

Ethics Law and Conflict of Interest: Know the Rules!

WASBO Spring Conference

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▼ *There is no odor so bad as
that which arises from
goodness tainted.*

- Henry David Thoreau

*It takes 20 years to build a
▼ reputation and five minutes
to ruin it.*

- Warren Buffett

ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Which entities are covered? S. 19.42(7u)
 - Local Government Units includes all cities, villages, towns, counties and special purpose districts (school districts).
 - Instrumentalities or corporations of political subdivisions or special purpose districts.
 - Combinations of subunits of political subdivisions or special purpose districts.
 - Instrumentalities of the state and any of the foregoing.

ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Persons who are covered – s. 19.42(7w)
 - Local public officials:
 - Elective officers of local government;
 - Appointive office in which employee is appointed for a specific term;
 - Appointive office filled by the head of the local government;
 - The position of member of the board of directors of a local exposition district not serving for a specified term.

ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- **Persons who are covered – s. 19.42(7w)**
 - **Local public officials:**
 - **An employee of a school district who holds a school administrator license or permit issued by the department of public instruction under rules promulgated by the department under s. 118.19 and whose employment requires that the individual hold that license or permit.**
 - **An employee of a school district who acts as the head of facilities and maintenance and whose employment duties include making purchasing decisions or recommendations for the school district.**

ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Prohibited conduct is codified in s. 19.59 – first category
 - Ban on use of public position to obtain financial gain or anything of substantial value for the benefit of:
 - The individual;
 - The individual's immediate family (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.") Wis. Stat. s. 19.42(7)(b).
 - An organization with which the individual is associated.

ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Prohibited conduct – second category:
 - Ban on offering or giving, directly or indirectly, anything of value to a local public official “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.”
 - Same prohibition on acceptance under such circumstances.

ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Prohibited conduct – third category:
 - Ban on “directly or by means of an agent, give, or offer or promise to give, or withhold, or offer or promise to withhold, his or her vote or influence, or promise to take or refrain from taking official action with respect to any proposed or pending matter in consideration of, or 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 or for the benefit of a candidate, a political party, any committee registered under ch. 11, or any person making a communication that contains a reference to a clearly identified local public official holding an elective office or to a candidate for local public office.”

ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Prohibited conduct – fourth category:
 - Ban on taking “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.”

ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Interpretive exception:
 - **HOWEVER**, the official may participate in the 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 nor the business’ or organization’s interest 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.

ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Prohibited conduct – fifth category:
 - Ban on “use of 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.”

ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- State statutes do not prohibit a local official from taking action on the lawful payment of salaries, benefits or reimbursements.
- This provision applies only to payment of salaries, not the establishment of the system of pay.
 - 1997 Wis. Eth. Bd. 6

ENFORCEMENT OF THE ETHICS CODE FOR LOCAL GOVERNMENT OFFICIALS

- Forfeiture of not more than \$1,000 for each violation.
- Violation of s. 19.59(1)(br) (related to political contributions in exchange for official action) results in additional forfeitures and possibility of prosecution as a Class I felony, punishable by a fine not to exceed \$10,000 or imprisonment not to exceed 3 years and 6 months or both.

ENFORCEMENT OF THE ETHICS CODE FOR LOCAL GOVERNMENT OFFICIALS

- **GET OUT OF JAIL FREE – Avoiding Liability through Advisory Opinions:**
 - Pursuant to s. 19.59(5)(a), an individual may request an advisory opinion.
 - Doing so insulates the official from liability under the Ethics Code IF the opinion is followed
 - Must be directed to either the local county or municipal ethics board if there is one, or the attorney for the school district.



Policies

- Most school districts have codified ethics principles in Board policy or policies within Employee Handbooks

Policies –
NEOLA
Example

The proper performance of school business is dependent upon the maintenance of unusually high standards of honesty, integrity, impartiality, and professional conduct by School Board members and District's employees, officers, and agents is essential to the School Board's commitment to earn and keep public confidence in the School District.

Policies – NEOLA Example

An effective educational program requires the services of employees of integrity, high ideals, and human understanding. To maintain and promote these essentials, the School Board expects all professional staff members to maintain high standards in their working relationships, and in the performance of their professional duties, to:

A. recognize basic dignities of all individuals with whom they interact in the performance of duties;

B. represent accurately their qualifications;

C. exercise due care to protect the mental and physical safety of students, colleagues, and subordinates;

D. seek and apply the knowledge and skills appropriate to assigned responsibilities;

E. keep in confidence legally-confidential information as they may secure;

F. ensure that their actions or those of another on their behalf are not made with specific intent of advancing private economic interests;

G. avoid accepting anything of value offered by another for the purpose of influencing judgment;

H. refrain from using position or public property, or permitting another person to use an employee's position or public property for partisan political or religious purposes. This will in no way limit constitutionally or legally protected rights as a citizen.

Policies – WASB Example

An effective educational program requires the services of men and women of integrity, high ideals, and human understanding. To maintain and promote these essentials, the Board of Education expects all professional staff members to maintain high standards in their working relationships, and in the performance of their professional duties, to:

A. recognize basic dignities of all individuals with whom they interact in the performance of duties;

B. represent accurately their qualifications;

C. exercise due care to protect the mental and physical safety of students, colleagues, and subordinates;

D. seek and apply the knowledge and skills appropriate to assigned responsibilities;

E. keep in confidence legally-confidential information as they may secure;

F. ensure that their actions or those of another on their behalf are not made with specific intent of advancing private economic interests;

G. avoid accepting anything of value offered by another for the purpose of influencing judgment;

H. adhere to the policies of the Board;

I. refrain from using position or public property, or permitting another person to use an employee's position or public property for partisan political or religious purposes. This will in no way limit constitutionally or legally protected rights as a citizen.

Questions to Ask Yourself (The Smell Test)

1. Am I, my immediate family, or an organization with which I am associated receiving anything of value for private benefit because of the position I hold?
2. Am I using the influence of my position to solicit something for the private benefit of myself, my family or an organization with which I am associated?
3. Am I, my immediate family or an organization with which I am associated, receiving, from a non-relative, anything of value for which we have not paid?
4. Will an official action on my part possibly result in private benefit to me, my immediate family or an organization with which I am associated?
5. Will the use of my staff or the public facilities benefit me in my private capacity?
6. Am I using public time, resources or facilities for my personal gain?

Unique Ethics Issues: Privileged Information

- Disclosure of confidential/privileged information received during a closed session is not a violation of the Wisconsin Open Meetings law.
- But is *may* be a violation of a local ethics code.
- Must consider: what are the consequences of disclosing privileged information?

Unique Ethics Issues: Privileged Information

- Very likely to undermine the trust placed in the Board or a Committee by employees and the public - disclosure of sensitive information that pertains to a specific individual or information that, if disclosed, would irreparably harm the interests of tax payers is not looked upon favorably. Employees and the public trust that the Board will act **professionally and ethically** in protecting their collective interests. Disclosing closed session discussions undermines this goal.
- Improperly disclosed closed session information may also create flash point issues that become impossible to combat in the public arena:
 - If one member discloses closed session discussions, which, in turn, leads to a flurry of rumors in the community, the Board is unable to publicly confirm or deny such rumors without likely further disclosing additional closed session discussions.
 - This could lead to improper conclusions about specific individuals, such as employees, which could result in **lawsuits for violation of privacy, reputational damage, or defamation.**

Conflict of Interest and the Dreaded “f” word (felony)

PUBLIC/
PRIVATE
PERSONAL
CONFLICT

Section 946.13(1)(a):

Public officials or employees may not, in their private capacity, negotiate, bid for, or enter into a contract in which she has a private pecuniary interest, direct or indirect, if at the same time she is authorized or required by law to participate in her capacity as such officer or employee in making of that contract or to perform in regard to that contract, some official function requiring the exercise of discretion on her part.

ELEMENTS OF THE CRIME

- Elements of s. 946.13(1)(a):
 - The defendant was a public officer or employee;
 - The defendant negotiated, bid for, or entered into a contract in a private capacity;
 - The defendant had a private pecuniary interest in the contract; and
 - The defendant was authorized or required by law to participate in the making of the contract in his capacity as a public officer or employee.

PRIVATE/PUBLIC PERSONAL CONFLICT

- Section 946.13(1)(b) prohibits:
 - Public officers or employees from participating in the making of a contract in her capacity as an officer or employee, in which she has a private pecuniary interest, direct or indirect, or performs in regard to the contract, some function requiring the exercise of discretion.

ELEMENTS OF THE CRIME

- Elements of Wis. Stat. § 946.13(1)(b):
 - Defendant was a public officer or employee;
 - Defendant participated in
 - the making of a contract in a capacity as a public officer or employee; OR
 - the defendant, in her capacity as a public officer or employee, performed a function requiring the exercise of discretion in regard to a contract; and
 - Defendant had a private pecuniary interest in the contract.

CONFLICTS OF INTEREST

- Exceptions to the statute:
 - Contracts in which any single public officer or employee does not receive more than \$15,000 a year from the state or political subdivision. Wis. Stat. s. 946.13(2)(a).
 - Contracts involving the deposit of public funds into public depositories. Wis. Stat. s. 946.13(2)(b)
 - Contracts involving loans under s. 67.12 (temporary borrowing or temporary promissory notes). Wis. Stat. s. 946.13(2)(c).

CONFLICTS OF INTEREST

- Consequences
 - Class I Felony (fine not to exceed \$10,000 or imprisonment not to exceed 3 years and 6 months, or both).
 - A contract procured in violation of the conflicts of interest statute **IS VOID** and the state or political subdivision on whose behalf the contract was made incurs no liability thereon. Wis. Stat. s. 946.13(3).
 - So the real kicker is that you go to jail AND you don't get to keep any of the money.

CONFLICTS OF INTEREST

- Avoiding liability
 - According to the Attorney General, abstention from voting on or debating the contract or any matter relating to the contract and refraining from personally or by agent negotiating or entering into the contract in a private capacity or performing in regard to the contract some official function requiring the exercise of discretion insulates an individual from liability.

CONFLICTS OF INTEREST

- Avoiding liability
 - HOWEVER, abstaining from voting does not avoid a violation of s. 946.13(1)(a) because a violation requires only the authority to act, not the actual action.
 - ALSO, performance of some official function requiring the exercise of an official's discretion with regard to the contract either before or after the execution violates s. 946.13.

PUBLIC OFFICIALS AND CONFLICTS OF INTEREST

- Proof of Liability
 - Notably, a violation of Wis. Stat. s. 946.13 does not require proof of criminal intent.
 - Section 946.13 is a **STRICT LIABILITY STATUTE.**

Ethics for
School
District
Officials

“Real World”
Examples

Example #1

- Your neighbor advises you that her daughter has applied for a job as a fourth grade teacher in one of your elementary schools. She has also asked that you “put in a good word for her” with the principal and hiring committee. What is your response? What if the neighbor starts inviting you over for cocktails and cookouts while the hiring process is taking place? Can you take the food and cocktails?

Example #2

- Your best buddy works for a company that provides diversity, equity, and inclusion training to employers to assist in creating a more positive and inclusive workplace. Your buddy would like to provide you with program information for you to present to your Leadership Team, and ultimately, your Board of Education. Your buddy seeks a five-year contract for this intensive training. Your buddy would also like to engage you as a consultant to assist in breaking into other area school districts. What do you do?

Example #3

- An attorney that does a lot of work with Wisconsin school districts and assists school officials to ensure that they comply with the law is in attendance at a Conference where you are also an attendee. The attorney picks up the tab (a minor expense for some, but a major expense for others) at the bar one evening. Did you violate the ethics code by not at least offering to reimburse the attorney?



Questions? Comments?



ATTOLLES

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