

# LEGAL ISSUES



## *Incompatibility of Offices & Conflicts of Interest*

*—Andrew T. Phillips & Bennett J. Conard, von Briesen & Roper, s.c.*

While county supervisors and other county elected officials and employees are likely familiar with the Wisconsin statutory ethics code and individual county ethics codes, the concept of incompatibility of public offices may not be as well known. Some of the issues related to incompatibility of offices are rooted in statute (particularly pertaining to county supervisors). However, much of the incompatibility concept is based in common law, and is not as readily ascertainable. In general, an incompatibility of public offices arises if a conflict of interest, or a potential conflict of interest, exists between the duties of two or more offices when held by the same person. In circumstances where incompatibility is found, the consequences are severe—the person will be found to have vacated the first position as a matter of law.

This article will briefly address the basics of what constitutes incompatibility of public offices, and review several examples found in caselaw and Wisconsin Attorney General Opinions.

### **Background**

For public policy reasons, a person may not hold two offices or positions if such offices or positions are considered to be incompatible with one another. In general, the doctrine of incompatibility is rooted in common law. The doctrine applies when one office is superior to another to the extent that their duties conflict and such incompatibility is to the public detriment, and also applies when the nature and duties of two offices render it improper from considerations of public policy for one person to discharge the duties of both. 81 Wis. Op. Att’y Gen. 90 (1993).

It is important to note that the doctrine of incompatibility applies to both public offices and positions of public employment. *Id.* However, in order for offices or positions to be incompatible, they must both be governmental offices or positions. While other ethics issues may be at issue between a governmental office/position and a private sector position held by the same person, they are not incompatible. *Id.*

Moreover, offices and positions may be incompatible when there is only a potential conflict of interest

between the duties of the offices or positions. The important factor is the character of the office and the potential for a conflict of interest.

When evaluating two positions for incompatibility, a good starting point is to determine whether one position is subordinate to the other. For example, positions are likely to be incompatible if one position is subject to the disciplinary, appointment, or removal power of the superior office or position, or the superior office regulates the compensation or other terms of employment of the other.

An important distinction in the incompatibility analysis is that it only applies to positions held by the same person. For example, two family members may hold positions that may otherwise appear incompatible (i.e., if such positions were held by one person). There very well may be other serious potential conflicts in such a situation, but there would not be an issue of incompatibility.

In the event that a person does accept a position or office that is incompatible with the one that person presently holds, the effect is that the individual immediately vacates the first office. This occurs automatically as a matter of law.

In addition to the common law doctrine discussed above, there are two strict statutory standards that apply to county supervisors. The first is Wis. Stat. § 59.10(4), which provides:

*No 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.*

This statute provides that any county officer or employee may be elected to the office of a county supervisor without first resigning their current office or position.

Additionally, Wis. Stat. § 66.0501(2) provides, in part that:

*Except as expressly authorized by statute, no member of a...county board...during the term for which the member is elected, is eligible for any office or position which during that term has been created by, or the selection to which is vested in, the board...This subsection does not apply to a member of any board...described in this subsection who resigns from the board...before being appointed to an office or position which was not created during the member's term in office.*

In other words, a county supervisor is required to resign from the board before accepting any position over which the board has appointing authority.

These two statutes make it clear that the position of county supervisor is incompatible with most other county offices or positions of employment (other than the few noted statutory exceptions). In the case of county supervisors, the legislature chose to make it clear that most positions are incompatible for public policy reasons.

### **Caselaw & Attorney General**

#### **Opinion Examples**

One of the foundational cases for the Wisconsin incompatibility doctrine is *State v. Jones*. 130 Wis. 572, 110 N.W. 431 (1907). *Jones* concluded that the offices of county judge and justice of the peace were incompatible with one another. *Id.* at 432. *Jones* found that even though it was not to a great extent, there was some overlap between the offices, and the effect was to reduce the number of officials available to perform court functions and duties. *Id.* For this

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reason, *Jones* held that it was not essential that “the clash of duty should exist in all or in the greater part of the official functions. If one office was superior to the other in some of its principal or important duties so that the exercise of such duties might conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible.” *Id.*

In *Otradovec v. City of Green Bay*, the Court extended the doctrine of incompatibility to positions of public employment in addition to public offices (as also noted above). 118 Wis. 2d 393, 347 N.W.2d 614 (Ct. App. 1984). Indeed, *Otradovec* determined that the “public detriment in having one person hold incompatible public offices can also exist when one person holds a public office and a position of public employment with duties that might conflict.” *Id.* at 432.

Serious conflicts and incompatible duties arose in this case because *Otradovec* was a member of the city’s common council and also was a residential appraiser in the city assessor’s office. *Id.* As such, *Otradovec* “had the power to vote on contracts setting the terms of his employment.” *Id.* He also could potentially vote on approval of the appointment of the city assessor who would in turn be his supervisor. *Id.* The *Otradovec* Court held that “[i]t does not matter that he may be permitted to abstain from voting in these areas or whether conflicts exist in all or a greater part of the functions of his office and position.” *Id.* In the eyes of the Court, simply the existence of the possibility of such substantial conflicts was detrimental to the public interest. *Id.*

Two opinions of the Wisconsin Attorney General also provide examples involving county supervisors and the strict statutory incompatibility standards applicable to them. The first is OAG-01-11, which analyzes Wis. Stat. §§ 66.0501(2) and 59.10(4), also discussed above (prohibiting county supervisors from

being appointed to positions by the board without first resigning the office of supervisor). In this Opinion, the Attorney General concluded that the office of county supervisor was incompatible with that of administrative coordinator. The Attorney General provided that Section 66.0501(2) is clear that a supervisor must resign prior to an appointment to a position such as administrative coordinator. OAG-01-11 at ¶ 5. Moreover, the supervisor “takes a risk in resigning, since he cannot be assured of being selected” to another position. *Id.* In order for a county supervisor to hold some other office or position the statutory authority to do so must be express.

Further, the Attorney General referenced Wis. Stat. § 59.10(4) in support of the fact that the office of county supervisor is explicitly incompatible with any other county office or employment. Any deviations from either Wis. Stat. §§ 66.0501(2) or 59.10(4) would require an exception elsewhere in the statutes. The Attorney General concluded that no such exception could be found, and that the offices of county supervisor and administrative coordinator are incompatible.<sup>1</sup>

In another opinion, the Attorney General concluded that the office of county supervisor was incompatible with the office of active duty deputy sheriff, even if the deputy sheriff is not paid by the county. OAG-03-11. In this scenario, a full-time tribal law enforcement officer desired to become a county supervisor. The tribal officer had also been deputized by the county sheriff pursuant to a cooperative agreement. While the tribal officer was subject to the county sheriff’s supervision and authority during joint law enforcement efforts, the tribal officer was never on the county’s payroll or received compensation from the county.

The Attorney General concluded that Wis. Stat. § 59.10(4) was intended to codify the common law rule of incompatibility, and applies to both public offices

and positions of public employment. OAG-03-13 at ¶ 5. In this case, the Attorney General determined that the tribal officer/deputy sheriff constituted a county officer because his position “exercises some portion of the sovereign power of the state.” *Id.* Therefore, the position the tribal officer also held as deputy sheriff would be incompatible with county supervisor.

Moreover, the Attorney General opined that the same result would apply under the common law, and that a statute does not overturn the common law doctrine unless it is clearly expressed to do so. *Id.* at ¶ 8. In this case, “the positions of deputy sheriff and supervisor are incompatible, regardless of compensation, because one office is subordinate to the other or subject to its supervision or control.” *Id.* at ¶ 10.

#### Endnotes

<sup>1</sup> In reaching such conclusion, the Attorney General noted that Wis. Stat. § 59.19 (requiring an elected or appointed official to serve as administrative coordinator) “**limits** the office of administrative coordinator to persons who are elected or appointive county officials rather than as **authorizing** any and all elective or appointive county officials to serve as administrative coordinator.” OAG-01-11 at ¶8.

### **Best Practices for Counties**

Counties should heavily scrutinize offices or positions if they are considering appointing or employing one person in multiple offices or positions. In general, no positions that are superior/subordinate to one another should be held by the same person. Moreover, county supervisors should generally not hold other offices or positions within the county (except for the limited exceptions involving committees and boards).

If you have any questions about the doctrine of incompatibility or any other governmental law needs, please contact the Wisconsin Counties Association or any member of the von Briesen & Roper Government Law Group ([www.vonbriesen.com](http://www.vonbriesen.com)).

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