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OAG – 1 – 07

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Dear Mr. Bretl:

You ask whether the chairperson of a county board may be removed from that position only for cause by a two-thirds vote of the board under Wis. Stat. § 17.10 (2005-06), or whether the chairperson may be removed at the will of a simple majority of the board under Wis. Stat. § 59.12 (2005-06). I have concluded that the less demanding procedures of Wis. Stat. § 59.12 apply to the removal of the chairperson from that position on the county board.

Wisconsin Stat. § 17.10(2) provides that “[c]ounty officers appointed by the county board may be removed by the county board for cause. All removals may be made by an affirmative vote of two-thirds of the supervisors entitled to seats on the county board.”

This section does not apply to the removal of the chairperson of a county board for two reasons. First, the chairperson of a county board is not a county officer by virtue of that position. Second, the chairperson of a county board is not appointed by the board.

Wisconsin Stat. § 17.10(2) applies only to persons who are removed from a position that makes them a county officer or, arguably in some cases, a county employee.

All members of a county board are county officers. Wis. Stat. § 59.10(3)(d) (2005-06). As a member of the county board, Wis. Stat. § 59.12(1), the chairperson of the board is a county officer by virtue of his or her membership on the board.

However, ending the tenure of a member of the county board as chair of the board does not oust that member from the board but only from a particular position on the board. The member loses the chair but not their seat on the board. So Wis. Stat. § 17.10(2) would apply to the removal of the chairperson of a county board only if the chairperson was a county officer, separately and distinctly from being a member of the board, solely by virtue of being the chairperson of the board.

The Legislature has expressly identified the principal officers of a county, in addition to members of the county board, in Wis. Stat. ch. 59. However, the chairperson of a county board

is not identified anywhere in this chapter as a county officer separate and distinct from being a member of the board. Nor is there any other provision regarding county offices which suggests that the chairperson of a county board is county officer separate and distinct from being a member of the board.

The Legislature's failure to include the chairperson of the county board among those identified as county officers is itself strong evidence that the chairperson is not a county officer in his or her own right under the principle that the express inclusion of some in the statutes implies the exclusion of all others. *See generally Northwest Airlines, Inc. v. DOR*, 2006 WI 88, ¶ 50, 293 Wis. 2d 202, 717 N.W.2d 280. This inference is confirmed by the judicially-established criteria for determining who is a public officer.

Whether a person who holds a government position is a public officer, including a county officer, depends primarily on the nature of the power instilled in the position by legislative delegation. *Wis. Law Enforcement Stds. Bd. v. Vill. of Lyndon Station*, 98 Wis. 2d 229, 240-41, 295 N.W.2d 818 (Ct. App. 1980), *aff'd*, 101 Wis. 2d 472, 305 N.W.2d 89 (1981); *Burton v. State Appeal Bd.*, 38 Wis. 2d 294, 300, 303, 156 N.W.2d 386 (1968). Persons cannot be public officers, however chosen, unless they have been given authority to exercise some of the sovereign power of government. *Law Enforcement Stds. Bd.*, 98 Wis. 2d at 240; *Burton*, 38 Wis. 2d at 300-01.

The chairperson of a county board has not been delegated any sovereign power above and beyond the power given to other members of the board and the board as a whole.

The chairperson has been delegated power to administer oaths to persons required to be sworn concerning matters before the board, to countersign all ordinances enacted by the board and to preside at meetings of the board. Wis. Stat. § 59.12(1). If directed by an ordinance enacted by the board, the chairperson may also countersign county orders, transact board business with local and county officers, expedite measures resolved upon by the board or take care that all laws pertaining to county government are enforced. *Id.*

These are mostly administrative and ministerial powers directed at facilitating decisions made by the board in the exercise of the board's powers of government. Moreover, the powers in addition to those given by Wis. Stat. § 59.12(1) are not delegated to the chairperson by the Legislature but by the county board.

Furthermore, public officers must be able to exercise their powers independently, without the control of a superior officer or body. *Law Enforcement Stds. Bd.*, 98 Wis. 2d at 240; *Burton*, 38 Wis. 2d at 300.

But the powers of a county as a body corporate can only be exercised by the county board, or pursuant to a resolution adopted or ordinance enacted by the board. Wis. Stat.

§ 59.02(1) (2005-06). So whatever power the chairperson of a county board exercises is subject to the ultimate control of the board.

Finally, a public officer must hold office by virtue of a commission or other written authority, must take an oath of office and give an official bond. *Law Enforcement Stds. Bd.*, 98 Wis. 2d at 240; *Burton*, 38 Wis. 2d at 300.

The chairperson of a county board does not hold office by virtue of any written authority but is simply elected by the members of the board. Wis. Stat. § 59.12(1). And there is no requirement that the chairperson take an oath or give a bond to hold that position, apart from the oath required as a member of the board. *See* Wis. Stat. § 59.21(1) (2005-06).

Therefore, the chairperson of a county board is not a county officer by virtue of holding the position of chair.

The chairperson of a county board is obviously not a county employee either.

An employee is someone who works for someone else, *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 604 (3d ed. 1996); *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* 743 (unabridged ed. 1986), something a county board chair does not do.

Moreover, statutory definitions of “public employee” indicate that a public employee is someone who is not a public officer. Wis. Stat. §§ 19.32(1bg) and 939.22(30) (2005-06). And while the chairperson of a county board is not a public officer by virtue of being the chairperson of the board, he or she is a public officer by virtue of being a member of the board.

So Wis. Stat. § 17.10 does not apply to the removal of the chairperson of a county board because the chairperson is not a county officer or employee, apart from being a member of the board, separately by virtue of holding the position of chair of the board.

Furthermore, Wis. Stat. § 17.10 does not apply to the removal of the chairperson of a county board because the chairperson is not appointed, but is elected, by the board.

Wisconsin Stat. § 59.12(1) provides that the county board, “at the first meeting after each regular election at which members are elected for full terms, shall elect a member chairperson.”

The literal language of this statute is not necessarily controlling because in some circumstances “elect” must be construed to mean “appoint.” 63 Op. Att’y Gen. 286, 288 (1974); 61 Op. Att’y Gen. 116, 118-19 (1972). The meaning which “elect” is intended to convey in a statute must be determined by the circumstances in which it is used. 61 Op. Att’y Gen. at 118. *See also Orion Flight Services v. Basler Flight Service*, 2006 WI 51, ¶ 16, 290 Wis. 2d 421,

714 N.W.2d 130 (meaning of provision must be determined by considering words in context in which they are used including related statutes).

However, the circumstances in which the word “elect” is used in Wis. Stat. § 59.12(1) demonstrate that it is used in the literal sense of elect instead of appoint.

This section uses variants of the word “elect” three times in the same sentence. It states that after each “election” in which members of the county board are “elected” the board members shall “elect” a chairperson. Wis. Stat. § 59.12(1).

The same word appearing several times in the same statute should be given the same meaning each time it appears. *State v. Charles*, 180 Wis. 2d 155, 159-60, 509 N.W.2d 85 (Ct. App. 1993); *In Interest of R.H.L.*, 159 Wis. 2d 653, 659, 464 N.W.2d 848 (Ct. App. 1990). And since there is no question that “elect” is used in the sense of elect instead of appoint the first two times it is used, since it refers to the process by which the members of a county board are chosen, it follows that “elect” is used in the sense of elect instead of appoint the third time it is used in rapid succession.

Moreover, after just providing that a county board should “elect” one of its members as chairperson, the Legislature went on to provide that a county board could “appoint” some of its members to committees. Wis. Stat. § 59.13(1) (2005-06).

The use of different words denotes a different intent. *R.H.L.*, 159 Wis. 2d at 660. So the use of “elect” in one statute and “appoint” in the following statute dealing with a related subject further evidences a legislative intent to use “elect” in the commonly understood sense of elect instead of the artificially understood sense of appoint in Wis. Stat. § 59.12(1).

My predecessor suggested in 63 Op. Att’y Gen. 286 that “elect” should be construed to mean “appoint” in a statute authorizing a county board to select a county officer to avoid a possible conflict with Wis. Const. art. XIII, § 9, which states that “[a]ll county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct.”

However, there is no potential constitutional problem in the present situation since, as discussed above, the chairperson of a county board is not a county officer by virtue of being the chairperson of the board. Therefore, there is no need to give the word “elect” a meaning different from the meaning plainly intended by the Legislature only to avoid an arguable invalidation of the statute.

Further, a seventy-six year old opinion of the Attorney General should not be misunderstood to state that the chairperson of a county board is an appointed officer. That

opinion merely stated that the statute which authorized a county board to fill vacancies in appointive county offices also authorized a county board to fill a vacancy in the office of chairperson of the board. 20 Op. Att’y Gen. 85, 89 (1931). The opinion recognized that the chairperson of a county board is elected, and acknowledged that a vacant chair position was to be filled by election rather than appointment. 20 Op. Att’y Gen. at 86-87, 90.

The fact that the chairperson of a county board is elected does not mean that the provisions for removal of an elective county officer in Wis. Stat. § 17.09(1) (2005-06) apply when the chairperson is removed. An elective officer is one who holds an elective office, Wis. Stat. § 13.62(6) (2005-06), which is an office that is filled by the vote of the people. Wis. Stat. § 19.42(5m) (2005-06). Since the chairperson of a county board is elected by the board rather than the people, the chairperson is not an elective officer.

The position of chairperson of a county board is distinctively different from the positions of town chairperson and village president, both of whom are directly elected to those specific positions by vote of the people. Wis. Stat. §§ 60.30(1)(a)1. and 61.19 (2005-06).

Therefore, neither of the provisions that permit removal of a county officer only by a supermajority vote for cause apply to the removal of the chairperson of a county board.

Instead, the removal of the chairperson of a county board is governed by Wis. Stat. § 59.12(1), which provides that the chairperson serves in that position “until the board elects a successor.”

There is nothing in this statute that requires the county board to have any particular reason for removing its chairperson. So applying the rule that the plain language of a statute is controlling, *State ex rel. Kalal v. Cir. Ct.*, 2004 WI 58, ¶¶ 44-51, 271 Wis. 2d 633, 681 N.W.2d 110, an incumbent chairperson may be removed at will by the county board simply by voting to elect someone else to that position.

Unless otherwise provided, a county board may determine all questions by the vote of a majority of the supervisors who are present when the vote is taken, as long as those present constitute a quorum. Wis. Stat. § 59.02(3) (2003-04). Since there is no other applicable provision, the board may replace its chairperson by a simple majority vote.

Finally, Wis. Stat. § 59.12(1) contains no limitation on the time when the board may choose to terminate the tenure of the incumbent chairperson by electing a successor. Indeed, the history of this provision shows that the Legislature intended to permit a county board to change chairpersons whenever it chooses to do so.

An early statute dealing with the replacement of a chairperson read much as the present statute does, providing that the chairperson should “hold this office until his successor is

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elected.” Wis. Stat. ch. 13, § 43 (1871). This statute was changed to provide that a successor to a chairperson elected at the beginning of a term of the county board could be replaced only at the beginning of the next term. Wis. Stat. § 667 (1878). But this limitation has long since been repealed, leaving no restriction on the replacement of a chairperson at any time during the term.

The omission from a later version of a statute of a provision which was contained in an earlier version is indicative of a legislative intent to alter the statute so that the omitted provision is no longer part of the law. See *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *Verdoljak v. Mosinee Paper Corp.*, 200 Wis. 2d 624, 633, 547 N.W.2d 602 (1996); *R.W.S. v. State*, 162 Wis. 2d 862, 879, 471 N.W.2d 16 (1991). This principle gains strength where, as here, the Legislature adds a provision to a statute, then later deletes the added provision, indicating that on second thought they believed they made a mistake by adding the provision to the law.

Thus, a county board may remove its chairperson at will by a simple majority vote at any time.

There may be some who believe that as a matter of policy it should be more difficult to replace the chairperson of a county board, that the chairperson should be subject to removal only for cause by a two-thirds vote of the entire board. But it is the province of the Legislature, not the Attorney General, to determine the rules for removing the chairperson. The Attorney General can only discern what rule the Legislature has determined to apply.

And in this respect it should be noted that the Legislature has simply applied to county boards the same rule it has applied to itself. Officers elected by either House of the Legislature may be removed by the House that elected them “at pleasure.” Wis. Stat. § 17.07(1) (2005-06).

Sincerely,

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