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Brown County

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February 26, 2010

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Via Fax: 432-4158

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In re: Village of Howard Ethics Referral

Dear Attorney Duffy:

This referral was originally received by our office in July 2009. Our legal intern was assigned to review the matter and returned a memo finding that there was no violation of statute warranting legal action by our office. I have included said memo. Because of the unique nature of the facts, I wanted to further research the situation before issuing a written response. I have now finally fully reviewed all the materials associated with your inquiry concerning a potential public official's ethic violations unauthorized by the Village Board and the Village of Howard at the June 22, 2009 meeting. After reviewing the material forwarded to our office, contacting the Attorney General's office and the State Ethics Board, I concur that our office should take no action under these circumstances.

BACKGROUND

The material forwarded to our office included a copy of a letter to the editor which appeared in the June 5, 2009 edition of the Ashwaubenon Press. In said letter, Trustee Kelly Crouch attempted to "set the record straight" concerning some apparent rumors. One topic involved Crouch's purchase of NFC play-off game tickets from Brett Backus, Vice-President of Woodman's Food Market, Inc., and a real estate developer in the Howard area. The other topic involved Backus' purchasing supplies and shipping them to Trustee Crouch's son's air crew in Iraq.

According to Attorney Duffy's letter, he spoke with Crouch on two separate occasions concerning each particular issue. Each time Duffy warned Crouch of a potential perception of conflict of interest and advised him to abstain from voting on items involving Woodman's.

It is undisputed that Crouch voted on three items which involved Woodman's. This was pointed out in Attorney Duffy's memorandum of June 18, 2009 and from a review of the Village Meeting Minutes. These votes include:

- March 24, 2008 - item 10B (Schroeder/Woodman's CUPs)
- May 28, 2008 - consent agenda regarding Woodman's Class A Beer and Liquor license
- *March 23, 2009 - Village Board Meeting consent agenda.

*this vote taken after the gift for his son in Iraq.

The Village code of Conduct in Howard is explicitly set forth in Section 1.11: Receipt of Gifts and Gratuities prohibited:

(1) Sec. 1.11 - Receipt of gifts and gratuities prohibited.

(a) No employee or official of the village shall receive or offer to receive, either directly or indirectly, any gift, gratuity or anything of value in excess of \$25.00 which he is not authorized to receive from any person, if such person:

(1) Has or is seeking to obtain contractual or other business or financial relationship with the village board;

(2) Conducts operations or activities which are regulated by the village board; or

(3) Has interests which may be substantially affected by the village board.

(b) The receipt of any gift, gratuity or anything of value, as denoted in subsection (a) of this section, is contrary to the public policy of the village

FACTS:

Crouch admitted to purchasing the Packers tickets and later provided to our office copies of the tickets purchased and copies of the cancelled checks which indicated that the amount paid was face value.

Crouch's explanation of the "food basket" was that his wife was at Woodman's Food Store inquiring about purchasing jerky and other food for her son and his crew serving in Iraq. She was told to contact someone in-house and later Bakus provided roughly \$250 worth of supplies which went to a "C130 crew" and a "C17 crew" in Iraq in August 2008. I reviewed the receipts of these transactions.

It is undisputed that there is a relationship between Crouch and Backus which goes back many years. Correspondence from both men acknowledge their long standing friendship prior to Crouch becoming a Trustee on the Village Board of Howard.

ANALYSIS:

In evaluating whether a situation necessitates action from the District Attorney's Office, we are cognizant of the purposes for the ethics and conflict of interest statutes including 19.59 and 946.13 and their corresponding municipal analogs. The laws exist to protect the integrity of the legislative process. They exist to ensure public confidence that decisions are not made because of "backroom deals" or because of personal gain rather than public good. For example, 23 OP Atty Gen 454 explains that the 946.13 statute was enacted "to protect the public from loss by unscrupulous officers who would seek to profit from their office by approving contracts, not on their merits, in a manner best suited for themselves".

Every case is determined by its facts. We analyze the facts and determine if the conduct shows an obvious intent to either skirt around the objectives of the law or shows an obvious connection that "but for" the relationship the public official's action would be different. As you have pointed out, the facts surrounding these matters are quite unique.

1. It is not a violation to purchase football tickets at face value. Generally the common meaning and case law dictate that paying the stated price of a ticket is not a gift. For guidance we look to the language in 19.59(1)(a) which states that "no local public official may use his...public position to obtain financial gain or anything of financial value for the private benefit for himself or his immediate family...a violation includes the acceptance of free or discounted admissions to a professional ... football game by a member of the district board of a local professional football

stadium district ...". While the statute is talking about a person who is a member of the football stadium district, the language of "free or discounted admissions" is illustrative of whether there is a problem. The tickets were not a gift or a gratuity. While the tickets could have been sold at a higher price, the State looks at the face value and notes that the amount was paid in full out of Trustee Crouch's own pocket. Had Crouch paid less than face value, the situation would be different.

2. The gift of roughly \$250.00 worth of supplies to the Aircrew in Iraq which came from developer Backus' business is a more difficult question. Even though Crouch did not benefit directly as the supplies were sent to Crouch's son and crewmates in Iraq, the code talks of a gift either directly or indirectly benefiting the official.

There is a legitimate question as to whether the Trustee received an indirect pecuniary benefit. Without the benefit of the Backus donation, it could be argued that the Crouchs would have otherwise incurred a bill of roughly \$250.00 to pay for the supplies and therefore the gift they received saved them a tangible amount of money. However, there also needs to also be the showing that the donee is providing a gift while "seeking to obtain contractual or other business or financial relationship with the Village."

We concur with the Attorney General's office that absent a quid pro quo it is difficult to claim a violation occurred when the food package was sent to Trustee Crouch's son. It does not appear that this gift was solicited by the trustee or his wife.

We also recognize what had been voiced at the meeting in that responsibility of public officials often brings sacrifices. A public officer does not have to stop being a friend or end relationships, but does have to be vigilant that his or her actions on the Board do not give rise to a possible perception of favoritism. Wis. Stat. 19.59(1)(b) states the objective standard:

"No person may offer or give to a local public official, directly or indirectly, and no local public official may solicit or accept from any person, directly or indirectly, anything of value if it could **reasonably be expected** to influence the local public official's vote, official actions or judgment, or could **reasonably be considered** as a reward for any official action or inaction on the part of the local public official."

In our opinion, it is more reasonable to view the offer to send roughly \$250.00 worth of beef jerky and other food as a measure of goodwill based upon family friendship. We are talking about a food basket to a member of our armed services. We do not believe the intent of the statute was violated. The enclosed documents from the Government Accountability (Ethics) Board indicate that a local public official may accept and retain items offered for a reason unrelated to the recipient's holding a public position (and when could not reasonably be expected to influence his vote.)

Most often one avoids any perception of favoritism by abstaining from debate and the voting process. We have seen incidents where public officials may have a spouse who is employed and the spouse's employment contract is up for renewal by a Board. There would be an indirect pecuniary interest in the contract to the Board member, and therefore to protect oneself, the Board member abstains from the contractual vote.

Your advice was most appropriate in recommending that Trustee Crouch abstained from voting on matters involving Woodman's. It would have been better practice for Trustee Crouch not to have voted on the March 23, 2009 item concerning Woodman's. He has acknowledged this as a mistake due to oversight. We have no indication there have been any other such votes since being advised to refrain from doing so by Attorney Duffy in August 2009. One other factor to be examined is the impact of the official's vote. The Woodman's item on which Crouch voted was a consent agenda item approved unanimously. Under the totality of the circumstances and ethics opinion 2007 Wis Eth Bd 9 which was forwarded to our office by the Ethic Board, we do not believe any action is appropriate.

In listening to the Board members comments at the June 22, 2009 hearing, we realize there was a difference of opinion as to whether this matter needed to have been forwarded for review. Village and Town Boards should be concerned with ethical practices of its members. It should be noted that legal counsel for the ethics board indicated that these are the types of situations that village board attorneys and members can call the Ethics Board for assistance.

In summary, our opinion is that there is no violation where the trustee paid face value for Packer tickets. There is no violation in the sending of a food basket to a Trustee's son in Iraq without an agreement to vote on the donor's behalf. When such a gift is made that may arguably create an indirect pecuniary benefit, the appropriate response is to abstain from voting on any matter that involves the donor. In this matter before us, the nature of the gift and the nature of the isolated subsequent vote do not create a situation necessitating any action from our office.

When these situations arise, it is prudent for public officials to always be careful, be reasonable and be honest. If you have any further comments or questions, please contact me.

Yours Very Truly,

A handwritten signature in black ink that reads "John P. Zakowski". The signature is written in a cursive style with a large, circular initial "J".

John P. Zakowski
District Attorney

JPZ/sgt

Memo

To: District Attorney John P. Zakowski
From: Katie Sarkela
Date: July 9, 2009
Re: Village Trustee Kelly Crouch Ethics Violations

Trustee Kelly Crouch is alleged to have received improper items from Bret Backus, Vice President of Woodman's Food Market, Inc. Crouch bought two tickets to the NFC Championship game in 2008, which he bought for the price listed on the ticket. Bret Backus also contributed to a care package being sent to his son's air crew in Afghanistan.

The ethics code for local government officials prohibits either the official or their immediate family from obtaining financial gain or something of substantial value. The penalty, as outlined in 19.59(7), is a fine of up to \$1,000 for each violation. Also, according to 19.59(8), the District Attorney only has twenty (20) days from the date of receipt of the verified complaint to take action on said complaint. After the twenty day time limit, the person making the complaint has the ability to petition the Attorney General to take action per 19.59(8)(d).

In my opinion, Crouch did not violate any ethical rules by purchasing the football tickets for the NFC game at face value. The other issue of his son benefiting from the contributions made to his care package is more problematic. I feel that since his son did not benefit monetarily, and the contribution was shared among the entire aircrew, Crouch should not be penalized for this either.

reviewed 8/7/09

Zakowski, John

From: Latorraca, Donald V. [latorracadv@DOJ.STATE.WI.US]
Sent: Tuesday, February 23, 2010 9:47 PM
To: Zakowski, John
Subject: ethics question

John,

Sorry I didn't get back to you sooner. I conferred with Roy Korte.

With respect to the Packer ticket situation, if he purchased at face value, that probably is not a violation. In terms of the jerky for the troops, that is an interesting situation. Roy thought that unless one could demonstrate a quid pro quo...trustee tells the developer send something to the troops, it is tough to argue a violation occurred. If the developer did this on his own initiative without the father's involvement, that would be a tough violation to prove.

I'm out Wednesday but in Thursday if you have questions.

Don

2/26/2010

Wisconsin Government Accountability Board

For county, city, village, town, school district and other local officials

Restraints on local officials' receipt of food, drink, favors, services, etc.

STATUTORY RESTRAINTS

Except as noted on the other side of the page, **local public officials should not accept:**

1. ITEMS OR SERVICES OFFERED BECAUSE OF PUBLIC POSITION.

Any item or service, including food, drink, and travel, of more than nominal value offered because of the person's holding a public office [§ 19.59(1)(a)];

2. ITEMS THAT COULD INFLUENCE JUDGMENT.

Any item or service that could reasonably be expected to influence an official's vote, official actions or judgment [§19.59(1)(b)];

3. REWARDS FOR OFFICIAL ACTION.

Any item or service that could reasonably be considered a reward for any official action or inaction [§19.59(1)(b)]; and

4. TRANSPORTATION OR TRAVELING ACCOMMODATIONS.

Discounted transportation, traveling accommodations, or communication services for which the supplier would usually charge [§946.11; Art. 13, §11].

To analyze a situation in which you are offered items or services, ask yourself these questions:

1. With respect to the item or service offered:
 - a. Is it being offered because of my public position?
 - b. Is it of more than nominal or insignificant value?
 - c. Is it primarily for my personal benefit rather than for the benefit of my local unit of government?

If you answer **"yes"** to all three questions, you may not accept the item or service.

2. Would it be reasonable for someone to believe that the item or service is likely to influence my judgment or actions or that it is a reward for past action?

If you answer **"yes,"** you may not accept the item or service.

If you have any doubts about a situation, seek advice from your local governmental attorney.

See other side 

2007 Wis Eth Bd 9
LOCAL OFFICIALS -- DISQUALIFICATION

The Ethics Board advises:

- (1) If a matter before a town board, is reasonably likely to have more than a trivial, insignificant, or insubstantial financial effect on a supervisor, then the supervisor SHOULD ABSTAIN from discussion, deliberation, and votes on that matter.
- (2) If a matter before a town board will have no effect or only a trivial, insignificant, or insubstantial financial effect on a supervisor, then the supervisor SHOULD PARTICIPATE; and
- (3) If reasonable people cannot reasonably foresee the effect of a board of supervisors' action on a supervisor's financial interests or disagree about whether the effect will be positive or negative or will be substantial or insignificant then the supervisor's financial interest is too speculative to deny the supervisor's participation in related discussion, deliberation, and votes, and the supervisor SHOULD PARTICIPATE UNLESS, in the supervisor's judgment, to do so would undermine public confidence in the decision or in government.

Facts

¶1 We base this opinion upon these understandings:

- a. You are a town's attorney.
- b. A supervisor on the town board owns and resides on a parcel of land adjacent to a town-owned park.
- d. The board of supervisors may have, in future meetings, occasions to consider improvements or alterations to the park.

Question

¶2 The Ethics Board understands your question to be:

Does the supervisor's ownership of property proximate to the town park limit the supervisor's involvement in the board of supervisors' future discussions, deliberations, and votes concerning improvements to and alterations of the park?

Discussion

¶3 Reduced to its elements, section 19.59(1) (a), Wisconsin Statutes, provides:

No local public official
May use his or her public position or office

To obtain financial gain or anything of substantial value
For the private benefit of himself or herself or his or her immediate
family, or for an organization with which he or she is associated.¹

¶4 Reduced to its elements, section 19.59(1) (c) 1. and 2., *Wisconsin Statutes*, provides:

Except for taking official action concerning the lawful payment of salaries or employee benefits or reimbursement of actual and necessary expenses or taking official action with respect to a proposal to modify a municipal ordinance,

No local public official may:

Take any official action

Substantially affecting a matter

In which the official, a member of his or her immediate family, or an organization with which the official is associated or has a substantial financial interest.

AND

No local public official

May use his or her office or position

In a way that produces or assists in the production of a substantial benefit

For the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.²

¶5 The supervisor is a local public official.³ This opinion addresses those instances in which the supervisor uses the office or position of supervisor or takes official action including the discussion, deliberation, or vote on matters before the town board of supervisors.

¹ Section 19.59(1)(a) and (c), *Wisconsin Statutes*, provides:

19.59 Codes of ethics for local government officials, employees and candidates. (1)(a) No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated.

² Section 19.59(1)(a) and (c), *Wisconsin Statutes*, provides:

19.59 Codes of ethics for local government officials, employees and candidates. (1) (c) Except as otherwise provided in par. (d), no local public official may:

1. Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.

2. Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

³ See 1997 Wis Eth Bd 6, ¶6; 1999 Wis Eth Bd 01, ¶4.

¶6 Whether the foregoing statute prevents a supervisor's discussion, deliberation, and vote on a matter before the town board depends upon whether the supervisor has a personal substantial financial interest in a matter. "Substantial" contrasts with "nominal value" and may be synonymous with "merchantable value"⁴ Substantial value is something more than token or inconsequential value.⁵ The Ethics Board has never found it necessary to establish the least value that may be quantified as substantial.⁶

¶7 The issue is one of fact. Public policy supports a government official's exercise of official duties when the financial effect of an official decision on the official's personal interests is uncertain and conjectural.⁷ In 1998, the question was whether a member of a city council could properly vote on whether to extend public utilities to an area in which the member owned a house. The Board said:

It is not clear that extension of service to the affected area or retention of the status quo will result in a private benefit of substantial value. You have indicated that the municipality is likely to require a substantial payment from the owner of each property to which water and sewer service is extended. On the other hand, these households may avoid the cost of maintaining wells and septic systems. Property values may be affected. The private benefits and costs are several and, in part, offsetting. In contrast, the public benefits from the provision of public water and sewer service may include added groundwater protection and improved public health. *If a public official's participation or action on government policy is neither forbidden nor antagonistic to public policy, then public policy favors a public official's exercise of his or her official duties.*⁸

4 A wholesale quantity of brochures had substantial value; 1997 Wis Eth Bd 13 ¶4. 7 Op. Eth. Bd. 2 (1983); 5 Op. Eth. Bd. 99 (1982), 73 (1981).

5 2005 Wis Eth Bd 5 ¶7; 1998 Wis Eth Bd 2 ¶8; 1995 Wis Eth Bd 5 ¶6; 7 Op. Eth. Bd. 22 (1983)

6 7 Op. Eth. Bd. 2 (1983); 5 Op. Eth. Bd. 99 (1982), 58 (1981).

7 See 2002 Wis Eth Bd 05.

8 See, e.g., 1995 Wis Eth Bd 3, ¶12; 8 Op. Eth. Bd. 33 (1985). We also note the expression of the legislature's intent set out in §19.45(1), *Wisconsin Statutes*. Although that portion of the Ethics Code is addressed to state officials, we believe it has relevance to local officials as well. In that section, the legislature has stated:

19.45 (1) The legislature hereby reaffirms that a state public official holds his or her position as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust. This subchapter does not prevent any state public official from accepting other employment or following any pursuit which in no way interferes with the full and faithful discharge of his or her duties to this state. The legislature further recognizes that in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government; that citizens who serve as state public officials retain their rights as citizens to interests of a personal or economic nature; that standards of ethical conduct for state public officials need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts which are substantial and material; and that state public officials may need to engage in employment, professional or business activities, other than official duties, in order to support themselves or their families and to maintain a continuity of professional or

1998 Wis Eth Bd 1, ¶10 (emphasis added).

Advice

¶8 The Ethics Board advises:

- (1) If a matter before the town board, is reasonably likely to have more than a trivial, insignificant, or insubstantial financial effect on the supervisor, then the supervisor SHOULD ABSTAIN from discussion, deliberation, and votes on that matter.
- (2) If a matter before the town board will have no effect or only a trivial, insignificant, or insubstantial financial effect on the supervisor, then the supervisor SHOULD PARTICIPATE; and
- (3) If reasonable people cannot reasonably foresee the effect of the board of supervisors' action on the supervisor's financial interests or disagree about whether the effect will be positive or negative or will be substantial or insignificant then the supervisor's financial interest is too speculative to deny the supervisor participation in related discussion, deliberation, and votes, and the supervisor SHOULD PARTICIPATE UNLESS, in the supervisor's judgment, to do so would undermine public confidence in the decision or in government.

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business activity, or may need to maintain investments, which activities or investments do not conflict with the specific provisions of this subchapter.

Section 19.45(1), *Wisconsin Statutes*.