



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

Steven P. Means
Executive Assistant

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

August 14, 2013

OAG—06—13

Mr. Mark A. Grady
Acting Corporation Counsel
Milwaukee County
901 North Ninth Street, Suite 303
Milwaukee, WI 53233

Dear Mr. Grady:

¶ 1. Your predecessor asked for an opinion relating to the authority of a county board to (1) limit the lobbying activities of the county executive, (2) require county department heads appointed and supervised by the county executive to report the steps that have been taken in carrying out a directive to the county board, and (3) demote, suspend, or discharge department heads and employees.

¶ 2. I conclude that a county board may require a county executive to clarify that he or she is not representing the position of the county when engaging in lobbying activities on behalf of a position that is not the position adopted by the county. A county board may require county department heads to submit reports to the county board, but it cannot require county department heads appointed and supervised by the county executive to report to the board in a supervisory sense. A county board is not authorized to demote, suspend, or discharge a department head or employee not appointed by the board unless that power is specifically conferred by statute.

¶ 3. The first question is whether a county board is authorized by state law to pass ordinances limiting the lobbying authority of the county executive. This is a question of state statutory, not constitutional, law. When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes. *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006).

¶ 4. The Milwaukee County Board recently created Milwaukee County General Ordinance § 1.25(4)-(5), which reads in pertinent part as follows:

(4) *Political Activity Prohibited.* The heads of county departments, bureaus, boards and commissions or any other member of their respective departments, bureaus, boards and commissions, in their official capacities, are prohibited from recommending any changes or amendments of the laws of the State of

Wisconsin to the legislature of the State of Wisconsin, or to any committee of the legislature, or to any member of the legislature . . . without first submitting to the county board any changes or amendments of the laws . . . and obtaining the approval of and a directive from said county board. In instances where matters are before the legislature at times when the county board is not in session, or when a meeting of the county board cannot be practicably convened, the directive of the committee on intergovernmental relations shall serve as the policy directive. . . .

- (5) *Other Political Activity.* Nothing in section 4 above, or the remainder of this section shall be construed as preventing any elected official from engaging in lobbying activities as an individual, or in their official capacity, if they make it clear that they are not representing the position of Milwaukee County. Further, no privately funded lobbying activities shall be engaged by any official elected or appointed, on behalf of any policy position that is not the adopted or stated position of Milwaukee County Government.

Section 1.25(4) applies to the heads of county departments, bureaus, boards, and commissions, and any of their members, in their official capacities. The ordinance does not apply to the county executive because he or she is not a county department head or a member of a county board or commission.

¶ 5. Section 1.25(5) clarifies that nothing in § 1.25(4) or in the remainder of § 1.25(5) prevents elected officials from engaging in lobbying activities, either as individuals or in their official capacities, if they make clear that they are not representing the position of the county. The provision also states that “no privately funded lobbying activities shall be engaged by any official elected or appointed, on behalf of any policy position that is not the adopted or stated position of Milwaukee County Government,” but that limitation also is inapplicable if the officials “make it clear that they are not representing the position of Milwaukee County.” Consequently, with respect to the county executive, § 1.25(5) prohibits only privately-funded lobbying activities on behalf of a policy position that is not “the adopted or stated position of Milwaukee County Government,” and then only if the county executive fails to make clear that he or she is not representing the position of the county.

¶ 6. A county board has authority to enact ordinances and resolutions, *see* Wis. Stat. § 59.02(1)-(2), and, except where specifically provided elsewhere by the state constitution or by statute, the county board “is vested with all powers of a local, legislative and administrative character,” *see* Wis. Stat. § 59.03(2)(a). The county board’s general organizational and administrative power is subject to legislative grants of that power to a county executive or to a person supervised by the county executive. Wis. Stat. § 59.51(1).

¶ 7. A county executive is the chief executive officer of the county. Wis. Stat. § 59.17(2). The county executive's primary duty is to "[c]oordinate and direct all administrative and management functions of the county government not otherwise vested by law in other elected officers." Wis. Stat. § 59.17(2)(a). In a county like Milwaukee County, which has an elected county executive, "the role of the county board is primarily policymaking and legislative, and the county executive exercises substantial direct and indirect control over personnel performing administrative and management functions for the various county departments and offices. 68 Op. Att'y Gen. 92, 95 (1979) (quoting 63 Op. Att'y Gen. 220, 227, 228 (1974)).

¶ 8. Lobbying activity on behalf of the county government is a policymaking function, not an administrative or management function. It is thus properly a role of the county board. A county executive has authority to make policy for a county only to the extent that such authority is conferred by statute or by the state constitution. Since the date this opinion was requested, 2013 Wisconsin Act 14 created Wis. Stat. § 59.53(24), which provides:

GOVERNMENT RELATIONS. In any county with a population of 750,000 or more, if the county has an office of intergovernmental relations or a department or subunit of a department that provides lobbying services for the county, that office, department, or subunit shall employ one individual who is responsible for representing the interests of, and reports to, the county executive and one individual who is responsible for representing the interests of, and reports to, the county board.

2013 Wis. Act 41, § 21E. This provision suggests that the Legislature has conferred some authority upon a county executive to lobby on behalf of the county executive's policy preferences, even if those preferences do not reflect the policy choices made by the county board.

¶ 9. Milwaukee County General Ordinance § 1.25(5) does not contravene the new statute. It applies only to privately-funded lobbying activities of the county executive. Such activity is not governed by Wis. Stat. § 59.53(24) because that statute involves publicly-funded lobbying. In my opinion, a county board lawfully may require that, if a county executive engages in privately-funded activities on behalf of a position that is not the position of the county, he or she must make that clear.

¶ 10. Your predecessor next asked whether a county board may require department heads to "report to" the county board. Milwaukee County General Ordinance § 1.25(3) requires county department heads to report both to the county board and to the county executive, "from time to time . . . the steps that have been taken in carrying out any directive[.]" Section 1.25(3) also requires county department heads to submit copies of their final report on the action taken to the county executive or to the appropriate standing committee.

¶ 11. The term “report” is not defined in the ordinance. “Report” has numerous meanings, including: (1) to be supervised by someone or an office; and (2) to make a report of particular facts. The ordinance uses “report” in the second sense. It provides that department heads shall report “the steps that have been taken in carrying out any directive[.]” “Steps” is the direct object of “report” and conveys that the department head shall report specific information, consistent with making a report of particular facts.

¶ 12. A county board lawfully may require county department heads to submit periodic reports as to steps taken in carrying out any directive both to the county board and to the county executive. The requirement is consistent with Wis. Stat. § 59.794(3)(b), which provides that “[a] board may require, as necessary, the attendance of any county employee or officer at a board meeting to provide information and answer questions.” The ordinance does not require county department heads to report to the county board in a supervisory sense, which would usurp the county executive’s administrative and managerial supervision of county department heads under Wis. Stat. § 59.17(2)(b)1. Similarly, requiring copies of final reports of county department heads to be submitted to the county executive or the appropriate standing committee does not usurp the administrative and managerial supervision of the county executive.

¶ 13. Finally, your predecessor asked whether a county board may penalize county department heads and employees through demotion, suspension, or discharge. Milwaukee County General Ordinance § 1.25(6) provides that willful violation of the county code of ordinances is considered a cause for demotion, suspension, or discharge of a county department head or employee. The ordinance does not purport to empower the county board to demote, suspend, or discharge a county department head or employee.

¶ 14. Only county officers appointed by the county board may be removed by the county board. Wis. Stat. § 17.10(2). Except where the statutes provide for the appointment of a department head to be made by a board or commission, or by other elected officers, county department heads are appointed by the county executive. Wis. Stat. § 59.17(2)(b)1. County employees who are not subject to a civil service ordinance may be disciplined only by the appointing authority unless otherwise stated in a statute, ordinance, or contractual provision. Wis. Stat. § 17.10(6). State law would preempt an ordinance that purported to authorize a county board to demote, suspend, or discharge employees that it had not appointed.

¶ 15. I conclude that a county board is authorized by state law to require a county executive to clarify that he or she is not representing the position of the county if he or she engages in privately-funded lobbying activities on behalf of a position that is not the position of the county. A county board may require county department heads to submit reports to the county board, but it cannot require them to report to the county board in a supervisory sense. Finally, a county ordinance that purported to authorize a county board to demote, suspend, or discharge

Mr. Mark A. Grady
Page 5

county department heads and employees not appointed by the county board would be preempted by state law unless that power were specifically conferred by statute.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBVH:DCR:cla