

W I S C O N S I N

COUNTY OFFICIALS HANDBOOK

7th Edition

A Publication of Wisconsin Counties Association, 2020

With the support of the UW-Extension's Local Government Center

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Conflicts of Interest & Ethics

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CONFLICT OF INTEREST

State law prohibits public officials and public employees from using their official position for personal gain. Specifically, Wis. Stat. § 946.13 prohibits a public officer from negotiating, bidding for, or entering into a contract in which he or she has a private monetary interest if, at the same time, he or she has a role to play in an official capacity in the making of that contract or performs in regard to that contract some official function requiring the exercise of discretion. Any public officer or public employee who violates Wis. Stat. § 946.13 is guilty of a Class I felony.

Wis. Stat. § 946.13 is directed not at corruption but at conduct presenting an opportunity for corruption. Because a public officer's judgment may be impaired when the officer transacts government business in which he or she has a personal economic interest, the statute attempts to prevent public officers from succumbing to temptation by making it illegal for them to enter into relationships that are fraught with the potential danger of advancing a private interest rather than a public good.¹

There are several exceptions to the prohibition in Wis. Stat. § 946.13. The most common exception is contracts that do not involve receipts and disbursements by the state or its political subdivision aggregating more than \$15,000 in any year.²

Court cases and attorney general opinions addressing various applications of the statute have concluded the following:

- ❑ A county board supervisor who votes to pay vouchers for county purchases from a store owned by the supervisor violates Wis. Stat. § 946.13.³ However, the supervisor can avoid a violation by abstaining from voting on the vouchers related to his business.
- ❑ A village board member may not accept a community development block grant program loan in excess of the statutory sum or perform work for a third person who has obtained a loan under the program in excess of the statutory sum.⁴
- ❑ A county board supervisor violates Wis. Stat. § 946.13 by selling land owned by the supervisor to the county where the value of the sale exceeds the statutory limit.⁵
- ❑ A county board member, employed by a law firm that is retained by a third party to negotiate the purchase of a county facility, may avoid a violation through abstention from acting on the contract in an official capacity and through noninvolvement in negotiating, bidding, or entering the contract with the county on behalf of the third party.⁶
- ❑ A contract does not have to be in existence for a violation to occur. Because negotiation ordinarily precedes the formation of a contract, and it is these pre-contractual bargaining relationships that raise the specter of self-interest if one of the parties is also a public official, the negotiation itself may trigger a violation.⁷

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A contract entered into in violation of Wis. Stat. § 946.13 is void and the state or the political subdivision on whose behalf the contract was made incurs no subsequent liability.

The attorney general's office has provided guidance on how an official can avoid violating Wis. Stat. § 946.13, such as:

- Abstaining from voting on or debating the contract or any matter relating to the contract;
- Refraining from personally or by agent negotiating or entering into the contract in a private capacity;
- Refraining from performing in regard to the contract some official function requiring the exercise of discretion.⁸

However, abstaining from voting does not avoid a violation of Wis. Stat. § 946.13(1)(a) because a violation only requires authority to act, not actual action.⁹ For example, where the county board as a whole must decide whether to purchase land, a county board supervisor would violate Wis. Stat. § 946.13(1)(a) if land owned by the supervisor's partnership was sold to the county for a purchase price in excess of \$15,000.¹⁰ Even though the supervisor abstains from all deliberations and voting on the contract, he/she has authority to act on the contract as a supervisor while also having a private monetary interest in the contract. In addition, performance of an official function requiring the exercise of an official's discretion with regard to the contract either before or after execution violates Wis. Stat. § 946.13.¹¹

ETHICS FOR LOCAL GOVERNMENT OFFICIALS

Wis. Stat. § 19.59 sets forth a code of ethics for local public officials. A "local public official" is defined as a person who holds "local public office." "Local public office" as defined by Wis. Stat. § 19.42(7w) includes:

- An elective office of a local governmental unit such as a county.
- A county administrator or administrative coordinator.
- An appointive office or position of a local governmental unit in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.
- An appointive office or position of a local government that is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority.¹²

The code of ethics for local public officials prohibits the following actions:

1. A local public official cannot 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, his or her immediate family, or for an organization with which he or she is associated.¹³

"Immediate family" is defined as an individual's spouse and 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.¹⁴

An individual is "associated" with an organization if the 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% of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.¹⁵

However, a local public official is not prohibited from using the title or prestige of his or her office to obtain campaign contributions that are permitted and reported as required by Wis. Stats. § Chapter 11. A local public official may also receive and retain from the Wisconsin Economic Development Corporation and the Department of Tourism anything of value that the organizations are authorized to provide by Wis. Stats. Chap. 19.¹⁶

Moreover, public officials may communicate their public role to potential customers or clients in their private capacity. A recent Wisconsin Ethics Commission (WEC) Opinion concluded that an attorney may include a description of their public service in a biography or resume so long as it is in the same style and prominence as the attorney's other positions and experience. However, public officials must still avoid using their position as a significant selling point in advertisements as this would likely qualify as the public official seeking to obtain financial gain by use of their official title (Note: WEC replaced the Government Accountability Board (GAB) on June 30, 2016. GAB also previously replaced the State Ethics Board. Currently, WEC oversees the administration of state government ethics in Wisconsin, and accordingly adopted the ethics opinions previously issued by GAB and WEC).¹⁷

2. A public official cannot solicit or accept from any person, directly or indirectly, anything of value if it could be reasonably 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 official.¹⁸
 - "Anything of value" includes money, property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not cover "hospitality" unrelated to government business.
 - A local public official is permitted to engage in outside employment.¹⁹
 - In interpreting a parallel statute applicable to state officials (Wis. Stat. § 19.45(3)), WEC interprets "expected to influence" in the following manner: "It would be unreasonable to expect a gift of not more than \$25 to influence an individual's judgment. It would be unreasonable to expect a favor or service from an individual or from an organization without any special interest in the actions of a public body to influence an official affiliated with that body."²⁰

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3. No local public official may give or withhold his or her vote or influence or refrain from taking official action with respect to any proposed or pending matter upon condition that any other person make or refrain from making a political contribution, or provide or refrain from providing any service or other thing of value, to a candidate, a political party, or any committee registered under Ch. 11.²¹
4. No local public official may 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.²²
 - In interpreting parallel state statute applicable to state officials (Wis. Stat. § 19.46(1)(a)), WEC issued a memorandum indicating that a state official may participate in an action "...even though the action will affect the official or an organization with which the official is associated..." as long as:
 - The official's action affects a whole class of similarly situated interests;
 - Neither the official's interest nor the interest of a business or organization with which the official is associated is significant when compared to all affected interests in the class; and
 - The effect of the official's actions on the interests of the official, or of the related business or organization, is neither significantly greater nor less than upon other members of the class.²³
 - For example, the WEC advised that a state legislator who was also an attorney could vote on a joint resolution regarding a constitutional amendment that would prohibit the Supreme Court from assessing lawyers to pay for legal services for the indigent. WEC concluded that legislator's interest in the subject of the joint resolution is insignificant when compared to the entire class of 15,000 licensed Wisconsin lawyers— all of whom would be equally affected by the proposal.²⁴
 - WEC has also advised:
 - If a matter before the board is reasonably likely to have more than a trivial, insignificant, or insubstantial financial impact on a supervisor, then the supervisor should abstain from discussion, deliberation, and votes on the matter.
 - If the matter before the board will have no effect or only a trivial, insignificant, or insubstantial financial effect on a supervisor, then the supervisor may participate.
 - If reasonable people cannot foresee the effect of a board of supervisors' action on a supervisor's financial interests, or disagree about whether the effect will be positive, negative, or will be substantial or insignificant, then the supervisor's financial interest is too speculative to deny the supervisor's participation in related discussion, deliberation, and votes. The supervisor may participate unless, in the supervisor's judgment, to do so would undermine public confidence in the decision or in government.²⁵

5. No local public official may 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.²⁶

Wis. Stat. § 19.59 does not prohibit a local public official from taking any action concerning the lawful payment of salaries, employee benefits, or reimbursement of actual and necessary expenses, or prohibit a local public official from taking official action with respect to any proposal to modify a county or municipal ordinance.²⁷

The application of the ethics statute to local officials creates problems in the insurance arena. For example, WEC analyzed the statute in the following manner in dealing with insurance issues:

- 2000 Wis. Eth. Bd. 02 – In the case of a county board supervisor selected as a member of an insurance company's board of directors by the company's organizer, the supervisor should not participate in county board consideration, discussion, or votes to award a contract to the company, or to change county policy to permit the purchase of services from the company.
- 2000 Wis. Eth. Bd. 04 – On the other hand, WEC advises that in the case of a local official who has been elected to serve on the board of directors of a municipal mutual insurance corporation by a government approved process, to represent the local government's interests on the board, Wis. Stat. § 19.59 does not bar the official from participating in the local government's consideration, discussion, or votes to award a contract to, or change government policy to permit the purchase of services from the corporation.

If a local public official violates the ethics code, criminal penalties could apply if the violation is found to be intentional. The penalty for intentionally violating Wis. Stat. § 19.59(1)(a), (b), or (c) is a fine of not less than \$100 or more than \$5,000; imprisonment of not more than one year in the county jail; or both.²⁸ Any person who intentionally violates Wis. Stat. § 19.59(1)(br) 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.

One sure way for an official to insulate him or herself from liability under the ethics statute is to take advantage of the mechanism in the statutes that allows for requests for advisory opinions. In short, an individual may request an advisory opinion, in writing, either personally or on behalf of an organization or governmental body pursuant to Wis. Stat. § 19.59(5)(a). Such request should be directed to the county ethics board, if there is one or, in the absence of a county ethics board, a county corporation counsel or attorney for a local governmental unit.

An official is presumed to have complied with Wis. Stat. § 19.59, or any ordinance enacted under Wis. Stat. § 19.59, when the official complies with an advisory opinion that the official received from a county ethics board, a county corporation counsel, or an attorney for a local governmental unit (assuming the material facts presented by the official are accurate).

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Pursuant to Wis. Stat. § 19.59(6), WEC must review (but is not required to respond to) opinion requests concerning the statutory local code of ethics submitted by certain requestors:

- Any county corporation counsel.
- Any attorney for a local governmental unit.
- Any "statewide association of local governmental units."

COUNTY ETHICS CODES (WIS. STAT. § 19.59(1M)-(4))

Any county, city, village, or town may enact an ordinance establishing a code of ethics for public officials, employees of the county or municipality, and candidates for county or municipal elective offices.

Any such ordinance must specify the positions to which it applies. The ordinance may apply to members of the immediate family of individuals who hold positions or who are candidates for positions to which the ordinance applies. An ethics ordinance may contain any of the following provisions:

- A requirement for local public officials, other employees of the county or municipality, and candidates for local public office to identify any of the economic interests specified in Wis. Stat. § 19.44.
- A provision directing the county or municipal clerk or board of election commissioners to omit the name of any candidate from an election ballot who fails to disclose his or her economic interests as required by the ordinance.
- A provision directing the county or municipal treasurer to withhold the payment of salaries or expenses from any local public official or other employee of the county or municipality who fails to disclose his or her economic interests as required by the ordinance.
- A provision granting administration and civil enforcement of the ordinance to an ethics board. The ethics board is appointed in the manner specified in the ordinance.
- Provisions prescribing ethical standards of conduct and prohibiting conflicts of interest on the part of local public officials and other employees of the county or municipality, or on the part of former local public officials or former employees of the county or municipality.
- A provision prescribing a forfeiture for violation of the ordinance in an amount not to exceed \$1,000 for each offense. A minimum forfeiture not to exceed \$100 for each offense may also be prescribed.

INCOMPATIBILITY OF PUBLIC OFFICES

COMMON LAW DOCTRINE THAT EXISTS INDEPENDENT OF ANY STATUTORY CONFLICT OF INTEREST.

Two offices or positions are incompatible if there are potential conflicts of interest between the duties of the offices or positions.

General Tests for Incompatibility

- If one of the offices or a position is subordinate to the duties of the other in one or more significant ways, such as being subject to the disciplinary, appointment, or removal power of the superior office

or position, or the superior office regulates the compensation of the other, then the two may be said to be incompatible.

- ❑ The mere physical inability of a person to perform the duties of both offices or the position and the office does not, of itself, have any bearing on incompatibility. Rather, incompatibility is determined based on the character of the offices, not the physical condition or ability of the individual holding the position and the office or the two offices.
- ❑ Where the existence of the second office precludes the continued existence of the first office or position, no incompatibility exists. For example, if several school districts were dissolved and consolidated into a newly-created district, a school board member of any of the dissolved districts could ordinarily become a school board member of the newly-formed school district.
- ❑ A situation that involves two different persons in two different positions does not raise questions of incompatibility of offices and positions (i.e., one spouse occupies an office or position and the other spouse assumes an apparently incompatible office or position). Although the incompatibility doctrine is not implicated, there may be serious potential conflicts of interest.²⁹
- ❑ When an individual accepts an office that is incompatible with the one he or she presently holds, the consequences are severe. The individual vacates the first office by operation of law.³⁰

Offices Found to be Incompatible

- ❑ County supervisor and county employee. Wis. Stat. § 59.10(4) provides that “[n]o county officer or employee is eligible for election or appointment to the office of supervisor, but a supervisor may also be a member of a committee, board or commission appointed by the county executive or county administrator or appointed or created by the county board, a town board, a mosquito control district, the common council of his or her city, the board of trustees of his or her village or the board of trustees of a county institution appointed under s. 46.18.”
- ❑ County supervisor and county administrative coordinator.³¹
- ❑ Public office and a position. Conflict can exist between a public office and a position; for example, the office of alderperson was found to be incompatible with the position of residential appraiser in assessor’s office.³²
- ❑ County board member and county/city hospital board member.³³
- ❑ Town clerk and town treasurer.³⁴
- ❑ School board member and school district employee.³⁵
- ❑ Town board member and sanitary district commission member.³⁶
- ❑ Office of coroner and deputy coroner, and the position of city police officer.³⁷

Offices Found to be Compatible

- ❑ Office of county supervisor and position of assistant state public defender.³⁸
- ❑ Register of deeds and office of school board member.³⁹
- ❑ Offices of county assessor and town supervisor.⁴⁰

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- Village president and supervisory deputy sheriff.⁴¹
- School board member and chairperson of town board – probably compatible.⁴²
- School board member and position as unpaid coach in the school district – likely compatible.⁴³

Endnotes

- 1 *State v. Venema*, 2002 WI App 202, ¶ 13, 257 Wis. 2d 491, 650 N.W.2d 898.
- 2 Wis. Stat. § 946.13(2)(a).
- 3 OAG 42-87.
- 4 76 Op. Att’y. Gen. 278 (1987).
- 5 OAG 22-87.
- 6 75 Op. Att’y. Gen. 172 (1986).
- 7 *Venema*, 2002 WI App 202.
- 8 52 Op. Att’y. Gen. 367 (1963).
- 9 *Venema*, 2002 WI App at ¶ 11, n. 3; 76 Op. Att’y Gen. at 93.
- 10 76 Op. Att’y Gen. 90 (1987).
- 11 63 Op. Att’y. Gen. 44 (1974).
- 12 The statute excludes a clerical position, a position limited to the exercise of ministerial action or a position filled by an independent contractor.
- 13 Wis. Stat. § 19.59(1)(a).
- 14 Wis. Stat. § 19.42(7).
- 15 Wis. Stat. § 19.42(2).
- 16 Wis. Stat. § 19.56(3)(f).
- 17 2017 ETH 01.
- 18 Wis. Stat. § 19.59(1)(b).
- 19 *Id.*
- 20 The local ethics code for public officials does not include a provision parallel to Wis. Stat. § 19.56 allowing state elected officials to “retain reasonable compensation, for a published work or for the presentation of a talk or participation in a meeting” related to a topic of legislative, administrative, executive or judicial processes or proposals.
- 21 Wis. Stat. § 19.59(1)(br).
- 22 Wis. Stat. § 19.59(1)(c)1.
- 23 See Wisconsin Ethics Board memorandum Private Interest in Official Action (November 1, 1989).
- 24 2008 GAB 02.
- 25 2007 GAB 09.
- 26 Wis. Stat. § 19.59(1)(c)2.
- 27 Wis. Stat. 19.59(1)(d).
- 28 Wis. Stat. § 19.58(1)(a).
- 29 See *Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 347 N.W.2d 614 (Ct. App. 1984); 58 Op. Att’y. Gen. 247 (1969); 74 Op. Att’y. Gen. 50 (1985); 76 Op. Att’y. Gen. 156 (1987).
- 30 *State v. Jones*, 130 Wis. 572, 110 N.W. 431 (1907); but see also *Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 347 N.W.2d 614 (Ct. App. 1984)(the public officer can choose which position to keep).
- 31 OAG 01-11.
- 32 *Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 347 N.W. 2d 614 (Ct. App. 1984).
- 33 66 Op. Att’y. Gen. 145 (1977).
- 34 68 Op. Att’y. Gen. 393 (1970).
- 35 Unpublished Op. Att’y. Gen. May 31, 1985; See also *Tarpo v. Bowman Public School District No. 4*, 232 N.W.2d 67 (N.D. 1975); *Vistocky v. City Council of City of Garfield*, 273 A. 2d 597 (1971).
- 36 69 Op. Att’y. Gen. 108 (1980).
- 37 78 Op. Att’y. Gen. 178 (1989).
- 38 75 Op. Att’y. Gen. 178 (1986).
- 39 Unpublished Op. Att’y. Gen. (1977).
- 40 63 Op. Att’y. Gen. 599 (1974).
- 41 76 Op. Att’y. Gen. 156 (1974).
- 42 74 Op. Att’y. Gen. 50 (1985).
- 43 2006 Wis. Eth. Bd. 01.