



Wisconsin Ethics Commission

Campaign Finance | Lobbying | Ethics
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Sent by email only to prellf@ci.superior.wi.us

March 15, 2021

Frog Prell
City Attorney
City of Superior

RE: Advisory Opinion Request – Conflict of Interest of Councilor

Dear Atty. Prell:

Thank you for contacting the Wisconsin Ethics Commission (“Commission”) to request an advisory opinion regarding the application of the Local Code of Ethics to the situation where a member of the common council and the mayor are married.

You advise that your request is submitted at the direction of the City of Superior Common Council, who received a copy of a letter from Councilor Craig Sutherland regarding the potential for a conflict of interest for Councilor Jenny Van Sickle due to her recent marriage to Mayor Jim Paine on October 17, 2020. You state that the Common Council voted at its meeting on February 2, 2021, to refer Councilor Sutherland’s concerns to your office with directions to solicit an opinion from the Commission in accordance with [WIS. STAT. § 19.59\(6\)](#). You have attached to your request a copy of Councilor Sutherland’s letter as well as your own memo summarizing the facts, relevant law, and your tentative conclusions. In this opinion, we will briefly offer our own guidance, which we believe is largely consistent with your draft memo.

To briefly summarize the facts from your memo, you state that in the City of Superior, the mayor’s salary is set by ordinance. You state that same ordinance provides that the mayor’s salary is to be adjusted by the same percentage, if any, as approved by the council for full-time, non-union employees.¹ You indicate that an ordinance also requires the city’s human resource committee to recommend on an annual basis, a cost-of-living adjustment for non-union employees.² You advise that the human resource committee’s recommendation is then presented to the council for approval, which may confirm, reject, or amend the recommendation. You state that the council’s decision regarding salary increases to the non-union employee group is typically made in time for

¹ CITY OF SUPERIOR, MUNICIPAL CODE § 2-82(a)(a) – Office of the mayor; duties; salary.

(1) For the period commencing April 17, 2007, a total of \$68,923.00. Commencing the third Tuesday of each April thereafter, the salary of the mayor shall increase by the same percentage as approved by the council for full-time non-union positions.

² CITY OF SUPERIOR, MUNICIPAL CODE § 42-20(6) – Duties of the human resource committee.

(6) To review the wages, hours and conditions of employment of all regular full-time nonunion employees and appointive officers (other than unpaid members of the board of police and fire commissioners) and to submit recommendations to the common council.

finance personnel to factor the cost of salaries as part of the city's annual budget. You state that Councilor Van Sickle is one of three councilors appointed to the human resource committee.

You also advise that the City provides its employees with a benefits package that includes the opportunity for employees to participate in a city-subsidized health insurance plan that covers the employee, his or her spouse, and dependent children (if applicable). You state that election to the common council does not qualify an individual for the city's health plan, but the position of mayor is a full-time position, and the individual holding that office would qualify to participate in the city's health plan. You advise that Mayor Paine is currently enrolled in the city's plan for single coverage. You indicate that the city's health insurance benefits receive attention primarily from the city's health insurance committee and the city's finance committee. Those committees work with the city's finance director and an independent broker to solicit bids, select a carrier, prepare a health and dental insurance plan budget, and make recommendations to the common council for final approval. You state that currently Councilor Van Sickle does not serve on the health insurance or finance committee.

Analysis

As a member of the Common Council, Councilor Van Sickle is a local public official under [WIS. STAT. § 19.42\(7w\)\(a\)](#). As such, she is subject to the restrictions set forth in the Local Code of Ethics, [WIS. STAT. § 19.59](#). Before analyzing the pertinent statutes, it is important to understand some key terms and Wisconsin's policy concerning conflicts of interest.

The relevant provisions of the Local Code of Ethics are as follows:

[WIS. STAT. § 19.42\(1\)](#) provides:

"Anything of value" means any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the state, fees and expenses which are permitted and reported under s. [19.56](#), political contributions which are reported under ch. [11](#), or hospitality extended for a purpose unrelated to state business by a person other than an organization.

[WIS. STAT. § 19.42\(2\)](#) provides:

"Associated," when used with reference to an organization, includes any organization in which an 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 percent of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.

[WIS. STAT. § 19.42\(7\)](#) provides:

"Immediate family" means:

- (a) An individual's spouse; and

(b) 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.

[WIS. STAT. § 19.45\(1\)](#) provides in relevant part:

“...standards of ethical conduct for state public officials need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts which are substantial and material...”

This language recognizes that there may be minor and inconsequential conflicts of interest where the Councilor may still act, as long as those conflicts are not substantial and material. Public policy generally favors a public official’s exercise of his or her official duties. [1997 Wis Eth Bd 1](#), ¶ 5; [1998 Wis Eth Bd 01](#), ¶ 10; [2002 Wis Eth Bd 05](#), ¶ 6; [2007 Wis Eth Bd 9](#), ¶ 7; [2009 GAB 04](#). The Commission and its predecessors have a long history of finding that a conflict does not prohibit official action where the impact of the official action on the official’s interests is remote and speculative. See [2009 GAB 4](#); [2005 Wis Eth Bd 2](#), ¶ 7; [1997 Wis Eth Bd 6](#), ¶ 13.

Your request clearly contemplates that Councilor Van Sickle will be taking official action or using her position or office, so for the purposes of our analysis we will assume there has been an official action or use of office.³ Additionally, as the prohibitions of [WIS. STAT. § 19.59\(1\)\(a\)](#) and [\(c\)2](#) are largely similar, we will consolidate our analysis of these provisions below.

1. Do [WIS. STAT. § 19.59\(1\)\(a\)](#) or [\(c\)2](#) prohibit the Councilor from using her position or office on matters related to her husband’s salary and benefits?

[WIS. STAT. § 19.59\(1\)\(a\)](#) provides in relevant part:

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 provision prohibits a Councilor from using her public position or office to obtain financial gain or anything of substantial value for the private benefit of herself, her immediate family, or for an organization with which she is associated. Participating in an official capacity in discussions, contract negotiations, and votes on issues before the Common Council is a use of office. [1997 Wis Eth Bd 6](#), ¶ 7; [1996 Wis Eth Bd 13](#), ¶ 4. “Financial gain” is not a defined term within subchapter III of Chapter 19. “Anything of value” is a broadly defined term, but it specifically excludes compensation and expenses paid by the state. [WIS. STAT. § 19.42\(1\)](#). Although this definition only refers to compensation paid by the state, as other statutes authorize the compensation of local public officials, the Ethics Code must also be read to permit local public officials to receive compensation from local governments. See [2008 GAB 07](#), fn. 7. “Substantial value” is anything

³ As noted above, certain official actions may be permissible under [WIS. STAT. § 19.59\(1\)\(c\)](#) due to the exception provided in [WIS. STAT. § 19.59\(1\)\(d\)](#). Councilor Van Sickle may wish to request additional advice if she believes an exception to the general rule may be applicable in a particular situation.

of more than token or inconsequential value. [2008 GAB 02](#), ¶ 4. Obtaining something of value may include an avoidance of financial loss. *Id.* at ¶ 9.

[Wis. STAT. § 19.59\(1\)\(c\)2](#) provides:

Except as otherwise provided in par. (d), no local public official may:

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.

Subsection (1)(c)2 prohibits a Councilor from using her public position or office in such a way as to produce or assist in the production of a substantial benefit for herself, an immediate family member, or an organization with which she is associated. Participating in an official capacity in discussions, contract negotiations, and votes on issues before the Common Council is taking official action and a use of office. [1997 Wis Eth Bd 6](#), ¶ 7; [1996 Wis Eth Bd 13](#), ¶ 4. Whether a given official action substantially affects a matter in which the official or a member of her immediate family has a substantial financial interest is always a question of fact. See [1997 Wis Eth Bd 06](#), ¶ 8. A “substantial benefit” is not a defined term, but the term “substantial value” has been held to be anything of more than token or inconsequential value. [2008 GAB 02](#), ¶ 4. Similarly, a “substantial benefit” is anything of more than token or inconsequential benefit.

It is clear that the Councilor would be using her position by participating in, or voting on, matters related to her husband’s compensation or benefits. As you describe it, the compensation or benefit changes would affect her spouse (a member of her “immediate family”). The question remaining is whether that action would result in financial gain, anything of substantial value, or a personal benefit. By its plain language, financial gain could include compensation such as salary and benefits. Similarly, an individual’s salary and benefits are things of substantial value and personal benefit. [1997 Wis Eth Bd 06](#), ¶ 9. However, as opined in [2008 GAB 07](#), compensation paid by the state or a unit of local government is not something of value. As described above, a “substantial benefit” is not a defined term, but there is precedent for the determination that the terms of a health insurance contract can be something of substantial value and a substantial benefit to the insured. [1996 Wis Eth Bd 10](#), ¶ 7; [1997 Wis Eth Bd 06](#), ¶ 15.

It appears likely that any increase in the salary paid to Councilor Van Sickle’s husband or the benefits he is eligible to receive would be considered a financial gain or a substantial benefit. This situation appears largely similar to that described in [1997 Wis Eth Bd 6](#). In that opinion, the Ethics Board held that a school board member whose spouse was a teacher with the district should not participate in negotiations, discussions, or votes on the teachers’ contract; and should not participate in negotiations, discussions or votes on the terms of another union’s contract if it will affect the terms of the teachers’ contract. [1997 Wis Eth Bd 6](#), ¶ 16. This precedent appears directly applicable to this situation as a vote on the salaries provided to non-union employees and appointed officials would have a direct impact on the salary to be paid to Councilor Van Sickle’s spouse. Only in situations where the impact of the official action could reasonably be said to be remote or speculative would the public policy favoring exercise of official duties outweigh this conflict. For

example, Councilor Van Sickle may be able to vote on such a salary increase if a mayoral election would occur before the salary increase would go into effect. Such an intervening event would make the impact on her spouse merely speculative as another individual could be elected to receive that salary.

[WIS. STAT. § 19.59\(1\)\(d\)](#) provides:

Paragraph (c) does not prohibit a local public official from taking any action concerning the lawful payment of salaries or 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.

This exception permits the Councilor to engage in official action concerning the lawful payment of salary and benefits. It also permits the Councilor to engage in official action to modify an ordinance. Generally, it does not provide an exception for the establishment of salaries or benefits. However, it is not clear how the Commission would opine where an ordinance establishing salaries and benefits is amended. Also, it is important to note that, by its terms, this exception only applies to paragraph [\(c\)](#), not to [\(a\)](#). [1997 Wis Eth Bd 06](#), fn. 5.

In light of the foregoing, it is clear that [WIS. STAT. § 19.59\(1\)\(a\)](#) prohibits Councilor Van Sickle from voting or otherwise using her position or office on matters that affect her spouse's salary and benefits, unless the impact of the official action is remote or speculative. Additionally, [WIS. STAT. § 19.59\(1\)\(c\)2](#) may also prohibit the Councilor from acting on those matters.

2. Does [WIS. STAT. § 19.59\(1\)\(c\)1](#) prohibit the Councilor from taking official action on matters related to her husband's salary and benefits?

[WIS. STAT. § 19.59\(1\)\(c\)1](#) provides:

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.

Subsection (1)(c)1 prohibits a Councilor from taking any official action substantially affecting a matter in which she, a member of her immediate family, or an organization with which she is associated has a substantial financial interest.

It appears clear that an individual has a substantial financial interest in the amount of their salary and the terms of their benefits. Therefore, the only question would be whether the official action would substantially affect that substantial financial interest. Whether a given official action substantially affects a matter in which the official or a member of her immediate family has a substantial financial interest is always a question of fact. See [1997 Wis Eth Bd 06](#), ¶ 8. Councilor Van Sickle is encouraged to request further advice as those facts present themselves. However, to

address one of the scenarios posed in your memo, it appears clear that Councilor Van Sickle may be eligible to participate in official action related to the annual budget under certain circumstances.

As described above, a conflict of interest does not prohibit official action where the official action's effect on the financial interest is remote and speculative. See [2005 Wis Eth Bd 2](#), ¶ 7. So, for example, preliminary discussions and deliberations that set the general parameters of the budget, but do not specify any impact on salary or benefits, may be permissible as the impact on Councilor Van Sickle's spouse's salary and benefits would be merely speculative.

Additionally, in 1996, the Ethics Board held that a city council member who was a retired city employee and received health insurance via the city could vote on the annual budget as a whole, as long as the member did not participate in discussions or votes on any amendment to the budget affecting the member's health insurance and any personal benefit that may result from a vote on the entire budget was indirect and attenuated. [1996 Wis Eth Bd 10](#), ¶ 9. In 1997, the Ethics Board also held that a school board member whose spouse was a teacher with the district could vote on the district's budget if the school board had already entered into a contract that establishes teachers' salaries and benefits for the period covered by the budget. [1997 Wis Eth Bd 06](#), ¶¶ 10-11, and 16. If similar facts are present when considering the city's annual budget, Councilor Van Sickle may be eligible to participate in official action.

In light of the above, Councilor Van Sickle should avoid participation in any official discussions, deliberations, or votes regarding the salary paid to her spouse or the benefits he is eligible to receive to avoid a potential violation of [Wis. STAT. § 19.59\(1\)\(c\)1](#); however, Councilor Van Sickle may be eligible to participate in preliminary discussions and deliberations that set the general parameters of the budget or similar official actions where the impact of the official action on the financial interest implicated is remote and speculative.

Common Law Duty of Undivided Loyalty

Finally, the Commission's predecessor agencies have found that a local public official owes an undivided duty of loyalty to the public whom he or she serves. Public policy favors a public official's exercise of his or her official duties and an official should avoid placing himself or herself in a position in which the official must refrain from exercising official responsibilities because a conflict of interest might arise. [2003 Wis Eth Bd 08](#); [1994 Wis Eth Bd 03](#). While the Commission does not have jurisdiction to opine on or enforce this common law duty, it and its predecessors have both advised caution when it appears that that duty may be implicated. As such, the Commission advises that Councilor Van Sickle exercise caution and be mindful of the common law duty of undivided loyalty to the City when acting in her official capacity. In exercising such caution, she may wish to refrain from taking official action if she feels that she may have conflicting loyalties.

Conclusion

It is the opinion of the staff of the Commission that Wis. STAT. § [19.59\(1\)\(a\)](#), and [\(c\)1](#) prohibit Councilor Van Sickle from voting or otherwise using her position or office on matters that affect her spouse's salary and benefits, unless the impact of the official action is remote or speculative.

It is also likely that [WIS. STAT. § 19.59\(1\)\(c\)2](#) would also prohibit such actions. Councilor Van Sickle may be eligible to participate in preliminary discussions and deliberations that set the general parameters of the budget or similar official actions where the impact of the official action on the financial interest implicated is remote and speculative.

This is an informal opinion issued by staff on behalf of the Ethics Commission as authorized by the Commission pursuant to [WIS. STAT. § 19.46\(2\)\(b\)](#) on March 7, 2017. No person acting in good faith upon this opinion is subject to criminal or civil prosecution for so acting if the material facts are as stated in the opinion request and the individual is following the advice provided above. The issuance of this opinion will be reported to the Commission at its next regular meeting. If the Commission disagrees with this opinion, the Commission may withdraw it or issue a revised opinion. No person acting after the date of the withdrawal of issuance of the revised opinion is exempted from prosecution if the opinion upon which the person's action is based has been withdrawn or revised in relevant degree.

If you have any further questions, please feel free to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read "D. A. Carlton, Jr.", with a stylized flourish at the end.

Daniel A. Carlton, Jr.
Administrator
Wisconsin Ethics Commission