administrator “[u]ntil the [S]enate has confirmed an appointment” of an administrator. [ss. 15.61 (1) (b) 1. and 15.62 (1) (b) 1., Stats.] Arguably, if the Senate rejects the confirmation of an administrator, it has not “confirmed an appointment” and thus the interim administrator whose confirmation was rejected may continue to serve as the interim administrator. However, this reading of the statutes ignores the presumed temporary nature of an “interim” administrator. It appears more likely that the ability of a commission to appoint an interim administrator is similar to the ability of the Governor to make an interim appointment, as described above, in that it exists to ensure that an administrator can be in place prior to Senate action on confirmation.

Second, the statutes provide that the administrator of the Elections Commission may be removed by the affirmative vote of a majority of all members of the Elections Commission. Similarly, the administrator of the Ethics Commission may be removed by the affirmative vote of a majority of all members of the Ethics Commission. [ss. 15.61 (1) (b) 2. and 15.62 (1) (b) 2., Stats.] However, the ability of each commission to remove an administrator appears to be compatible with a vacancy resulting from Senate rejection of the confirmation of an administrator. This is consistent with interim appointments nominated by the Governor; for such appointments, the Governor can remove the appointee or a vacancy could result from Senate rejection of the confirmation of the appointee. [ss. 17.07 (3), (4), and (5) and 17.20 (2) (a), Stats.]

## CONCLUSION

It appears likely that a court would find that a Senate “no” vote on confirmation of the interim administrators of the Elections Commission and the Ethics Commission results in the removal of the administrators and vacancies<sup>3</sup> in the administrator positions because such a

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<sup>3</sup> If a vacancy in the administrator position for the Elections Commission or the Ethics Commission occurs, the commission must appoint a new administrator, and submit the appointment for Senate confirmation, within 45 days after the date of the vacancy. If the commission does not appoint a new administrator within 45 days, the Joint Committee on Legislative Organization must appoint an interim administrator to serve until a new

reading of the statutes is likely consistent with legislative intent and gives effect to the requirement for Senate confirmation.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

JKR:jal

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administrator is confirmed by the Senate but for a term of no longer than one year. [ss. 15.61 (1) (b) 1. and 15.62 (1) (b) 1., Stats.]

## Haas, Michael R - ELECTIONS

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**From:** Rolston, Stacey L - DOA  
**Sent:** Wednesday, January 24, 2018 12:19 PM  
**To:** Haas, Michael R - ELECTIONS; Thomsen, Mark L - ELECTIONS  
**Subject:** RE: Restoration Information

Michael (and Chairman Thomsen) –

In follow up to the questions posed below, I have received a legal opinion from DOJ on the issue of a new appointment. If you recall, as we discussed options and scenarios last evening, I told you I had asked for legal clarification on Monday for a scenario in which the Senate denied confirmation, the appointment was ended, and then the Elections Commission met to reappointment Michael as interim Administrator. In short, the question was: would that appointment be valid? DOJ's opinion is that any reappointment of Michael to the same position would be invalid. The action of the Senate rejected the appointment and the language of s.15.62 requires the commission to only fill this vacancy through the appointment of a "new administrator" within 45 days. We will follow the advice of DOJ's counsel and consider a reappointment invalid meaning we will not be able to enter the transaction into our pay system.

In response to questions of DOA's involvement and removal, DOA HR provides payroll and HR support to both commissions and thus must facilitate the transactions and assist the employee(s). Because the Senate voted against confirmation of the potential Administrator who was serving as the interim, there was no way for the statutory requirement of "consent of the senate" to be met and thus the appointment had to end.

While timelines may vary in the actions taken by human resources when employment contingencies are not met, in this instance there were unique constraints. Ambiguity regarding the end date of the interim appointment might have negatively impacted the 45 days from point of vacancy in which the Commission is allotted to find a candidate for administrator; and, might have negatively impacted Michael's right to exercise immediate restoration to the classified service if he desired (he is permitted immediate restoration or up to 3 months to affect restoration).

Please let me know if you have any further questions,

Stacey

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**From:** Rolston, Stacey L - DOA  
**Sent:** Wednesday, January 24, 2018 7:23 AM  
**To:** Haas, Michael R - ELECTIONS <Michael.Haas@wisconsin.gov>; Hauge, Sharrie - ELECTIONS <Sharrie.Hauge@wisconsin.gov>  
**Cc:** Dally, Lisa E - DOA <Lisa.Dally@wisconsin.gov>  
**Subject:** RE: Restoration Information

Thank you Michael. I need to confer with my legal staff who were not available last night. I will have a response for you today.

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**From:** Haas, Michael R - ELECTIONS  
**Sent:** Tuesday, January 23, 2018 6:14 PM  
**To:** Rolston, Stacey L - DOA <Stacey.Rolston@wisconsin.gov>; Hauge, Sharrie - ELECTIONS <Sharrie.Hauge@wisconsin.gov>  
**Cc:** Dally, Lisa E - DOA <Lisa.Dally@wisconsin.gov>  
**Subject:** RE: Restoration Information

## Buerger, David - ETHICS

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**From:** Rolston, Stacey L - DOA  
**Sent:** Wednesday, January 24, 2018 12:38 PM  
**To:** [REDACTED]; Halbrooks, David - ETHICS  
**Subject:** Appointment Question

Brian and Mr. Halbrooks –

I sent a response to the Elections Commission a few minutes ago regarding what happens in the event Mr. Haas is reappointed by the Elections Commission. Although Brian advised that your meeting isn't until tomorrow, I thought it appropriate to send you the same information right away. Here is the response to Elections regarding the issue of a new appointment of Mr. Haas:

“In follow up to the questions posed below, I have received a legal opinion from DOJ on the issue of a new appointment. If you recall, as we discussed options and scenarios last evening, I told you I had asked for legal clarification on Monday for a scenario in which the Senate denied confirmation, the appointment was ended, and then the Elections Commission met to reappointment Michael as interim Administrator. In short, the question was: would that appointment be valid? DOJ's opinion is that any reappointment of Michael to the same position would be invalid. The action of the Senate rejected the appointment and the language of s.15.61 requires the commission to only fill this vacancy through the appointment of a “new administrator” within 45 days. We will follow the advice of DOJ's counsel and consider a reappointment invalid meaning we will not be able to enter such a transaction into our pay system.”

This would be true if Brian were reappointed to the Ethics Commission Administrator as well.

Please let me know if you have any additional questions,

Stacey



VWDFH\#JR OVWR Q # Deputy Administrator

Department of Administration  
Division of Personnel Management

[stacey.rolston@wisconsin.gov](mailto:stacey.rolston@wisconsin.gov)

Main: (608) 266-9820 | Direct: (608) 266-1499

