



OFFICE OF CORPORATION COUNSEL

MEMORANDUM

MARGARET C. DAUN
Corporation Counsel

COLLEEN A. FOLEY
PAUL D. KUGLITSCH
Deputy Corporation Counsel

TIMOTHY R. KARASKIEWICZ
MOLLY J. ZILLIG
ALAN M. POLAN
DEWEY B. MARTIN
JAMES M. CARROLL
KATHRYN M. WEST
JULIE P. WILSON
CHRISTINE L. HANSEN
DALE R. NIKOLAY
Assistant Corporation Counsel

TO: Honorable Supervisors of the County Board

FROM: Margaret C. Daun, Corporation Counsel *MD*
Colleen A. Foley, Deputy Corporation Counsel *CF*
Paul D. Kuglitsch, Deputy Corporation Counsel *PK*

DATE: February 14, 2018

RE: Referral File Nos. 18-57; 18-75

At the County Board's February 1, 2018 meeting, several questions were referred to the Office of Corporation Counsel regarding Milwaukee County Board Resolution File No. 18-75.

File No. 18-75 sought review and approval of the County Executive's December 29, 2017, appointment of Mr. James Sullivan to the position of Parks Director pursuant to Wis. Stat. Section 59.17(2)(bm).

A related question was also asked at this same meeting during the Board's consideration of Milwaukee County Board Resolution File No. 18-57. File No. 18-57 sought review and approval of a Temporary Assignment to a Higher Classification (TAHC per MCGO § 17.085) for Ms. Jeanne Dorff to allow her to continue to service as the Interim Director of the Department of Health and Human Services until the County Executive submits a permanent appointment to the position.

QUESTIONS PRESENTED

- 1. What is the date by which the 60-day statutory timeline for Board action on this recommended appointment expires?**

Answer: February 27, 2018.

The County Executive submitted Mr. Sullivan's appointment as Parks Director to the Board on December 29, 2017. That appointment occurred pursuant to Wis. Stat. § 59.17(2)(bm)¹ and is subject to County Board confirmation. Wis. Stat. § 59.17(2)(bm)2. The County Board is required to take action "within 60 days after the county executive submits the appointment to the

¹ Wisconsin Stat. Section 59.17(2)(bm) sets forth the appointment process for five key department heads – the directors of Parks, DHHS, DAS, HR, and Transportation.

board for confirmation.” *Id.* Therefore, the Board must act within 60 days of the December 29, 2017 submission -- **on or before February 27, 2018**. If the Board fails to act, then the appointment becomes effective on February 28, 2018.²

2. There is no term referenced in the appointment letter from the County Executive in File No. 18-75. Therefore, to what date could the appointee serve in this position per statutes if confirmed by the Board?

Answer: Mr. Sullivan may serve for a term of four years from the date of confirmation, plus an additional six months after his term expires.

Under Wis. Stat. Section 59.17(2)(bm)2., the term of the five key department heads is “4 years or less.” The term commencement date is the day on which the County Board confirms the appointment. MCO § 17.30(2). In addition, Wis. Stat. § 59.17(2)(bm)2. allows an appointee to remain in his or her position for an additional “6 months after the term for which he or she was appointed and confirmed expires.” *See also* MCO § 17.30(2). Per an opinion of the State Attorney General dated August 24, 2016, if “the County Executive did not impose a limit on the terms, the [] department heads have four-year terms” (plus an additional six months after the term expires). *See* OAG 8-24-16 to Corporation Counsel (attached as **Ex. 2**, see p. 2).

3. If the County Board rejects confirmation of an appointment, can that individual continue to serve in the position to which they were appointed by the County Executive.

Answer: No. Wis. Stat. § 59.17(2)(bm)2. does not expressly address repercussions if the County Board rejects confirmation of an appointee, but it is the opinion of the OCC that based on statutory construction and relevant case law, a court would deem the appointee removed and the position vacant.

Appointments under Wis. Stat. § 59.17(2)(bm) are “subject to the confirmation of the county board” and allowed to assume the duties of their position, pending Board action. *See* Wis. Stat. § 59.17(2)(bm)2. To render meaningful the phrase “subject to confirmation of the county board,” a court would likely interpret this phrase to mean that an appointee under (2)(bm)2., once appointed, may assume the duties of the position, but that if his or her confirmation is rejected, the person can no longer continue in the position, as there would no longer be any “pending Board action.” Any other interpretation would make the confirmation process meaningless -- if the legislature intended an appointee to serve in the position regardless of Board rejection, it would be unnecessary to include Board confirmation in the first place.

² In a December 5, 2016 memo by then-interim Corporation Counsel Colleen Foley, this office rendered the same opinion with respect to the County Executive’s appointment of Ms. Holly Davis to the Director position of the Department on Aging (attached as **Ex. 1**, see p. 2, answer to question 5). Although Ms. Davis was appointed under Wis. Stat. §§ 46.82(5)(a) and 59.17(2)(b)1., that appointive process contains the same 60-day statutory time period for Board action as Wis. Stat. § 59.17(2)(bm)2.

Further, absent specific language addressing what happens upon rejection, the Wisconsin Supreme Court has recognized that the rejection of an appointee removes the appointee and creates a vacancy in the position. In *State ex rel. Reynolds v. Smith*, 22 Wis. 2d 516 (1964), the court reviewed two appointments made by the governor during a senate recess that were subject to “the advice and consent of the senate.” These appointments were made pursuant to Wis. Stat. § 17.20(2)(a) (1963)³, which provided that “[a]ny such appointment subject to confirmation by the senate shall be in full force until acted upon by the senate, and when confirmed by the senate shall continue for the residue of the unexpired term.” Like Wis. Stat. § 59.17(2)(bm)2., this statute required an appointee to be confirmed by a legislative body, and allowed the appointee to perform the duties of his or his position until confirmed. Also like Wis. Stat. § 59.17(2)(bm), the statute lacked specificity regarding an appointee’s rejection. The court found that under these circumstances, rejection of the appointments by the confirming body terminated the lawful status of the appointee in the appointed position.

Applying these principles to appointments under Wis. Stat. § 59.17(2)(bm), if the Board rejects confirmation, a court would likely find that that the rejection removes the appointee and results in a vacancy in the position.

4. Can the County Executive reappoint an appointee to the same recommended position if his or her confirmation had been rejected by the County Board? If so, when?

Answer: Yes, the County Executive can reappoint an appointee to the same recommended position after the Board rejects confirmation, but he must wait until at least 90 days have expired from the date of rejection before doing so.

The Board exercises its powers over county business by adopting resolutions or enacting ordinances. Wis. Stat. § 59.02(1). When the Executive submits an appointment to the Board for confirmation, the submission is in the form of a resolution. The resolution functions as a recommendation by the Executive to the Board to approve his chosen appointee. The submission is given a file number and referred to the standing committee with jurisdiction over the office. MCO § 1.21. Confirmation of the appointee is considered by the Board and determined by roll call vote. *Id.* If rejected, the County Clerk is required to notify the appointing authority of the rejection. *Id.* Under the rules of the County Board, once a resolution fails to be adopted, it cannot “be reintroduced again until a lapse of at least ninety (90) days from the date of its ... failure of adoption.” MCO § 1.09(e). At its core, the Board’s rejection of confirmation is a failure to adopt a resolution, therefore the County Executive must wait until at least 90 days have passed from the date of rejection before reappointing the same failed appointee to the same appointed position.

Further, because rejection of confirmation creates a vacancy in the position, any appointment (or reappointment) to the same position would effectively be a “new” appointment and so must follow the original appointment process. *See* Wis. Stat. § 17.22(1).

³ Appointments under this statute were referred to as recess appointments whereby the governor was authorized to fill vacancies by appointment during a senate recess. Recess appointments were allowed to exercise the powers and duties of the office until action was taken by the senate. Wisconsin Stat. Section 17.20(2) has since been revised and now expressly states that “[a]ny appointment made under this paragraph which is withdrawn or rejected by the senate shall lapse. When a provisional appointment lapses, a vacancy occurs.”

5. The recommended appointee previously served as a Director of a different County department. Would the County Executive have to submit a new appointment to the County Board for confirmation to return this individual to his prior position?

Answer: Unclear. On the one hand, because Mr. Sullivan assumed the duties of the Parks Director, a court could conclude that by doing so, Mr. Sullivan resigned from his position as Child Support Services Director, leaving the position vacant. Accordingly, the Executive must submit a new appointment to the Board for confirmation of Mr. Sullivan as Child Support Services Director before Mr. Sullivan could resume the duties of his previous position.

Mr. Sullivan's previous position of Child Support Services Director is currently vacant. Wisconsin Stat. § 17.03 provides in part that any public office shall become or be deemed vacant upon the death, *resignation*, or removal of an incumbent. Because Mr. Sullivan accepted the County Executive's appointment to the position of Parks Director on January 2, 2018 and exclusively assumed those duties on that same date, a court could find that he implicitly resigned from his prior position, and thereby created a vacancy under Wis. Stat. § 17.03.

Vacancies in appointive county offices must be filled "*in the manner prescribed by law.*" See Wis. Stat. § 17.22(1) (emphasis added). The Child Support Services Director is a department head in an appointive county office. The State Attorney General has opined that under Wis. Stat. § 59.17(2)(b)1., this Board may require confirmation of the County Executive's appointments to any department head position.⁴ OAG 07-13 (attached as **Ex. 3**, see pp. 1-2). Pursuant to MCO § 17.30(2), the Board requires confirmation of the Child Support Services Director. So, if a court were to find that Mr. Sullivan resigned from his previous position, a court would also likely find that Wis. Stat. §§ 17.22(1) and 59.17(2)(b)1. require the Executive to submit a new appointment to the Board for confirmation before Mr. Sullivan resumes his prior position as Child Support Services Director.

However, on the other hand, a court could conclude that since the Executive has yet to make a permanent, formal, appointment of a new Director of Child Support Services (or even announced a potential appointee), Mr. Sullivan instead took a leave of absence from that position to complete the appointment and confirmation process for Parks Director and that therefore, he did not permanently vacate⁵ his position. If his confirmation is ultimately rejected, it is also therefore possible that a court could conclude that Mr. Sullivan would be entitled to return to the directorship of Child Support Services, with whatever remains of his term of appointment that applies as if he never left.

Going forward, the advice of the OCC is that to avoid any issues, where possible, if the Executive wishes an appointee to be able to return to his or her prior directorship if an appointment

⁴ The appointment process for the positions of Corporation Counsel and the Medical Examiner are controlled by another set of statutes, Wis. Stat. Sections 59.42(2)(a) and 59.38(5), respectively. Those appointment processes are not addressed here.

⁵ Such a circumstance appears to be contemplated by the TAHC ordinance, where a distinction is made between permanent and temporary vacancies. MCGO § 17.085(1)(a) and (b).

is not confirmed, a TAHC may be used to temporarily assign the appointee to the new directorship, contemporaneously with a formal, written appointment, or if a TAHC is not available, that a formalized process be created to permit leaves of absence by current employees to go through an appointment and confirmation process (not unlike the leave of absence process available for employees to run for public office). This would enable persons already employed at the County as an appointed director, to return to their prior directorship if their new appointment is rejected, without having to be reconfirmed. *See also infra* at pp. 7-9 (discussing other practical tools).

6. When can an individual assume the duties of an appointment under Wis. Stat. § 59.17(2)(bm)?

Answer: It is the opinion of the OCC that a court would likely conclude that the language of Wis. Stat. § 59.17(2)(bm) requires the Executive to submit a formal, written appointment for the Director of Parks, the Department of Health and Human Services, Department of Administration, Department of Transportation, and Human Resources⁶ to the Board for confirmation *before* or *substantially contemporaneous to* an appointee's assumption of the duties of the position based on the plain language of the statute.⁷

The sentence at issue states: "An appointee ... may assume his or her duties immediately, pending board action which shall take place within 60 days after the county executive submits the appointment... ." Wis. Stat. §§ 59.17(2)(b)1., 59.17(2)(bm).

To determine what the legislature intended by this language, we must apply its plain meaning. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶ 44-45, 271 Wis. 2d 633, 662-63, 681 N.W.2d 110, 124 (commenting "[w]e assume that the legislature's intent is expressed in the statutory language"). "[S]tatutory interpretation begins with the language of the statute." *Id.*, ¶ 45. "Statutory language is given its common, ordinary, and accepted meaning."

⁶ The appointment process for the five (5) key department heads under Wis. Stat. § 59.17(2)(bm) as noted above and the other department heads under Wis. Stat. § 59.17(2)(b)1. are identical. Both require appointments by the County Executive. Both require Board confirmation within 60 days after the Executive's submission. And both allow an appointee to assume the duties of the position "immediately, pending board action." The opinion set forth here therefore also applies equally to department heads appointed under section 59.17(2)(b)1.

⁷ In 2004, former Corporation Counsel William Domina issued an advisory legal memorandum in which the OCC opined that six (6) months is the outside limit for service by a deputy department head in an unconfirmed "acting" department head status (attached as Ex. 4, see pp. 5-6, answer to question 3). Apparently, this opinion has been understood to allow the Executive to direct new, permanent candidates for appointed directorships to assume the duties of a directorship for up to six (6) months before the Executive formally submitted that appointment to the Board in writing for consideration. Unfortunately, that is a misreading and misapplication of the opinion. The question Mr. Domina answered addressed only the tenure of a TAHC (Temporary Assignment to a Higher Classification) for continuance as department head before the Executive's appointment of his permanent pick for the position. The opinion *did not* address the subject of an Executive's candidate for a permanent appointment to a department head position taking over the duties of that position before formal submission of the appointment to the Board. Further, in 2004 when Mr. Domina wrote his opinion, the statutes governing department head appointments, including the five key department heads, did not contain language allowing an appointee to assume the duties of the position before Board action. So his opinion of course could not consider that fact pattern. The language at issue here first came about under 2013 Wisconsin Act 14. It should also be noted that the other questions answered by Mr. Domina's 2004 opinion are dated and should no longer be relied upon given the noted changes in the law and subsequent related Attorney General guidance.

Id. In addition, “statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.*, ¶ 46. “In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute.” *Id.*

The first two words of the sentence at issue standing alone require formal appointment by the County Executive since the statute refers to “an appointee.” If there is no formal appointment, how could there be “an appointee?” A press announcement of a future appointment does not bring a putative appointee (i.e., a candidate for a position) under the aegis of the statute since, until a formal appointment letter is sent to the County Board, that individual is still only a potential appointee or candidate – and the statute only permits actual “appointees” to assume the duties of the position.

Furthermore, the final clause “pending board action ... within 60 days after the ... appointment” also mediates in favor of the interpretation set forth here. The phrase “pending board action” must be tied to some event – that event is the appointment and without the appointment there would be no “appointee” to “assume his or her duties.”

Moreover, as noted above, well-worn maxims of statutory construction require that the plain language of a statute must be followed and implemented, particularly where any alternate interpretation would read words into the statute or create absurd results. If the sentence at issue here was interpreted to mean anything other than requiring formal appointment before the assumption of duties, then some distinction between formal appointees and announced, but not yet formally appointed candidates for certain directorships would exist even though the sentence at issue uses “appoint” in both clauses of the sentence. Specifically, the latter, “60-day deadline” clause would apply only to formal appointees, while the former, “assume duties” clause would apply to announced, but not yet formally appointed candidates (i.e., “acting” or “interim” directors). If the legislature intended to permit candidates without a formal appointment to assume the duties of the position, it could have said so or at least used different terminology to distinguish between the two within the same sentence. It did not. Therefore, it is not reasonable to read the statute to use “appoint” to refer to two different statuses in the same sentence. OAG, 8-24-16, at p. 3 (citing *Bank Mut. v. S.J. Boyer Constr., Inc.*, 2010 WI 74, ¶ 31 (“When the same term is used throughout a chapter of the statutes, it is a reasonable deduction that the legislature intended that the term possess an identical meaning each time it appears.”)). And so, a court is likely to find that any interpretation of the sentence at issue to create two different kinds of statuses – even though both clauses of the sentence use derivatives of the word “appoint” – would violate basic canons of statutory construction.

Also, given that the Board must act within 60 days after appointment, if the legislature intended to permit candidates short of appointment to assume the duties of a position, it is logical to assume that they would have expressly stated a maximum amount of time for such a “quasi-appointment” or “interim” or “acting” status. The absence of such a cut-off time frame on the front-end of the appointment process also indicates that the plain language must be given full meaning here.

In addition, if the statutory language was interpreted to permit a candidate to assume his or her duties before the formal submission of the appointment for confirmation, he or she could theoretically perform those duties indefinitely without the appointment ever being confirmed by the Board because there is no specific deadline enconced in statute. This would, in turn, nullify the statutory term limits of the five (5) key department heads under Wis. Stat. § 59.17(2)(bm)2. and render the confirmation process under both statutes moot. This absurd result cannot be what the statute contemplates.

To be clear, this opinion does not alter the ability of the Executive to “TAHC” a deputy director (or any other County employee) into an appointed directorship for up to six months, *see* MGCO § 17.085(1). *See also* Ex. 4, Domina 8-24-2004 at p. 5. Using a TAHC, a current County employee may assume the duties of a vacant directorship position at the Executive’s pleasure, and then the Executive could simultaneously (or sometime later) announce that the TAHC’d individual will eventually be the appointee, and then wait until the six months’ time limit on the TAHC was nearly gone before submitting the formal, written appointment to the Board, triggering the 60-day deadline and permitting the appointee to continue in the position until the Board acted.

Given the totality of the foregoing analysis, it is the OCC’s opinion that a court is likely to conclude that the only way to reasonably read Wis. Stat. §§ 59.17(2)(bm), and 59.17(2)(b)1., particularly given the legislative history, *see supra* n.7, would be to conclude that it requires the Executive to submit a formal, written appointment to the Board for confirmation *before* or *substantially contemporaneous to* an appointee’s assumption of the duties of the position, which then triggers the 60-day deadline for Board action.⁸

Practical Considerations and Hypotheticals

1. Internal Candidates from a Different Department

Importantly, the statute is permissive regarding the assumption of duties – an appointee “may” assume the duties, but he or she is not mandated to do so. Therefore, in the case of someone like Mr. Sullivan, the County Executive could have formally appointed Mr. Sullivan, thereby triggering the 60-day deadline for Board action, and Mr. Sullivan could have remained in his then-current position, as Director of Child Support Services. Under this scenario, if Mr. Sullivan’s appointment was ultimately rejected, he would simply continue as the Child Support Services Director. A court would likely conclude that this complies with state statute.

Alternately, Mr. Sullivan could have been TAHC’d into the Parks Director position, contemporaneously with the submission of a formal appointment. Under this scenario, if Mr. Sullivan’s appointment was ultimately rejected, he would simply return to his position as the Child

⁸ The OCC is aware of historical misuses of the “acting” department head status. For example, Corporation Counsel Daun began her position in advance of her formal appointment and confirmation. Importantly, Corporation Counsel is governed under an appointment process that does *not* permit the assumption of duties prior to confirmation, *see* Wis. Stat. § 59.42(2)(a) (“The corporation counsel shall be appointed by the county executive, with the concurrence of a majority of the board and shall not serve at the pleasure of the county executive.”). Therefore, a court would most likely conclude that it was not in compliance with state statutes for Corporation Counsel Daun to assume the duties of her position prior to *both* formal appointment *and* confirmation.

Support Services Director. A court would likely conclude that this complies with state statute. Importantly, a court would not likely permit Mr. Sullivan to continue on under the TAHC if his appointment was rejected, since doing so would nullify the legislature's grant of confirmation power over this position to the Board.

Related, under the current state of affairs, should Mr. Sullivan's appointment be rejected, it is also very unlikely that a court would approve of Mr. Sullivan being newly TAHC'd into the Parks Director position immediately following a rejection of his appointment to that position by the Board, since doing so would also, as above, effectively rob the Board of its co-extensive confirmation powers.

2. Internal Candidates from the Relevant Department

The current circumstances at the Department of Health and Human Services also provide an excellent example. The County Executive has announced that Mary Jo Meyers will be his appointee to head DHHS, but he has not yet submitted her formal appointment. Once he does, she is free to assume those duties, but need not do so. In the interim, Ms. Dorff has been TAHC'd into the Directorship. A court is likely to conclude that this complies with state statute.

In another hypothetical, if Mr. Sullivan's appointment is rejected, one of the four Parks Chiefs can and would need to take on directorship duties, as instructed by the Executive, since doing so is one of the essential functions of a "deputy" or "second-in-command," *see, e.g.*, Wis. Stat. §§ 59.23(1), 59.25(2), and 59.40(1) (describing duties of deputy clerk, treasurer, and clerk of court), unless and until either (i) a new appointee is named and assumes the duties of the position or is confirmed, or (ii) someone else is TAHC'd into the Parks Director position. In Parks, because the Director earns a higher salary than each of the Chiefs, the mechanism available to the Executive to designate an "acting" Parks Director in the absence of a confirmed appointee or a formally-nominated appointee who has assumed the duties of the job pending confirmation is through a TAHC.

But what happens if a potential "second-in-command" or a "deputy" actually earns a higher rate of pay than the now-vacant directorship position (e.g., Human Resources)? TAHCs are creations of County ordinance, not state statute, and are primarily focused on providing employees with a higher rate of pay when they take on new duties and responsibilities for a limited time period, to ensure that employees are fairly compensated for that new work. Of course, no employee would agree to a TAHC if it *reduced* their compensation (and this could also create wage claim issues as well). Particularly in a post-Act 14 and Act 55 landscape, even without a formal TAHC under the circumstances described in this paragraph, under common law and statutory principles of separation of powers, the Executive must still be able to control day-to-day management, which necessarily entails clear delineation of chains-of-command for executive branch administrative departments. In turn then, it is likely that a court would conclude, under the circumstances of this hypothetical, that the Executive could administratively designate a "deputy" or "second-in-command" (this could also be referred to as an "acting" director) from within the subject department to assume directorship duties if a TAHC is not available, absent other local or

state laws that dictate how department directorship vacancies must be handled.⁹ However, the circumstances where this would be necessary (i.e., a vacant directorship, a rejected appointee, and where a “second-in-command” would be TAHC-ineligible because he or she earns a higher salary than the director) are rare. Under these rare circumstances, it is unclear how long an administratively-designated “acting” departmental head could serve without Board review, but a court would not likely conclude that this could continue indefinitely, since doing so, as above, would rob the Board of its co-extensive confirmation power. The OCC advises that a court could potentially conclude that an administratively-designated departmental head, without a TAHC (because a TAHC is not available under the circumstances of this hypothetical), could serve in that capacity for 6 months without Board approval, following the model of the TAHC ordinance. But this is outcome is far from certain, since TAHCs are creatures of County ordinance, and not state statute, which circumscribes and dictates the Executive’s appointment and day-to-day management powers, as well as the Board’s confirmation and policy-setting powers.

3. External Candidates

In yet another alternate hypothetical, if an external candidate is announced as a putative appointee, that person *may* assume the duties of the job *after* the formal letter of appointment is transmitted to the Board, but that individual could also elect to remain in his or her current, external position to wait and see if they will be confirmed. This may be desirable from the perspective of external appointees, since they could remain in their incumbent external position until they are confirmed, providing continuity of employment and increased job security. External candidates also might find that approach unappealing, since it would require an external candidate to effectively “lame duck” him or herself with their current employer by announcing their intention to take another job.

4. Candidate Assumes Duties of Job Absent a Formal, Written Appointment

If an appointee assumes the duties of the position without the submission of a formal, written appointment communication to the Board by the Executive, a court could view the Executive’s submission to be a merely ministerial act, since the candidate’s taking on of the duties of the appointed position has affected the County Executive’s appointment, regardless of any formal, written communication of that fact. In other words, a candidate that takes on the duties of the job prior to transmittal of a formal, written appointment becomes a *de facto* officer. See *Reynolds*, 22 Wis. 2d at 218 (“[A]ll that is required to make an officer de facto is that the individual claiming the office be in possession of it, performing its duties, and claiming to be such officer under color of election or appointment.”). Once an appointee takes on the duties of the job, it could be argued that the 60-day Board action deadline begins to run whether or not the County Executive submits a formal letter of appointment to the Board.

Under this scenario, further complicating questions would require resolution. And the very existence of these complicating questions also belies any interpretation of the relevant statutes that does not mandate formal appointment before the assumption of duties. If a candidate (who is not

⁹ Under these circumstances, such an “acting” director should continue to receive the higher of the two applicable pay rates. The OCC also advises the Executive to consult with the OCC under such circumstance to determine if additional compensation is required, in the event that an “acting” director is essentially doing two jobs.

the second-in-command in the relevant department, *see supra* at 8) takes on the duties of a job without the transmittal of a formal, written appointment by the County Executive to the Board (and without a TAHC), the complicating questions include:

(1) May the Board take action to confirm or reject the appointment even if they have not received a formal appointment letter? Unclear. A court could conclude that the Board could take such an action since, as explained above, the candidate has become a *de facto* officer and the County Executive's transmittal of a formal, written appointment letter is merely a ministerial act since the substantive act already occurred once the candidate assumes the duties of the job and is thus, indisputably the appointee.

(2) If the Board did not act within 60 days of the candidate's assumption of duties without transmission of a formal appointment in writing by the County Executive, would the candidate have a lawful right to remain in the position if the Board did not act after the 60 days? Unclear. However, a court could answer the question in the negative, since the 60-day deadline was not triggered by a formal, written appointment and because to hold otherwise would run contrary to the intent of the statutes requiring board confirmation of these positions. But a court could also find that a candidate does have a right to remain in the position, since the statute does not expressly require formal, written notice of the appointment.

(3) What happens if the County Executive sends a formal, written letter of appointment sometime after a candidate assumes the duties of the job, whether before or after the initial 60-day period has expired? Unclear. But a court could conclude that the Executive could submit the formal appointment on the 59th day or at any time thereafter, thus triggering the statutory requirement that the Board act within 60 days after the submission. This interpretation would permit a candidate without a formal appointment to assume the duties of the job for some additional period before the formal appointment. But as alluded to above, a court may view this as improperly nullifying the Board's confirmation powers.

(4) What happens if the Board cannot determine exactly when a candidate took over the duties of a job absent a formal appointment under any of the above hypotheticals? This could likely be determined through an inquiry to the Comptroller's Office and/or Human Resources regarding when the candidate's compensation changed or when s/he began work.

5. The Most Challenging Hypothetical: Successive Appointments are Rejected and/or TAHC Extensions are Rejected on Non-Substantive Grounds

A final "doomsday" hypothetical also needs to be considered: What happens if successive appointees are rejected, resulting in no permanent director for a period of over 180 days (i.e., 6 months), and contemporaneously, the Board rejects the TAHC extension of the executive's designated "acting director," after 180 days per MCGO § 17.085(1), for reasons other than substantive "for cause" reasons? These circumstances would present a clear conflict between the

state legislature's express grant of confirmation power to the Board under Wis. Stat. §§ 59.17(2)(bm), and 59.17(2)(b)1., and the Executive's day-to-day management authority, which includes controlling chain of command in executive branch administrative departments.

With the understanding that this scenario is highly unlikely and may never occur, the OCC is reticent to opine. However, to provide some guidance, the OCC believes that similar to the analysis presented in #2 above, under these circumstances, a court would most likely conclude that the Executive could administratively designate that the current "acting" department director continue on without a TAHC extension, or designate a new a "deputy" or "second-in-command" from within the subject department, to assume directorship duties – potentially with or without a TAHC.¹⁰ As in #2 above, the circumstances where this would arise are extremely rare and potentially would never occur (i.e., a vacant directorship, multiple rejected appointees, and a TAHC extension rejected after 6 months for non-substantive reasons). But should these extraordinarily rare circumstances come to fruition, it is unclear how long an administratively-designated "acting" department head could serve without Board review and without a TAHC, but as above in #2, a court would not likely conclude that this could continue indefinitely, since doing so would rob the Board of its co-extensive confirmation power. A court could potentially conclude that an administratively-designated "acting" department head, without a TAHC, could serve in that capacity for an additional 6 months without Board approval. But just as above, this is outcome is uncertain. Thus, it is also possible that a court could permit an administratively-designated "acting" department head, whose TAHC extension is rejected by the Board (for non-substantive "for cause" reasons), if coupled with the successive rejection of permanent appointees by the Board, to serve indefinitely based upon Acts 14, 55 and the fundamental separation of powers principles enshrined in our state Constitution.¹¹ But again, this is a highly unlikely scenario. Should this occur, the OCC would not provide any definite opinion and would advise its clients to seek independent legal counsel. To be clear, the analysis presented above is premised on *both* the successive rejection of appointees *and* the rejection of a TAHC for reasons other than "for cause" or substantive job performance issues.

Legal Options

¹⁰ Even more unknowable would be the appropriate salary for such an "acting" director without a TAHC.

¹¹ Interestingly, these very questions of separation of powers – particularly related to appointment powers – are being currently debated in the federal courts, *see English v. Trump, et al.*, No. 17-2534, Mem. Op. & Order (D.D.C. Jan. 10, 2018) at 2-4, 11-17, 23, 29-36 (resolving the conflict between the legislature's designation of whom should serve as the acting director of the CFPB after the resignation of its Director in the CFPB's enabling legislation and the President's powers under other legislation that designates how key executive branch leadership vacancies should be handled, in favor of the President's powers, stating, at 29, "the [executive] must 'take care that the laws be faithfully executed,' across the entire Executive Branch A key means of doing so is 'the power of appointing, overseeing and controlling those who execute the laws.," and at 30, "[An] imposition on the President's Take Care Clause responsibilities matters. The Constitution's separation of powers is not a mere abstract principle, but a practical measure that is 'critical to preserving liberty.' The people do not vote for the 'Officers of the United States.' They vote for the President. And the public must be able to hold the President accountable for his Take Care Clause responsibilities across the entire Executive Branch.," and at 33, the plaintiff complains that the CFPB "would be headed by an acting director hand-picked by the President without the check of Senate confirmation. Of course, there is nothing unusual about this – it is precisely what happens whenever a President chooses to name an acting officer under the FVRA.").

To avoid uncertainty and operational disruption, with respect to candidates for appointive office governed by Wis. Stat. § 59.17(2)(bm) or § 59.17(2)(b)1., approaches that are more likely to be found to be legal by a court include:

- (a) internal candidate does not assume the duties of the appointed position until formally appointed and confirmed;
- (b) internal candidate assumes the duties of the appointed position under a TAHC, if available, thereby permitting a candidate to earn the salary of the new position for up to 6 months, and return to his or her prior position if the appointment is ultimately rejected, regardless of when the Executive formally submits the appointment, so long as it is within 6 months;
- (c) internal candidate assumes the duties of the appointed position under a temporary leave of absence from the prior position after a formal, written appointment has been submitted by the County Executive to the Board, which will enable an appointee to earn the salary of the new position for up to 60 days and to return to his or her prior position if the appointment is ultimately rejected;
- (d) external candidates may only assume the duties of the position once a formal, written, appointment letter has been submitted to the Board by the Executive, *but see also* n.8;
- (e) in the case of rejected or pending appointments where the candidate has not assumed the duties of the appointed position,
 - i. the executive TAHCs any current employee into the vacant appointed position for up to 180 days, after which Board approval is required to extend the TAHC; or
 - ii. the directorship is left vacant; or
 - iii. where a TAHC is not possible (see #2), the “deputy” assumes directorship responsibilities (or an internal member of the subject department as directed by the County Executive assumes directorship responsibilities, where there is no clear “deputy” or “second in command”), even if such a staff person or deputy is not formally appointed and will not be formally appointed.

In addition, and as alluded to above, *see supra* n.7, the OCC recognizes that the guidance set forth in this memorandum may potentially require a change to past practice. However, as the Attorney General made clear, “the fact that the past practice of Milwaukee County [was not in line with state law] does not govern the question of statutory interpretation. Under Wisconsin law, evidence of past practice could not by itself resolve the statutory construction question because it might only confirm that the statute was misinterpreted.” OAG 8-24-16 at p.4.

Nonetheless, given the interpretive complexities noted herein, as well as the complexity and critical importance of these constitutional separation of powers issues, the OCC will, upon request, submit any or all of these questions (and/or hypotheticals) to the Attorney General for an opinion. In addition, given the inherently conflictual viewpoints that the clients of the OCC could

take on any these issues, it may also be appropriate for the Board, the Executive, and potentially the Comptroller to consult with independent counsel regarding these issues. It is also unlikely that the OCC will be able to opine further on this topic beyond what is contained herein.

RELEVANT STATUTES

§ 59.17(2)(bm)

1. In any county with a population of 750,000 or more, appoint the following persons:
 - a. The director of parks, recreation and culture under s. 27.03(2).
 - b. The director of the county department of human services under s. 46.21(1m)(a).
 - c. The director of the county department of administration under s. 59.52(1)(a).
 - d. The director of personnel of the county civil service commission under s. 63.02(2).
 - e. The director of transportation under s. 83.01(1).
2. Each appointment under subd. 1. is subject to the confirmation of the county board and is in the unclassified service, serving at the pleasure of the county executive and holding office until a new appointment is made by the county executive and confirmed by the board. **An appointee of the county executive may assume his or her duties immediately, pending board action which shall take place within 60 days after the county executive submits the appointment to the board for confirmation.** No prior appointee may serve longer than 6 months after the term for which he or she was appointed and confirmed expires, unless reappointed and reconfirmed. The term of each appointment is 4 years or less. The county executive shall comply with hiring policies set by the board when making appointments under subd. 1.

§ 59.17(2)

(b) In any county with a population of 750,000 or more:

1. Appoint and supervise the heads of all departments except where the statutes provide that the appointment shall be made by a board or commission or by other elected officers. Notwithstanding any statutory provision that a board or commission or the county board or county board chairperson appoint a department head, except ss. 17.21 and 59.47 (3), the county executive shall appoint and supervise the department head. Except for a statutory provision which specifies that a board or commission or the county board shall supervise the administration of a department, the county executive shall administer, supervise, and direct all county departments, including any person who negotiates on behalf of the county, and the county board, other board, or commission shall perform any advisory or policy-making function authorized by statute. Any appointment by the county executive under this subdivision requires the confirmation of the county board unless the county board, by ordinance, elects to waive confirmation. **An appointee of the county executive may assume his or her duties immediately, pending board action which shall take place within 60 days after the county executive submits the appointment to the board for confirmation.** Any department head appointed by a county executive under this subsection may be removed at the pleasure of the

county executive. The county executive shall comply with hiring policies set by the board when making appointments under this paragraph.



OFFICE OF CORPORATION COUNSEL

COLLEEN FOLEY
Interim Corporation Counsel

PAUL D. KUGLITSCH
Deputy Corporation Counsel

TIMOTHY R. KARASKIEWICZ
MOLLY J. ZILLIG
ALAN M. POLAN
JENNIFER K. RHODES
DEWEY B. MARTIN
JAMES M. CARROLL
KATHRYN M. WEST
JULIE P. WILSON
CHRISTINE L. HANSEN
CARRIE THEIS
Assistant Corporation Counsel

Date: December 5, 2016

To: Chairman Theodore Lipscomb, Sr.

Cc: Kelly Bablitch, Chief of Staff

From: Interim Corporation Counsel Colleen Foley

Re: Departmental Appointments

Background: The County Executive appointed Holly Davis as the Director of Aging in a letter to the Board dated November 17, 2016. The related file, 16-727, has been referred to the Health and Human Needs Committee. That appointment has raised a number of questions for Supervisors.

1. The appointment letter does not define Ms. Davis's term. Does the omission of an end date in the appointment letter affect the length of the term should this appointment be confirmed as submitted?

No, there is no set term for appointment of Milwaukee County department heads other than the five key department heads – the director of parks, recreation and culture, the director of the department of human services, the director of the department of administration, the director of personnel of the county civil service commission, and the director of transportation. For those five department heads only, there is a term limit of “four years or less”. Wis. Stat. § 59.17(2)(bm).

For all other department heads in any county with a population of 750,000 or more, the County Executive shall make the appointment subject to confirmation of the Board with no requirement of a term limit:

Appoint and supervise the heads of all departments except where the statutes provide that the appointment shall be made by a board or commission or by other elected officers. . . Any appointment by the county executive under this subdivision requires the confirmation of the county board unless the county board, by ordinance, elects to waive confirmation.

Wis. Stat. §59.17(2)(b)(1).¹ This is a different situation from Hector Colon's confirmation, where the Executive submitted an appointment letter without a term limit

¹ Per the opinion of the State Attorney General, the Board may require confirmation of the Executive's appointments to any department head position. OAG-07-13. Department head appointees were not originally subject to Board confirmation until 1985 Wisconsin Act 29, §1156. See Wis. Stat. §59.031(wr)(1985-86).
Courthouse, Room 303 • 901 North 9th Street • Milwaukee, WI 53233 • Telephone: 414-278-4300 • FAX: 414-223-1249

for a key department head. In that case for that office, the term could be negotiated between the Executive and the Board before confirmation. That is not the situation here.

2. What is the end date of this appointment?

In the absence of a statute to the contrary, an officer appointed not for a fixed term serves at the pleasure of the appointing officer. *Adamczyk v. Town of Caledonia*, 52 Wis.2d 270, 275, 190 N.W.2d 137, 140 (1971). See also *Wolf v. City of Fitchburg*, 870 F.2d 1327, 1331 (7th Cir. 1989). And any department head appointed by the Executive and confirmed by the Board under Wis. Stat. §59.17(2)(b)(1) serves at the pleasure of the Executive. Therefore, there is no infinite entitlement to the position because the Executive can remove that department head at any time. See *Unertl v. Dane Cty.*, 190 Wis. 2d 145, 153, 526 N.W.2d 102 (1977) (citing *Wolf v. City of Fitchburg*, 870 F.2d 1327, 1331 (7th Cir. 1989).

So, though there is no end date per se, Ms. Davis' appointment expires with the term of the appointing authority. And after the Executive's term expires for whatever reason, Ms. Davis becomes a holdover director still subject to removal at any time by the Executive, whether that person is the current Executive or a successor. Ultimately, no statute authorizes the Board to mandate a reappointment/reconfirmation when the originally appointed and confirmed candidate becomes a holdover.

3. Is the term of this appointment congruent with the term of the Executive?

See preceding response.

4. If this Executive were re-elected to another term or a different individual were elected to either fulfill the current term (through a special election) or to start a new term (through a regular election), when would a reappointment have to be submitted to the Board (or future Boards) if at all?

In any of these scenarios, these department heads would continue in office until relieved by the re-elected or new Executive.

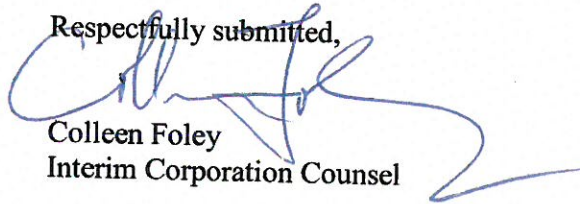
5. Does the 60 day provision in Act 14 apply? If it does, what is the date by which the appointment is automatically confirmed if the Board does not act?

Yes, the 60 day provision in Act 14 applies. Per the statute, "[a]n appointee of the county executive may assume his or her duties immediately, pending board action which shall take place within 60 days after the county executive submits the appointment to the board for confirmation." The Executive submitted his appointment letter for Ms. Davis on November 17, 2016 and 60 days thereafter is January 16, 2017. Should the Board not act on Ms. Davis's confirmation by January 16, 2017, she will be automatically confirmed.

6. Can the County Executive choose to submit an appointment for any Director position with a specific end date?

No. There is only an appointment and confirmation process required under Wis. Stat. §59.17(2)(b)(1). “Statutory interpretation ‘begins with the language of the statute’ and is ‘interpreted in the context in which it is used.’” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting *Seider v. O’Connell*, 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659). Unlike appointments under Wis. Stat. § 59.17(2)(bm) that involve a term limit, and similar to Act 14’s contract procedures, the confirmation process for these non-key department heads involves purely an up or down vote.

Respectfully submitted,



Colleen Foley
Interim Corporation Counsel



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Andrew C. Cook
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Brian P. Keenan
Assistant Attorney General
keenanbp@doj.state.wi.us
608/266-0020
FAX 608/267-2223

August 24, 2016

Ms. Colleen Foley
Interim Corporation Counsel
Milwaukee County Courthouse
901 North 9th Street, Suite 303
Milwaukee, WI 53233

Dear Ms. Foley:

I write in response to Paul Bargren's May 27, 2016, letter requesting advice on the interpretation of Wis. Stat. § 59.17(2)(bm)2. It is my understanding that Mr. Bargren has since retired and that you are now serving as Interim Corporation Counsel. Following my receipt of Mr. Bargren's letter, I also received a letter dated June 23, 2016, from Theodore Lipscomb, Sr., Chairman of the Milwaukee County Board of Supervisors. I will also respond to the legal analysis offered in Chairman Lipscomb's letter.

Mr. Bargren asked whether the intervening re-election of the Milwaukee County Executive requires that the department heads appointed under Wis. Stat. § 59.17(2)(bm)1. be confirmed again by the County Board. In the County Executive's prior term, he appointed individuals to each of the five department head positions without assigning any limit to their terms. Two appointments were made in May 2012, one in March 2013, one in November 2013, and one in February 2015. Each appointment was confirmed by the County Board as required by Wis. Stat. § 59.17(2)(bm)2. The County Executive was re-elected in April 2016. I conclude that, under the plain language of Wis. Stat. § 59.17(2)(bm)2., the department heads can continue serving their terms without another confirmation by the County Board.

"[S]tatutory interpretation 'begins with the language of the statute.'" *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting *Seider v. O'Connell*, 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659). In addition, "statutory language is interpreted in the context in

Ms. Colleen Foley
August 24, 2016
Page 2

which it is used.” *Id.* ¶ 46. Both the plain language and the context of the statute show that the “term” referenced is the term of the appointee.

The statute reads:

Each appointment under subd. 1. is subject to the confirmation of the county board and is in the unclassified service, serving at the pleasure of the county executive and holding office until a new appointment is made by the county executive and confirmed by the board. An appointee of the county executive may assume his or her duties immediately, pending board action which shall take place within 60 days after the county executive submits the appointment to the board for confirmation. No prior appointee may serve longer than 6 months after the term for which he or she was appointed and confirmed expires, unless reappointed and reconfirmed. The term of each appointment is 4 years or less. The county executive shall comply with hiring policies set by the board when making appointments under subd. 1.

Wis. Stat. § 59.17(2)(bm)2. The statute provides that department heads are appointed, confirmed, and then serve in their position until they are replaced by a new appointment or the term expires (plus an additional six months allowed by statute). The statute makes clear that “[t]he term of each appointment is 4 years or less.” Wis. Stat. § 59.17(2)(bm)2. The statute further provides that the department heads “serv[e] at the pleasure of the county executive and hold[] office until a new appointment is made by the county executive and confirmed by the board.” *Id.*

Here, because the County Executive did not impose a limit on the terms, the current department heads have four-year terms. They need not be confirmed again to serve the full length of the term, or an additional six months “after the term for which he or she was appointed and confirmed expires.” *Id.* The alternative interpretations offered by Mr. Bargren and Chairman Lipscomb are at odds with the plain language of the statute.

Mr. Bargren’s letter asks whether the phrase “[n]o prior appointee may serve longer than 6 months after the term for which he or she was appointed and confirmed expires” refers to the term of the County Executive who appointed the department head, not the term of the appointee. Under this interpretation, the statute would limit a department head to serving six months after the County Executive’s term expires, absent a reappointment and reconfirmation. The “term” referenced in Wis. Stat. § 59.17(2)(bm)2. is the term of the appointee, not the County Executive. This is plain from the language of the clause, which involves “the term *for which* he or she was appointed and confirmed.” Wis. Stat. § 59.17(2)(bm)2.

Ms. Colleen Foley
August 24, 2016
Page 3

Had the Legislature intended to reference the term of the County Executive, the statute would reference the term *during which* he or she was appointed. The use of the word "confirmed" further makes clear the phrase refers to the term of the appointee because while the appointee's term is subject to confirmation, the County Executive's is not. The fact that the statute sets the term of the appointee at "4 years or less" also makes clear that the "term" in Wis. Stat. § 59.17(2)(bm)2. is the term of the appointee; it is not reasonable to read the statute to use "term" to refer to two different terms in adjacent sentences. *Bank Mut. v. S.J. Boyer Constr., Inc.*, 2010 WI 74, ¶ 31, 326 Wis. 2d 521, 785 N.W.2d 462 ("When the same term is used throughout a chapter of the statutes, it is a reasonable deduction that the legislature intended that the term possess an identical meaning each time it appears.")

Chairman Lipscomb suggests that a term of "4 years or less" indicates that the term is to be concurrent with the term of the County Executive, specifically that "the phrase 'or less' refers to a director who is appointed at some point mid-way through the county executive's term." (Lipscomb Letter at 2.) Had the Legislature intended the terms to be concurrent, however, it would have simply said that the term was concurrent with the County Executive rather than using a defined number of years.

Chairman Lipscomb also suggests the department head's term is "indefinite" because there is no "definite term of office." (Lipscomb Letter at 2.) A department head's term is not indefinite because the term has a clear limit of four years. The statute setting the term of Milwaukee County's department heads is therefore not like the statute setting the term of the Secretary of Veterans Affairs at issue in 67 Op. Atty. Gen. 257 (1979), which said the Secretary served "an indefinite term." *Moses v. Bd. of Veterans Affairs*, 80 Wis. 2d 411, 415, 259 N.W.2d 102 (1977) (quoting Wis. Stat. § 15.05(1)(b) as amended in 1977). While Wisconsin law provides that "[i]n the absence of a statute fixing the length of a term, the term of an appointed officer expires with the expiration of the term of the appointing entity," *Unertl v. Dane Cty.*, 190 Wis. 2d 145, 153, 526 N.W.2d 775 (Ct. App. 1994) (citing *Wolf v. City of Fitchburg*, 870 F.2d 1327, 1331 (7th Cir. 1989)), this rule does not apply here because the statute sets the length of a department head's term at "4 years or less." Wis. Stat. § 59.17(2)(bm)2.

Chairman Lipscomb further suggests that the department head's term should not be interpreted to be "definite" because "a definite term could convey a legitimate claim to entitlement to the position" that would implicate the Due Process Clause of

Ms. Colleen Foley
August 24, 2016
Page 4

the Fourteenth Amendment. (Lipscomb Letter at 3.) Interpreting the statute to allow an employee to serve the full four-year term without re-confirmation by the County Board, however, does not provide a department head with an entitlement to the position for the full four years of the term. Because department heads serve "at the pleasure of the county executive," Wis. Stat. § 59.17(2)(bm)2., the County Executive may remove a department head prior to the expiration of the term. *E.g.*, *Forbes v. Milwaukee Cty.*, No. 05-C-591, 2007 WL 41950 (E.D. Wis. Jan. 4, 2007). Simply put, a statute does not provide a constitutionally protected right to employment by providing a definite end to a term when the statute also makes clear the employee may be removed before the conclusion of the term "at the pleasure of the county executive." Wis. Stat. § 59.17(2)(bm)2. The statute makes this clear by defining the term as "4 years or less." Wis. Stat. § 59.17(2)(bm)2.

Lastly, the fact that the past practice of Milwaukee County was to reappoint department heads upon the County Executive's reelection does not govern the question of statutory interpretation. Under Wisconsin law, "evidence of past practice could not by itself resolve the statutory construction question because it might only confirm that the statute was misinterpreted." *Appointment of an Interpreter in State v. Tai V. Le*, 184 Wis. 2d 860, 873, 517 N.W.2d 144 (1994).

I conclude that the five department heads do not need to be reconfirmed by the County Board upon the re-election of the County Executive. Please feel free to contact me with any questions.

Sincerely,



Brian P. Keenan
Assistant Attorney General

BPK:sed

cc: County Executive Chris Abele
County Board Chairman Theo Lipscomb Sr.
Deputy Corporation Counsel Paul D. Kuglitsch

2013 WL 6645996 (Wis.A.G.)

Office of the Attorney General

State of Wisconsin

OAG-07-13

December 12, 2013

*1 Mr. Mark Grady
Deputy Corporation Counsel
Milwaukee County
901 North 9th Street, Rm. 303
Milwaukee, WI 53233

Dear Mr. Grady:

¶ 1. Former Milwaukee County Corporation Counsel Kimberly Walker asked whether the Milwaukee County Board (“Board”) may require confirmation of the county executive's or other administrator's appointments to positions in the unclassified service other than specific positions for which the Legislature has authorized the Board to require confirmation. I conclude that the Board may require confirmation of the county executive's appointments to any position in the unclassified service that is a department head. The Board may not require confirmation of the executive's or other administrators' appointments to positions in the unclassified service that are not department heads.

¶ 2. The Legislature has explicitly authorized the Board to require confirmation of the executive's appointments to certain specific positions: medical examiner, corporation counsel, and the five positions enumerated in [Wis. Stat. § 59.17\(2\)\(bm\)l](#). See [Wis. Stat. § 59.17\(2\)\(bm\)l](#). (director of parks recreation and culture; director of county department of human services; director of county department of administration; director of personnel of county civil service commission; director of transportation); [Wis. Stat. § 59.38\(5\)](#) (medical examiner); and [Wis. Stat. § 59.42\(2\)\(a\)](#) (corporation counsel). In addition, the Board controls the management of the house of corrections. See [Wis. Stat. § 303.17\(1\)](#). Former corporation counsel did not raise any question concerning the Board's authority to require confirmation of appointments to those positions.

¶ 3. Section 17.30(2) and (3) of the Milwaukee County ordinance requires that, in addition to those positions, appointments to a number of other positions in the unclassified service must also be confirmed:

Chief information officer, Director of child support enforcement, Airport director, Director of county economic development, Behavioral health administrator, Director department on aging, Zoological gardens director, Director of employee benefits, Director of family care, Fiscal and budget administrator, Deputy director of child support enforcement (administration); Chief deputy medical examiner, Chief of operations, Deputy Director D[e]partment of P[ublic] W[orks]/transportation, Director of highway engineering and operations, Deputy airport director (operation/maintenance), Chief of recreation services, and Deputy zoological director (administration/finance).

Former corporation counsel asked whether the Board may require confirmation of appointments to these positions.

¶ 4. As to appointments to positions in the unclassified service that are department heads, the Board may require confirmation. [Wisconsin Stat. § 59.17\(2\)\(b\)l](#). provides that, in a county with a population of 750,000 or more, the county executive “[a]ppoint[s] and supervise[s] the heads of all departments except where the statutes provide that the appointment shall be made by a board or commission or by other elected officers.” [Wisconsin Stat. § 59.17\(2\)\(b\)l](#). also provides that “[a]ny appointment by the county executive under this subdivision requires the confirmation of the county board unless the county board, by ordinance, elects to waive confirmation.” The Board has express statutory authority

to require confirmation of all department heads, including department heads that are not specifically mentioned in Wis. Stat. §§ 59.17(2)(bm)l., 59.38(5), and 59.42(2)(a).¹

*2 ¶ 5. As to other positions in the unclassified service, there is no such statutory authority. Other than Wis. Stat. §§ 59.17(2)(bm)l, 59.38(5), and 59.42(2)(a), there are no other statutes that expressly authorize the Board to require confirmation of the executive's appointments to positions that are not department heads. Absent that authority, the Board may not require confirmation of the executive's appointments.

¶ 6. Wisconsin Stat. § 59.51(1) grants county boards “the authority to exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive ... or to a person supervised by a county executive ... or any enactment which is of statewide concern and which uniformly affects every county.” The Legislature has chosen to grant broad administrative and managerial powers to county executives. Wisconsin Stat. § 59.17(2)(a) provides that the county executive “[c]oordinate[s] and direct[s] all administrative and management functions of the county government not otherwise vested by law in other elected officers.”²

¶ 7. Among the county executive's administrative functions is the selection or appointment of an individual to a position. Selecting or appointing an individual to perform a particular task or function is an organizational or administrative power. *Harbick v. Marinette City.*, 138 Wis. 2d 172, 176-77, 405 N.W.2d 724 (Ct. App. 1987); OAG-01-13, ¶ 13. A requirement that the executive's appointment be confirmed gives the county board the ability to negate the administrative power to appoint. Because Wis. Stat. § 59.17(2)(a) vests administrative and management functions in the county executive to the exclusion of the county board, county boards can require confirmation of the county executive's appointments only if authorized by the Legislature to do so. No statute authorizes the Board to require confirmation of the executive's appointments to any position in the unclassified service listed in § 17.30(2) and (3) of the Milwaukee County ordinance unless the position is a department head.

¶ 8. Former corporation counsel also questioned whether the Board can require confirmation of appointments by department heads or other administrators to subordinate positions in the unclassified service listed in § 17.30(2) and (3) of the Milwaukee County ordinance. No statute expressly authorizes the Board to require confirmation of such appointments. The Board may not require confirmation if the power to make appointments to those positions is an “organizational or administrative power [statutorily granted] to a county executive ... or to a person supervised by a county executive[.]” Wis. Stat. § 59.51(1).

¶ 9. Among the county executive's organizational or administrative powers is the duty to “administer, supervise, and direct all county departments [.]” Wis. Stat. § 59.17(2)(b)l. This broad language grants the county executive the authority to direct department heads and administrators to make appointments of specific, eligible persons to subordinate positions in the unclassified service, or to make such appointments directly if the executive chooses to do so. The Board cannot require confirmation of appointments by department heads or other administrators to subordinate positions in the unclassified service because a confirmation requirement would negate the county executive's authority.

*3 ¶ 10. I therefore conclude that the Board may require confirmation of the county executive's appointments to any position that is a department head, but it cannot require confirmation of appointments by the executive or by other administrators to other positions in the unclassified service except in cases where the Board is authorized by statute to require confirmation.

Sincerely,

J.B. Van Hollen
Attorney General

Footnotes

- 1 Although appointments of department heads under what is now [Wis. Stat. § 59.17\(2\)\(b\)l.](#) originally were not subject to county board confirmation, the Legislature authorized a confirmation requirement in 1985 Wisconsin Act 29, § 1156. *See* [Wis. Stat. § 59.03 l\(2r\)](#) (1985-86).
- 2 The “‘elected officers’ referred to in [Wis. Stat. § 59.17\(2\)\(a\)](#) are those enumerated in subchapter IV of Wis. Stat. ch. 59 and do not include county board supervisors.” OAG-01-13, ¶ 12 (April 9, 2013). The phrase “elected officers” in [Wis. Stat. § 59.17\(2\)\(b\)l.](#), which is applicable to Milwaukee County, similarly does not include county board supervisors.

2013 WL 6645996 (Wis.A.G.)

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.



OFFICE OF CORPORATION COUNSEL

PM 1000.00416

EXHIBIT 4


Milwaukee County

WILLIAM J. DOMINA
Corporation Counsel

TIMOTHY R. SCHOEWE
MARY ANN GRIMES
ROBERT E. ANDREWS
Deputy Corporation
Counsel

LOUIS EDWARD ELDER
JOHN F. JORGENSEN
MARY ELLEN POULOS
MARK A. GRADY
JOHN E. SCHAEPEKAHM
TIMOTHY R. KARASKIEWICZ
RICHARD H. BUSSLER, JR.
Principal Assistant
Corporation Counsel

INTEROFFICE MEMORANDUM

TO: LEE HOLLOWAY, COUNTY BOARD CHAIRMAN
FROM: WILLIAM DOMINA, CORPORATION COUNSEL 
SUBJECT: ADVISORY LEGAL MEMORANDUM; CONFIRMATION OF APPOINTMENTS OF COUNTY DEPARTMENT HEADS; "ACTING" APPOINTMENTS.
DATE: AUGUST 24, 2004

Your memorandum of June 23, 2004, poses three specific questions related to the procedure for appointment and confirmation of certain department heads and deputy department heads under s. 17.30, M.C.G.O. We will address those questions in the order presented:

1. Section 17.30, Milwaukee County Ordinances, as currently constituted, has an outdated listing of appointments requiring confirmation. Which appointed County positions currently required confirmation by the County Board?

As you have observed, s. 17.30, M.C.G.O., has not been amended to conform to several significant changes in County government, including the closing of Doyne Hospital, the loss of the Museum as a County institution, the subsuming of the Department of Human Resources under the Department of Administrative Services, and the merger of the Department of Parks, Recreation and Culture and the Department of Public Works into the Department of Parks and Public Infrastructure. In addition, many positions have been retitled and given new title codes, and the format of all title codes has been changed. Consequently, the lists of positions set forth in subsecs. (2) and (3) of s. 17.30, M.C.G.O., are obsolete

This office has reviewed the positions listed in s. 17.30(2) and (3), M.C.G.O. Based upon an analysis of the nature and function of each position and, where appropriate, applicable statutory requirements, we have tentatively concluded that the following positions fall within the ambit of s. 17.30(2) or (3), M.C.G.O., and require periodic reappointment and reconfirmation under that ordinance:

| | |
|---|------------------|
| Parks Superintendent | Title Code 89960 |
| Director of Human Services | Title Code 88570 |
| Director of Administration | Title Code 88500 |
| Director of Human Resources | Title Code 89000 |
| Director of Parks and Public Infrastructure | Title Code 89950 |
| Transportation Superintendent | Title Code 89970 |
| Director of Child Support Enforcement | Title Code 88640 |
| Adm. Sec'y. – Director of Office for Persons with Disabilities | Title Code 85490 |
| House of Correction Superintendent | Title Code 88660 |
| Airport Director | Title Code 84410 |
| Director of Economic Development | Title Code 88495 |
| Mental Health Administrator | Title Code 88260 |
| Director – Department on Aging | Title Code 89480 |
| Zoological Gardens Director | Title Code 88430 |
| Deputy Director of Human Resources | Title Code 89010 |
| Fiscal and Budget Administrator | Title Code 88420 |
| Deputy Director – Child Support Enf. | Title Code 89750 |
| Chief Deputy Medical Examiner | Title Code 88030 |
| Deputy Airport Director (Operations/ Maintenance) | Title Code 88060 |
| Deputy Zoo Director (Adm./Finance) | Title Code 88480 |

Among those positions, only six serve terms that are limited by statute and are therefore subject to a **statutory** requirement of periodic reappointment and reconfirmation: Parks Manager, who functions as the “general manager” of the parks under Wis. Stat. s. 27.03(2); Director of Human Services, under Wis. Stats. s. 46.21(1)(m); Director of Administrative Services, who functions as the “director of the county department of administration under s. 59.52(1)(a)”; Director of Human Resources, who functions as the “director of personnel of the county civil service commission under s. 63.02(2)”; Transportation Superintendent, who functions as the “director of transportation under s. 83.01(1)”; and Director of Parks and Public Infrastructure. We have included the Director of DPPI even though there is no suggestion in the statutes that the legislature ever envisioned a county department which merges the functions of the parks department and the department of public works, and therefore there is no statute applicable to such a department or its director. However, it is reasonable to infer that if the parks director and the transportation director (who in Milwaukee County is, by definition, also the director of public works, Wis. Stat. s. 83.01(1)(b)) are subject to the requirement of periodic reappointment and reconfirmation under Wis. Stat. s. 59.17(2)(bm), then the

director of a consolidated department who supervises both should be subject to the same requirement.

The department heads enumerated in s. 17.30(2), M.C.G.O., other than those requiring statutory reconfirmation as discussed in the foregoing paragraph, must be appointed by the county executive and confirmed by the county board. However, the requirement that they be reappointed and reconfirmed with each new term of the county executive is based solely on the fact that the county board has decided to include them in that ordinance. There is no corresponding statutory requirement related to the issue or reappointment or reconfirmation.

For example, the Director of the Department on Aging, as the director of the county "aging unit", must be appointed by the county executive subject to the "approval" of the county board, Wis. Stat. s. 46.82(5)(a). However, there is no statute which limits her term or ties it to the term of the county executive who appoints her, so there is no statutory requirement that she be reappointed and reconfirmed. The requirement for her reappointment and reconfirmation stems from the ordinance.

None of the other department heads enumerated in s. 17.30(2) is mentioned in any statute. To the extent that they manage divisions of county government which are recognized as "departments", they fall within the general language of Wis. Stat. s. 59.17(2)(b):

"In any county with a population of 5000,000 or more, [the county executive shall] appoint and supervise the heads of all departments except where the statutes provide that the appointment shall be made by a board or commission or by other elected officers."

Under that statute, those department heads must be confirmed by the county board unless the county board waives the confirmation requirement. However, under the statute their terms are not limited in duration or tied to the term of the county executive who appoints them, so there is no statutory requirement that they be reappointed and reconfirmed, such requirement exists only in the ordinance

The statutes do not require that any of the deputy department heads who are enumerated in s. 17.30(3), M.C.G.O., be appointed by the county executive and confirmed by the county board. With the exception of the deputy director of human services, none of those deputy department heads is mentioned in any statute. Under Wis. Stat. s. 46.21(1)(m), a county board "may" create a deputy director of human resources, but the statutes do not prescribe any method for the appointment of such a deputy. Thus, the deputy department heads identified above are subject to reappointment and reconfirmation only under the requirements of the ordinance.

2. For appointed positions that must be re-appointed after the start of a new term in office, how long can the County executive wait before bringing those re-appointments to the County Board? Section 17.30 indicates a six-month time frame but the exact period of time seems unclear.

Sec. 17.30, M.C.G.O., creates a potential ambiguity with respect to the expiration of the terms of department heads. Those department heads "shall serve a term of office which . . . expires six months after expiration of the term of office of the County Executive or County Board Chairman in office at the time of appointment." Describing the term limitation in the alternative creates an inconsistency because the term of office of the county executive expires the day before the first Monday in May each fourth year, Wis. Stat. 59.17(1), whereas the term of office of the county board chairman expires the day before the third Monday following the first Tuesday in April each fourth year, Wis. Stat. s. 59.10(2)(b).

The statute which corresponds to s. 17.30, M.C.G.O., does not resolve this ambiguity because the term limitation in the statute is based upon a definite term of office which the legislature evidently assumes will have been established at the time of appointment and confirmation. "No prior appointee may serve longer than 6 months after the term for which he or she was appointed and confirmed expires, unless reappointed and reconfirmed. The term of each appointment is 4 years or less," Wis. Stat. s. 59.17(2)(bm)2. We resolve this ambiguity by measuring the term of appointment from the commencement of the term of office of the County Executive, as it is slightly later in time, therefore concluding the term of office for the appointee at a slightly later date.

Based on the foregoing, we conclude that if a department head is serving under an appointment which by its terms expires on a date certain, then that office holder can serve no longer than six months after the expiration of that term unless he or she is reappointed and reconfirmed. If the officer's appointment does not identify an exact termination date, he or she can serve no longer than six months after the expiration of the term of the county executive in office at the time of his or her appointment.

The terms of the deputy department heads listed in s. 17.30(3), M.C.G.O., expire six months after the confirmation or reconfirmation of their respective department heads at the beginning of each four-year county executive term cycle. That date may differ for each deputy department head, depending upon how long it takes the county executive to appoint or reappoint each of his department heads at the beginning of each term and how long it takes the county board to confirm those appointments.

3. How long can an 'Acting' Department or Division Head remain in an 'acting' status before the County Executive is required to make a permanent appointment and forward it to the County Board for confirmation?

Neither the statutes nor the ordinances address "acting" status for a department head. An individual is either appointed and confirmed as a department head or not. A deputy department head performs the duties of his department head in the event of absence or vacancy not because the deputy department head is appointed "acting" department head but rather because the defining feature of the deputy's job is that he performs the department head's duties when such an absence or vacancy occurs¹. It is, therefore, unsurprising that there is no published authority which discusses the subject of "acting" county department heads.

Ch. 17, M.C.G.O. appropriately treats a deputy department head's performance of the duties of his or her department head as a "temporary assignment to higher classification" (TAHC). Sec. 17.085(3), M.C.G.O., recognizes that the TAHC procedure is applicable to deputy and assistant department heads: "Employees on temporary assignment shall receive the higher rate of pay if the assignment includes all duties of the higher level position and such duties are performed for a least three (3) consecutive scheduled working days. However, a department head, deputy department head, associate department head or immediate assistant department head shall not be eligible to receive the higher rate of pay if the assignment lasts less than six weeks." [Emphasis Added].

The TAHC ordinance, s. 17.085, includes a limitation which should effectively limit the time that a deputy or assistant department head serves as "acting" department head to six months, unless longer service in that capacity is approved by the County Board: "(7) Employees in the unclassified service [which includes all positions relevant to this discussion] may receive a temporary assignment to another unclassified position for the duration of its vacancy, but no more than six months, unless an extension beyond six months is approved by the County Board."

We are aware of historical misuses of the "acting" department head status, most famously when, during a prior administration, the head of this office served as "acting" corporation counsel for several years. There is no statute, reported appellate decision or attorney general's opinion which addresses this issue. However, in our view, the six month maximum prescribed in s. 17.085(7) represents a reasonable outside limit for service by a department head in an unconfirmed "acting" status. Service for any longer period in an "acting" capacity without express approval of the county board violates the ordinance

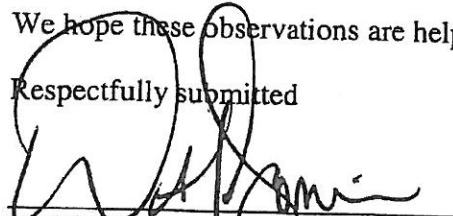
¹ See, e.g., Wis. Stats. ss. 59.23(1), 59.25(2), and 59.40(1), which describe the functions of the deputy clerk, deputy treasurer and chief deputy clerk of court.

Lee Holloway, County Board Chairman
August 24, 2004
Page 6

governing TAHC's and contravenes the public policy expressed in the statutory requirement that Milwaukee County department heads be appointed by the county executive and **confirmed by the county board.**

We hope these observations are helpful to you.

Respectfully submitted



WILLIAM J. DOMINA
Corporation Counsel