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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).

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,


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