

Understanding the legal basics of conflicts of interest and ethics for school officials

In his book *Walden*, Henry David Thoreau famously said “there is no odor so bad as that which arises from goodness tainted.” The public justifiably expects school district officials to act in an ethical manner free from suggestion of a conflict of interest. This all sounds great and seems pretty simple. But the terminology used to define “ethical” behavior or “conflict of interest” is oftentimes incapable of precise definition, thus making it at times difficult to understand where the lines between ethical and unethical are drawn. The purpose of this article is to provide a foundational understanding of the law on conflicts of interest and ethics so school district officials may avoid the “odor” of these issues altogether.

Conflicts of interest

The law prohibiting public officials from engaging in official conduct that produces a private benefit is long-standing. The leading treatises recognize the common law doctrine that a public officer is forbidden from placing himself or herself in a position where private interest conflicts with public duty. (63A Am. Jur. 2d Public Officers and Employees, 322 (1984))

State law prohibits public officials and employees from using their official position for personal gain. Section 946.13 of the Wisconsin Statutes prohibits a public officer or employee from negotiating, bidding for, or entering into a contract in which he or she has a private monetary inter-



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est 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. *State v. Venema*, 2002 WI App 202, ¶13. Section 946.13 is directed not at corruption but at conduct presenting an opportunity for corruption. Because a public officer or employee’s judgment may be impaired when the officer or employee transacts government business in which he or she has a personal economic interest, the statute attempts to prevent public

officers and employees from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with the danger that they will advance a private interest rather than a public good. Id. Any public officer or public employee who violates Wis. Stat. § 946.13 is guilty of a Class I felony (punishable by a fine up to \$10,000 or imprisonment up to 3 years and 6 months, or both).

It is important to note the prohibitions contained with Wis. Stat. § 946.13 apply in equal force to both school district officers and employees. For purposes of Wis. Stat. § 946.13 and its application to school districts, a “public officer” includes members of a school board, persons holding an administrator license and whose employment requires such license and the head of facilities or maintenance if the employment duties include making purchasing decisions or recommendations. See Wis. Stat. § 19.42(7w).

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. Wis. Stat. § 946.13(2)(a).

The question often arises as to the legal consequences associated with a contract that was procured in violation of Wis. Stat. § 946.13. According

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to Wis. Stat. § 946.13(3), a contract entered into in violation of this section is void and the state or the political subdivision on whose behalf the contract was made incurs no liability thereon.

The attorney general 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. 52 Op. Att’y. Gen. 367 (1963).

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. *State v. Venema*, 2002 WI App at ¶ 11, n. 3; 76 Op. Att’y Gen. at 93. Moreover, performance of some 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. 63 Op. Att’y. Gen. 44 (1974).

Ethics for school district officials and employees

1. To whom does the code of ethics for local government officials apply?

Section 19.59, Wis. Stat., sets forth a code of ethics for local public officials. Unlike the prohibitions set forth in Wis. Stat.

§ 946.13, the requirements contained in Wis. Stat. § 19.59 apply only to “local public officials.” A “local public official” is defined as a person who holds “local public office.” As indicated above, “local public office” as defined by Wis. Stat. § 19.42(7w) includes:

- An elective office of a local governmental unit such as a school district (school board).
- 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 Wis. Stat. § 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.

Thus, the code of ethics applies to school board members, administrators licensed by the DPI, and any other administrator-level school employees holding licensure through DPI whose position requires such licensure.

2. How are the terms used within Wis. Stat. § 19.59 defined?

Before reviewing the categories of prohibited conduct, it is important to understand the defined terms used within the statute.

- “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. Wis. Stat. § 19.42(7).

- 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. Wis. Stat. § 19.42(2).
- “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.

3. Categories of conduct prohibited under Wis. Stat. § 19.59

Section 19.59 prohibits “local public officials” from engaging in the following:

Category 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 or his or her immediate family, or for an organization with which he or she is associated. Wis. Stat. § 19.59(1)(a). However, a local public offi-

Using the 'Ethics Smell Test'

School district officials and employees should ask themselves the following questions when confronted with a potential problem under the conflict of interest prohibitions or ethics code:

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. Will the use of my staff or the public facilities benefit me in my private capacity?
4. 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?
5. 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?
6. Am I using public time, resources or facilities for my personal gain?

This "smell test" should serve as an early warning system – if the answer to any of the questions is "yes," the official or employee should immediately request the opportunity to speak with district leaders and legal counsel.

cial 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 law.

Category 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. Wis. Stat. § 19.59(1)(b). The Wisconsin Ethics Commission has interpreted "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."

Category 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, any person who is subject to a registration requirement under Wis. Stat. § 11.05, 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. Wis. Stat. § 19.59(1)(br).

Category 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. Wis. Stat. § 19.59(1)(c)1. In interpreting the parallel state statute applicable to state officials (Wis.

Stat. § 19.46(1)(a)), the Wisconsin Ethics Commission 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. See Wisconsin Ethics Board memorandum Private Interest in Official Action (November 1, 1989).

Category 5: No local public official may use his or her office or position in a way that produces

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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. Wis. Stat. § 19.59(1)(c)2. Importantly, a local public official is not prohibited 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. Wis. Stat. 19.59(1)(d).

4. What are the penalties for violating the code?

Both criminal and civil penalties may apply if a local public official violates the ethics code. Criminal penalties 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 nor more than \$5,000 or imprisonment not more than one year in the county jail or both. Wis. Stat. § 19.58(1)(a). 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 3 years and 6 months. From a civil penalty standpoint, a person violating Wis. Stat. § 19.59(1) may be required to forfeit not more than \$1,000 for each violation with additional penalties associated

with a violation of Wis. Stat. § 19.59(1)(br).

5. Your “get out of jail free” card.

One sure way for an official to insulate him or herself from liability under the code 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 district's legal counsel. Of course, the immunity from penalties applies only if the advice is sought before official action is taken and only if the advice is followed. Nonetheless, this presents a powerful “get out of jail free” card and it should be used liberally.

Avoiding ethics and conflict of interest issues altogether - The Smell Test

Even the appearance of a conflict of interest or ethics issue can be damaging. If the news headline reads “School Board Member Gives \$1 Million Contract to Relative,” the public isn't interested in a lengthy explanation of the defined terms within the law. For this reason, we highly encourage school district officials and employees to ask themselves the following questions when confronted with a potential problem under the conflict of interest prohibitions or ethics code:

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?

This “smell test” should serve as an early-warning system – if the answer to any of the questions is “yes,” the official or employee should immediately request the opportunity to speak with district leadership and legal counsel.

Finally, it bears mentioning the words of investor Warren Buffet's when he warned that “it takes 20 years to build a reputation and five minutes to ruin it.” District officials, district employees and the district itself all rely upon relationships throughout the community to succeed.

Ethics concerns and conflict of interest allegations can quickly erode the trust upon which those relationships are founded. This is why school officials must remain vigilant in the desire to exhibit ethical and responsible behavior.