



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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OAG—10—09

Ms. Malia T. Malone  
Polk County Assistant Corporation Counsel  
1005 West Main Street, Suite 100  
Balsam Lake, WI 54810

Dear Ms. Malone:

¶ 1. You have requested an opinion, on behalf of the Polk County Corporation Counsel, regarding the proper disposition of seized money that may constitute contraband when the state has not sought the forfeiture of such money through judicial proceedings.

**Question Presented and Brief Answer**

¶ 2. Specifically, you ask whether a law enforcement agency may retain seized money when a court has not formally found that the seized money constitutes contraband subject to forfeiture through a proceeding for the return of property under Wis. Stat. § 968.20.

¶ 3. In my opinion, I conclude that the law enforcement agency may not retain the seized money and must comply with the proper statutory procedure for the disposition of unclaimed money.

**Analysis**

¶ 4. Wisconsin Const. art. X, § 2 provides in relevant part that “all moneys and the clear proceeds of all property that may accrue to the state by forfeiture . . . shall be set apart as a separate fund to be called ‘the school fund,’ . . .” Wisconsin law authorizes the state to commence forfeiture proceedings against seized property, including money that constitutes the proceeds of criminal activity. *See* Wis. Stat. §§ 961.55 and 973.075. If the court finds that the property is contraband and orders its forfeiture, the agency must deposit the seized money or the proceeds from the sale of the forfeited property in the state school fund as provided by statute. Wis. Stat. §§ 961.55(5) and 973.075(4).

¶ 5. For a variety of reasons, the state may elect not to initiate a forfeiture action for seized money. Wisconsin Stat. § 968.20 permits a property owner to petition the circuit court for return of property, including money, that law enforcement agencies have seized, but has not been

the subject of a state-initiated forfeiture action. *See Jones v. State*, 226 Wis. 2d 565, 578, 594 N.W.2d 738 (1999). If the state demonstrates that the property is contraband, then the court may not order the property returned. *Id.* at 570. Though Wis. Stat. § 968.20 is not a forfeiture proceeding in the traditional sense, Wisconsin appellate courts recognize that a court's decision declining to return contraband property to its owner constitutes a "forfeiture" of that person's interest in it. *State v. Perez*, 2001 WI 79, ¶¶ 59-61, 244 Wis. 2d 582, 628 N.W.2d 820 (referring to § 968.20 as a forfeiture statute); *In re Return of Property in State v. Bergquist*, 2002 WI App 39, ¶ 8, 250 Wis. 2d 792, 641 N.W.2d 179 (denying return of weapon under § 968.20 held a "forfeiture"); and *State v. Kueny*, 2006 WI App 197, ¶ 7, 296 Wis. 2d 658, 724 N.W.2d 399 ("The forfeiture order was proper under Wis. Stat. § 968.20(1m)(b) if Kueny committed a crime involving the use of the seized weapons."). Requiring law enforcement agencies to transfer contraband money to the school fund is consistent with the purpose of Wis. Const. art. X, § 2 and the framers' intention to "throw everything possible into the school fund." *Estate of Payne*, 208 Wis. 142, 145, 242 N.W. 553 (1932); *accord* 61 Op. Att'y Gen. 208, 209 (1972).

¶ 6. Your question focuses on what happens to seized money when the circuit court has not had occasion to declare it contraband through an asset forfeiture proceeding or through a motion for the return of seized property. Because the money's potential status as contraband does not by itself vest its title in the school fund, the law enforcement agency does not have authority to transfer it to the school fund. Indeed, Wis. Const. art. X, § 2 specifically contemplates that money accrues to the school fund through "forfeiture."

¶ 7. At common law, forfeiture of a person's interest in property to the government contemplated judicial action. As such, a forfeiture cannot occur without a judicial determination that the property constitutes contraband and is subject to forfeiture. *See United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 125 (1993) (plurality) quoting *United States v. Grundy*, 3 Cranch 337, 350-51 (1806) (" 'It has been proved, that in all forfeitures accruing at common law, nothing vests in the government until some legal step shall be taken for the legal assertion of its right, . . . ' "). To be sure, a legislature could adopt a statutory scheme that permits an agency under limited circumstances to administratively forfeit contraband without a judicial action. *See Dusenbery v. United States*, 534 U.S. 161 (2002). However, the Wisconsin Legislature has promulgated a scheme that expressly contemplates a judicial declaration that property constitutes contraband and is subject to forfeiture. *See* Wis. Stat. §§ 961.55-.555; 973.075-.076; *see also Jones v. State*, 226 Wis. 2d 565, 578, 594 N.W.2d 738 (1999). To permit a law enforcement agency to unilaterally declare money or other property contraband and forfeit it would circumvent the legislative preference for judicial involvement in forfeiture proceedings.

¶ 8. Absent a judicial finding that the money constitutes contraband and is subject to forfeiture, a law enforcement agency should dispose of the money as unclaimed or abandoned property. Wisconsin Stat. § 59.66(2) proscribes the procedure for disposing of unclaimed property in possession of county and municipal officials, including law enforcement officials.

Wisconsin Stat. ch. 177 governs disposal of unclaimed property in possession of a state agency. If no one claims the money, then a county or municipal law enforcement agency may not retain the money for its own use. Rather, it must transfer the money to the county treasurer pursuant to § 59.66(2). If at any time during the process for disposing of unclaimed money a person asserts an interest in it, the law enforcement agency may decline to return the money on the grounds that it may constitute contraband. Should the agency decline to return it, the person could seek its return through a proceeding under § 968.20. At that time, if the agency demonstrates its status as contraband and the court orders its forfeiture, the agency should then transfer it to the school fund.

### **Conclusion**

¶ 9. I conclude that a law enforcement agency may not retain unclaimed contraband money for its own use. In the absence of an asset forfeiture proceeding initiated by the state or a judicial determination that the money constitutes contraband, a local law enforcement agency should dispose of the money as unclaimed property pursuant to Wis. Stat. 59.66(2).

Sincerely,

J.B. Van Hollen  
Attorney General

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