
1994 Wis Eth Bd 5
LOCAL CODE; DISQUALIFICATION; EMPLOYMENT CONFLICTING
WITH OFFICIAL DUTIES; IMPROPER USE OF OFFICE

The Ethics Board advises that two city council members should not participate in any official discussions, consideration, or vote concerning a city's lease or purchase of a building while each simultaneously derives income from a business that itself has, or from a business whose principal owner has, a direct financial stake in the outcome of the city's decision.

OEB94-5 (September 28, 1994)

Facts

[1] This opinion is based upon these understandings:

- a. You are a City Attorney.
- b. A member of the City Council, Official A, is employed by a company which is principally owned by an individual who also owns a substantial interest in a building in the city's downtown.
- c. The city is currently exploring the possibility of leasing or purchasing the building.
- d. A second member of the City Council, Official B, is an architect employed by an architectural firm which has been retained by the current owners to develop plans for the building.

Questions

[2] The Ethics Board understands your question to be:

May a member of a city council, in his or her official capacity, participate in the city's decision to lease or purchase a building if the member's employer has a substantial pecuniary interest in the matter?

Discussion

[3] In our view, neither member should participate in the City's decision to lease or purchase the building in question.

[4] Section 19.59, Wisconsin *Statutes*, generally prohibits a local public official (1) from using his or her office to obtain anything of substantial value or a substantial benefit for himself or herself or for an organization with

which the official is associated or (2) from taking any official action substantially affecting a matter in which the official or an organization with which the official is associated has a substantial financial interest.¹ In addition, the statute prohibits a local public official from accepting anything of value “if it could reasonably be expected to influence the local public official’s vote, official actions or judgment.”² A member of a city council is a local public official subject to §19.59.³

Use of Office

[5] Under the terms of the statute, an official is deemed associated with an organization if the official or a member of the official’s immediate family

“is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.”

§19.42(2), *Wisconsin Statutes*.

[6] In the present case, Official A is not associated, within the meaning of the statute, with the group that owns the building that is the subject of the city’s discussions. Thus, unless Official A’s employment or compensation would be affected by the sale or lease of the building to the city, §19.59(1)(a) and (c) are unlikely to serve as a bar to his participation in the city’s decision with respect to the building.

[7] In contrast, the architectural firm that employs Official B is likely to be an organization with which Official B is associated within the meaning of the statute. Official B would be associated with the firm if he is an

¹ Section 19.59(1)(a) and (c), *Wisconsin Statutes*, provides:

19.59 Codes of ethics for local government officials, employees and candidates. (1)(a) 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. This paragraph does not prohibit a local public official from using the title or prestige of his or her office to obtain campaign contributions that are permitted and reported as required by ch. 11.

* * *

(c) 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.

² Section 19.59(1)(b), *Wisconsin Statutes*.

³ Under section 19.42(7u) (7w) and (7x), *Wisconsin Statutes*, a local public official includes an individual that holds an elective city office.

authorized representative or agent of the firm; that is, if he speaks for or represents the company in any of its dealings with clients or others. Moreover, the firm's retention to develop plans for the building and to oversee subsequent construction work likely will be affected by the city's actions. Thus, Official B probably should not participate in his official capacity in deliberations or votes concerning the city's purchase or lease of the building. Similarly, if Official B's employment or compensation would be affected by the city's sale or lease of the building, he should not participate.

Influencing Judgment

[8] Section 19.59(1)(b) provides that an official may not accept anything of value if it could reasonably be expected to influence the official's vote, actions or judgment.⁴ In addition, a public officer owes an undivided duty of loyalty to the public whom he or she serves.⁵ The question under the statute is whether Official A's or Official B's continued employment with their respective employers could reasonably be expected to influence their judgment with respect to the city's lease or purchase of the building. This is an objective test; the answer is what a reasonable person could expect under the circumstances.

[9] In our view, the council members' continued employment by parties having a demonstrated interest in the city's decision on the building could reasonably be expected to influence their judgment in the city's decision to lease or purchase the building.⁶ This comports with common sense. Thus, unless there are other factors of which we are unaware, we advise that Official A and Official B either rid themselves of their employment or refrain from voting on the issue of leasing or purchasing the building.⁷

Advice

[10] The Ethics Board advises that the two city council members about whom you have asked should not participate in any official discussions, consideration, or vote concerning the city's lease or purchase of the building at issue while each simultaneously derives income from a business that itself

⁴ Section 19.42(1), *Wisconsin Statutes*, defines "anything of value," in relevant part, as

[A]ny money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment

⁵ 1993 Wis Eth Bd 04; 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.

⁶ See, e.g., *Zagoreos v. Conklin*, 491 N.Y.S.2d (A.D. 1985); *Sokolinski v. Woodbridge Township Municipal Council*, 469 A.2d 96 (N.J. Super. A.D. 1983).

⁷ Our advise is consistent with the view of the courts expressed in several cases that if a local official votes on a contract in which the official's employer has an interest, the contract is void. *Heffernan v. City of Green Bay*, 266 Wis. 534 (1954) (if alder person who voted to approve contract had been employee of individual's company when another company owned by the individual bid for the contract, the contract would have been illegal and void); *Edward E. Gillen Co. v. City of Milwaukee*, 183 N.W. 679 (Wis. 1921); *Ballenger v. Door County*, 131 Wis. 2d 422 (Ct. App. 1986).

has, or from a business whose principal owner has, a direct financial stake in the outcome of the city's decision.