



Ethics and Conflicts of Interest Part 3: The Incompatibility Doctrine and Miscellaneous Conduct Provisions*

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Author's Note: ***This is the third article in a 3-part series covering (1) the state ethics code applicable to local public officials, (2) the law prohibiting private interests in public contracts, and (3) the Incompatibility doctrine and miscellaneous statutes prohibiting certain conduct**

Incompatibility Doctrine

The incompatibility doctrine is a court-created doctrine that prohibits a public official from simultaneously holding dual offices or an office and a position of public employment where the two are incompatible.¹ A general treatise quoted in a 1985 Wisconsin Attorney General Opinion elaborates on incompatibility:²

“[Offices] are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. Two offices or positions are incompatible if there are many potential conflicts of

interest between the two, such as salary negotiations, supervision and control of duties, and obligations to the public to exercise independent judgment. ... Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when the one is subordinate to, or subject to audit or review by, the second; obviously in such circumstances, where both posts are held by the same person, the design that one act as a check on the other would be frustrated. ...

An incompatibility exists whenever the statutory functions and duties of the office conflict or require the officer to choose one obligation over another.”

Incompatibility determinations are made by reviewing the duties and responsibilities of the two offices or the office and position involved, not by examining the character of the person holding the offices or position.³ A leading municipal law treatise explains:⁴

“Public policy demands that an officeholder discharge his or her duties with undivided loyalty. The doctrine of incompatibility is intended to assure performance of that quality. Its applicability does not turn upon the integrity of the person concerned or his or her individual capacity to achieve

impartiality, for inquires of that kind would be too subtle to be rewarding. The doctrine applies inexorably if the offices come within it, no matter how worthy the officer's purpose or extraordinary his or her talent.”

In *Compatibility of Offices 581*, the League opined that the incompatibility doctrine probably does not apply to an individual who holds a public position and provides a service to a governmental entity as an independent contractor.⁵

Because the governing body exercises control over such matters as salaries, duties, and removal or discipline of many municipal officers and employees and often has appointment authority or confirmation authority, the League has long opined that governing body members cannot hold other public offices or positions of employment unless the arrangement is specifically authorized. We have opined that this is true even where a department is under the control of a board or a commission, like the police and fire commission or a utility commission, since the governing body still exercises budgetary and general supervisory control over the departments and appoints board or commission members.⁶

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1. *State v. Jones*, 130 Wis. 572 (1907); *Martin v. Smith*, 239 Wis. 314 (1941); *Otradovec v. City of Green Bay*, 118 Wis. 2d 393 (Ct. App. 1984). In *Otradovec*, the court held the incompatibility doctrine extends to positions of public employment as well as public offices and that an appraiser employed in the City Assessor's office could not also serve as an alderperson because as alderperson he had power to vote on contracts setting the terms of his employment and could also vote on appointment of the city assessor in whose office he worked. The possibility of abstention did not make the two compatible.

2. 74 Op. Att'y Gen. 50 (1985), quoting 63A Am. Jur. 2d Public Officers and Employees § 78 (1984).

3. *State v. Jones*, 130 Wis. 572 (1907); *Martin v. Smith*, 239 Wis. 314 (1941); and *Otradovec v. City of Green Bay*, 118 Wis. 2d 393 (Ct. App. 1984).

4. 3 McQuillin, Mun. Corp., § 12.67 (3d ed.).

5. “An independent contractor is one who is employed to do a piece of work without restriction as to the means to be employed, and who employs his own labor and undertakes to do the work in accordance with his own ideas or under plans furnished by the person for whom the work is done, to produce certain results required by such person. The mere reservation by a municipality of the privilege of inspecting and generally supervising the work, and making changes in the plans, does not destroy or impair the character of independent contractor. Whether one is an employee or an independent contractor generally should be determined from the facts of the particular case, and from a proper construction of the contract as a whole.” *Weber v. Hurley*, 13 Wis. 2d 560, 568, 109 N.W.2d 65 (1961), quoting 18 McQuillin, Mun. Corp. (3d ed.), p. 343, § 53.75.

6. *Compatibility of Offices 583*.

Incompatibility Exceptions

Statutory exceptions to the incompatibility doctrine include a significant new provision that allows a village trustee serving as a village employee to be paid an hourly wage not exceeding a total of \$15,000 per year.⁷ A similar provision allows a town supervisor to perform a limited amount of work as a town employee; note that no similar provision exists for city governing body members. That amount may be paid *in addition* to any salary paid to trustees under Wis. Stat. § 61.32, and *in addition* to amounts paid under Wis. Stat. § 66.0501(4) (explained below). Of note, this provision does not amend or reference the pecuniary interest statute, § 946.13, a criminal statute prohibiting public officials and employees from having private interests in public contracts over which they have authority⁸ and containing an exception for contracts which, in the aggregate, do not involve receipts and disbursements exceeding \$15,000 in one year. However, courts assume that lawmakers know the laws in effect when they create legislation.⁹ Presumably, the legislature would not authorize a trustee to receive these cumulative amounts but make receiving them a felony.

Another important exception is § 66.0501(4), which allows volunteer fire fighters, emergency medical services practitioners, or responders in a city or village to also hold an elective office in that municipality if their annual compensation from one or more of those positions, including fringe benefits, does not exceed a certain amount – \$25,000 if the city or village has a population of 5,000 or less, or \$15,000 if the city or village has a population of more than 5,000.

Another exception, § 66.0501(2), provides that the governing body may be represented on city or village boards

and commissions where no additional compensation, except a per diem, is paid to the governing body representatives. A representative of a governing body who is a member of a city or village board or commission may receive a per diem only if the remaining members of the board or commission may receive a per diem.

Finally, additional statutory exemptions allow a governing body member to also serve as a county supervisor¹⁰ and allow a local public official to serve as an election official and be compensated for that service.¹¹

Enforcement/Consequences

Under the incompatibility doctrine, a public official who takes a second office that is incompatible with an existing office is deemed to have vacated the first office.¹² The law is less clear regarding the holding of an incompatible office and position. In *Otradovec v. City of Green Bay*,¹³ the court of appeals allowed the

alderperson employed as an appraiser in the city assessor's office to choose between the office and employment.

The incompatibility doctrine is not self-enforcing. Quo warranto actions are a means to challenge someone's right to hold office.¹⁴

Miscellaneous Conflict of Interest/ Misconduct Provisions

Conflict of Interest

Because the legal article in the June 2021 issue of this magazine focused on the state ethics code applicable to local officials, those provisions are not covered here. Briefly highlighted below are other conflict of interest and conduct provisions local officials and employees should be aware of.

An 1879 Wisconsin Supreme Court decision holds that members of a legislative body are disqualified to vote on propositions in which they have a

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7. See 2021 Wis. Act 69, effective July 10, 2021.

8. Section 946.13 was explained in greater detail in an article on p. 28 of the July 2021 issue of *The Municipality* (Pecuniary Interest 395).

9. *City of Milwaukee v. Kilgore*, 193 Wis. 2d 168, 183, 532 N.W.2d 690, 695 (1995).

10. Wis. Stat. § 59.10(4) and Compatibility of Office 604.

11. Wis. Stat. § 66.0501(4)(b).

12. See *Martin v. Smith*, 239 Wis. 314, 326, 1 N.W.2d 163, 169 (1941).

13. See footnote 1.

14. See Wis. Stat. § 784.04

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direct pecuniary interest adverse to the municipality. *Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208, 2 N.W. 291 (1879). It is unclear whether the rule announced in *Hall* extends to legislative decisions of a governmental body.¹⁵

Robert's Rules of Order

Many municipalities have adopted Robert's Rules of Order. Robert's says no member should vote on a question in which the member has a direct personal or pecuniary interest not common to other members of the organization. However, Robert's says this does not prevent a member from voting for himself for an office or other position to which members are generally eligible, nor from voting when other members are included with him in a motion.

The Wisconsin court of appeals cited Robert's and the *Hall* decision in a case where the employee of an entity seeking a rezoning abstained from voting as a county board supervisor on the matter. The court concluded that had the employee-supervisor voted, his vote would have been disqualified.¹⁶

Eligibility for Other Public Positions

Under Wis. Stat. § 66.0501(2), except as expressly allowed by law, governing body members are ineligible, during the term for which elected, for any office or position created by the governing body during that term, even if they resign first. They are also ineligible for any office or position if the selection for it is vested in the governing body unless the member resigns before the selection is made. However, governing body members are eligible for any elective office.

Misconduct in Office Statute

Under Wis. Stat. § 946.12, any public officer or employee who does any of the following is guilty of a Class I felony, punishable by a fine not to exceed \$10,000 or imprisonment not to exceed three years and six months or both:¹⁷

- Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of his or her office or employment within the time or in the manner required by law.
- In his or her official capacity does an act which he or she knows exceeds his or her lawful authority or which he or she knows is forbidden by law to do in his or her official capacity.
- In his or her official capacity, by commission or omission, exercises a discretionary power in a manner inconsistent with the duties of the office or employment or the rights of others with intent to obtain a dishonest advantage personally or for another.
- In his or her official capacity intentionally and materially falsifies an entry in an account or record book or return, certificate, report or statement.
- Under color of the office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which the officer or employee knows is greater or less than is fixed by law.

Bribery

Wisconsin Stat. § 946.10 prohibits public officers or employees from directly or indirectly accepting or offering to accept any property or personal advantage they are not authorized to

receive, based on an understanding that the officer or employee will act in a certain manner regarding any matter pending or that might come before the officer or employee in his or her official capacity or do or omit to do any act in violation of the officer's or employee's lawful duty. Bribery is a Class H felony, punishable by a fine not to exceed \$10,000, or imprisonment not to exceed six years or both.¹⁸

Another provision relating to bribery is found in Article XIII, sec. 11 of the Wisconsin Constitution, which prohibits municipal incumbents and candidates from soliciting or accepting any free pass or frank, or any privilege withheld from any person, for the traveling accommodation or transportation of any person or property, or the transmission of any message or communication. Violation is bribery and results in vacation of the office.¹⁹

Discounts at Certain Stadiums

The state ethics code prohibits any person serving in a local elective office from accepting any discount on the price of admission or parking charged to members of the general public, including any discount on the use of a sky box or private luxury box, at a stadium that is tax exempt from general property taxes under sec. 70.11(36).²⁰

Liquor Licensee Relations

No member of a municipal governing body may hold an alcohol beverage wholesalers permit under sec. 125.54 or, with respect to the issuance or denial of retail licenses under sec. 125.51, do any act in violation of sec. 19.59(1).²¹

15. See 63 Op. Att'y Gen. 545 (1974), citing 133 A.L.R. 1257; 62 C.J.S., Municipal Corporations, § 402 (rule may not extend to legislative decisions).

16. *Ballenger v. Door County*, 131 Wis. 2d 422, 388 N.W.2d 624 (Ct. App. 1986).

17. Wis. Stat. § 939.50(3)(i).

18. Wis. Stat. § 939.50(3)(h).

19. Wis. Const. Art. XIII, § 11. See also 77 Op. Att'y Gen. 237, 244 (1988).

20. Wis. Stat. § 19.451.

21. Wis. Stat. § 125.51(1)(b). Section 19.59(1) is part of the state ethics code.

Rules of Professional Conduct

Some public officials and employees are also subject to special conflict of interest rules imposed pursuant to professional rules of conduct related to the profession or position (e.g., municipal attorneys and municipal judges).²²

Assessors and Board of Review Members

Wisconsin Stat. §§ 70.501 and 70.502 prohibit misconduct by assessors and board of review members.

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22. See Supreme Court Rules (SCR) Chapters 20 and 60 and also 60.01(8).



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