STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Mr. Jeffrey B. Fuge
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Dear Mr. Fuge:

You indicate that Polk County, which does not have a county executive or a county administrator, is considering the establishment of an office of county auditor. You ask two questions with respect to the possible hiring of a county auditor. I have paraphrased the questions and discuss each in turn.

QUESTIONS PRESENTED AND BRIEF ANSWERS

1. May the county board in a county that does not have a county executive or a county administrator delegate the authority to appoint and remove the county auditor to an entity other than the county board?

The answer to the question as stated is that the county board chair appoints the county auditor under civil service procedures. The appointment and removal of the county auditor is therefore subject to the county ordinance or resolution establishing such procedures. The county board could, however, establish a department of administration and assign audit functions to that department. The appointment and removal of the person in the department of administration who performs audit functions could be delegated to an appropriate county official such as the county administrative services coordinator or the head of the department of administration, who would then have the authority to remove the person who is assigned those audit functions absent any contractual provision or county personnel ordinance to the contrary.

2. To what extent may the statutory duties of the county clerk under Wis. Stat. ch. 70 and specifically under Wis. Stat. § 70.63 be transferred to the office of county auditor or to a person in the department of administration who performs audit functions?

In my opinion, the statutory duties of the county clerk under Wis. Stat. ch. 70 may not be transferred to the county auditor, but the county auditor may be granted supervisory authority over the manner in which such duties are exercised.

PRINCIPAL STATUTES INVOLVED

I. APPOINTMENT AND REMOVAL STATUTES.

Wisconsin Stat. § 17.10 provides in part:

> Removal of appointive county officers. . . .
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> (2) APPOINTED BY COUNTY BOARD. County 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.
>
> (3) APPOINTED BY CHAIRPERSON OF COUNTY BOARD. County officers appointed by the chairperson of the county board may be removed by the chairperson for cause . . . .
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> . . . .
>
> (6) OTHERS. (a) Except as provided under par. (b), all other appointive county officers may be removed at pleasure by the officer or body that appointed them. Removals by a body, other than the county board, consisting of 3 or more members may be made by an affirmative vote of two-thirds of all the members thereof.
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> . . . .
>
> (7) GENERAL EXCEPTION. County officers appointed according to merit and fitness under and subject to a civil service law, or whose removal is governed by such a law, shall be removed only as therein provided.

Wisconsin Stat. § 59.47 provides:

> (1) In every county the clerk shall act as auditor, unless a separate office of county auditor is created as provided in sub. (2), and, when directed by resolution of the board, shall examine the books and accounts of any county officer, board, commission, committee, trustees or other officer or employee entrusted with the receipt, custody or expenditure of money, or by or on whose certificate any funds appropriated by the board are authorized to be expended, whether compensated for services by fees or by salary, and all original bills and vouchers on which moneys have been paid out and all receipts of moneys received by them. The clerk shall have free access to such books, accounts, bills,

vouchers and receipts as often as may be necessary to perform the duties required under this subsection and he or she shall report in writing the results of the examinations to the board.

(2) The board by resolution may create a separate office of county auditor and may fix the compensation of the auditor. The auditor shall perform the duties and have all of the powers conferred upon the clerk as auditor by sub. (1), and shall perform such additional duties and shall have such additional powers as are imposed and conferred upon him or her from time to time by resolution adopted by the board.

(3) If a county auditor's office is created under sub. (2), the chairperson of the board shall appoint a person known to be skilled in matters of public finance and accounting to act as county auditor. The appointment shall be made under ss. 63.01 to 63.17 and shall be subject to confirmation by the board. The auditor shall direct the keeping of all of the accounts of the county, in all of its offices, departments and institutions, and shall keep books of account necessary to properly perform the duties of the office. The auditor's salary and the amount of the official bond shall be fixed by the board. The auditor shall perform all duties pertaining to the office, have all of the powers and perform the duties in sub. (1) and perform other duties imposed by the board.

II. STATUTES INVOLVING TRANSFER OF FUNCTIONS.

Wisconsin Stat. § 59.03 provides in part as follows:

(1) ADMINISTRATIVE HOME RULE. Every county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county.

Wisconsin Stat. § 59.04 provides as follows:

Construction of powers. To give counties the largest measure of self-government under the administrative home rule authority granted to counties in s. 59.03(1), this chapter shall be liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power.

Wisconsin Stat. § 59.51(1) provides as follows:

> Board powers. (1) ORGANIZATIONAL OR ADMINISTRATIVE POWERS. The board of each county shall have the authority to exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive or county administrator or to a person supervised by a county executive or county administrator or any enactment which is of statewide concern and which uniformly affects every county. Any organizational or administrative power conferred under this subchapter shall be in addition to all other grants. A county board may exercise any organizational or administrative power under this subchapter without limitation because of enumeration, and these powers shall be broadly and liberally construed and limited only by express language.

Wisconsin Stat. § 59.52(1)(b) provides in part:

> Any county with a population of less than 500,000 may create a department of administration and assign any administrative function to the department as it considers appropriate, except that no administrative function may be assigned to the department if any other provision of state law requires the performance of the function by any other county office, department or commission unless the administrative function is under the jurisdiction of the . . . county auditor, in which case, the function may be assigned to the department notwithstanding sub. (8) and ss. 59.47, 59.60 and 63.01 to 63.17. Except as provided under par. (a), in any county with a county executive or county administrator, the county executive or county administrator shall have the authority to appoint and supervise the head of a department of administration; and except as provided under par. (a), the appointment is subject to confirmation by the county board unless the appointment is made under a civil service system competitive examination procedure established under sub. (8) or ch. 63.

ANALYSIS

I. DELEGATION OF AUTHORITY TO APPOINT AND REMOVE COUNTY AUDITOR.

The first question is whether the county board in a county that does not have a county executive or a county administrator may delegate the authority to appoint and remove the county auditor to an entity other than the county board. Wisconsin Stat. § 59.47(2) provides that the "board by resolution may create a separate office of county auditor[.]" If the county board creates the office of county auditor, Wis. Stat. § 59.47(3) provides that "the chairperson of the

board shall appoint a person known to be skilled in matters of public finance and accounting to act as county auditor." Ordinarily, when the county board chair appoints a county officer, that officer may be removed only by the county board chair and only for cause. Wis. Stat. § 17.10(3). Here, Wis. Stat. § 59.47(3) contains an additional requirement that "[t]he appointment [of the county auditor] shall be made under ss. 63.01 to 63.17[.]" The procedures described in Wis. Stat. §§ 63.01 to 63.17 are civil service procedures. When appointing the county auditor, the county board chair must therefore comply with the county ordinance or resolution establishing such procedures. Wisconsin Stat. § 17.10(7) provides that a county officer whose appointment is governed by civil service procedures is subject to removal according to such civil service procedures. The removal of the county auditor is therefore subject to the specific provisions established by ordinance or resolution of the county board under Wis. Stat. §§ 63.01 to 63.17 and is not governed by the more general removal provision contained in Wis. Stat. § 17.10(3).

Rather than creating the separate office of county auditor pursuant to Wis. Stat. § 59.47(2), a county board could create a department of administration pursuant to Wis. Stat. § 59.52(1)(b) and assign administrative audit functions to that department under that statute. If "the administrative function is under the jurisdiction of the . . . county auditor . . . the function may be assigned to the department notwithstanding sub. (8) and ss. 59.47, 59.60 and 63.01 to 63.17." Wis. Stat. § 59.52(1)(b). A person in the department of administration who performs audit functions therefore need not be appointed using civil service procedures. A county ordinance or resolution could provide for the appointment of a person in the department of administration who performs audit functions by an appropriate county official such as the county administrative services coordinator or the head of the department of administration. Absent any contractual provision or county personnel ordinance to the contrary, the county administrative services coordinator or the head of the department of administration who appoints the person performing audit functions would then also have the authority to remove that person pursuant to Wis. Stat. § 17.10(6)(a).

II. TRANSFER OF CERTAIN FUNCTIONS OF COUNTY CLERK TO COUNTY AUDITOR.

The second question asks to what extent the statutory functions of the county clerk concerning property tax administration generally under Wis. Stat. ch. 70 and specifically under Wis. Stat. § 70.63 may be transferred to the county auditor or to a person in the department of administration who performs audit functions. Prior opinions of the Attorney General have examined the extent to which the functions of the county clerk may be transferred to the county auditor under what is now Wis. Stat. § 59.47. *See* 67 Op. Att'y Gen. 248 (1978); 67 Op. Att'y Gen. 1 (1978); 65 Op. Att'y Gen. 132 (1976); 63 Op. Att'y Gen. 196 (1974); 24 Op. Att'y Gen. 787 (1935). *See also* 77 Op. Att'y Gen. 113 (1988). The extent to which the functions of the county clerk may be transferred to the county auditor under what is now

Wis. Stat. § 59.47 was also examined in *Harbick v. Marinette County*, 138 Wis. 2d 172, 405 N.W.2d 724 (Ct. App. 1987).

Harbick, 138 Wis. 2d at 181, involved the transfer of "account keeping duties not specifically identified and vested with the clerk by statute." The court of appeals affirmed the trial court's "determin[ation] that the clerk was solely responsible for those account keeping duties identified in sec. 59.17(3) through (7), Stats. [now Wis. Stat. § 59.23(2)(a)-(g)], and those identified elsewhere by statute, or that were performed by the clerk on an immemorial basis." *Harbick*, 138 Wis. 2d at 175. *Harbick* endorsed the reasoning in 65 Op. Att'y Gen. at 136-37, which concluded that the county board could "transfer duties of keeping certain accounts and books of account from the county clerk to some other officer where an express statute did not require the county clerk to perform the duties." As to statutory functions expressly given to the county clerk, that opinion of the Attorney General concluded that "the county board could authorize the finance officer to exercise only indirect supervision through the county clerk" with respect to accounts and books of account. 65 Op. Att'y Gen. at 137. In 67 Op. Att'y Gen. at 249, the authority granted the office of county auditor once that office is created by the county board under what is now Wis. Stat. § 59.47(3) was further described by the Attorney General as follows:

> I construe this as power to direct *the manner* in which such books of account are kept, where the manner is not prescribed by statute, and that such power extends to accounts kept by the county clerk by reason of express statute or at the direction of the county board as authorized by sec. 59.17(8), Stats. A county auditor in counties over 300,000 population possessed such power under former sec. 59.72(3), Stats. It should be noted, moreover, that "directing the manner" of keeping the books implies or is the same thing as "supervising" the process.

(Italics in original).

Harbick, 138 Wis. 2d at 176-77, also briefly discussed the county home rule statutes, now Wis. Stat. §§ 59.03, 59.04, and 59.51(1), stating as follows:

> In light of this explicit statement of legislative intent, sec. 59.17(8) [now Wis. Stat. § 59.23(2)(h)] must be broadly interpreted when a county is exercising its organizational and administrative powers. Determining which official will perform a county's account keeping duties is an organizational and administrative task. Permitting a county board to make this determination comports with the legislature's intent.

(Citations omitted). In response to a series of questions from the Senate Organization Committee concerning the authority of the county executive as it relates to the statutory administrative and management functions exercised by other elected county officials such as the

clerk, the Attorney General in 77 Op. Att'y Gen. at 115-16 characterized and elaborated upon the holding in *Harbick*:

> [I]t is my opinion that the substantive statutory scheme established for elective county officers by the Legislature constitutes legislative enactments "of statewide concern and which uniformly affects every county," within the meaning of sections 59.025 and 59.07(intro.). Under such a view, neither the various elective county offices nor their constitutional or statutory duties, functions and authority can be abolished, consolidated or altered under the newly enacted provisions of chapter 59 here being considered. Rather, I view these new enactments as authorizing counties to expand upon and "fill the gaps" in the organizational and administrative structure which is already in place in such a fashion as not to conflict with the performance of such elected officers' mandated functions. . . .
>
> In reviewing the statutes under consideration, I note that the expanded county administrative authority is general in character, while the Legislature's directions as to what functions are to be performed by the county's elective officials are typically expressed in much more specific terms. It may be presumed that those more detailed statutory directives are intended to prevail over a statute of general application in the event of any conflict. Such a conclusion is supported by *Harbick v. Marinette County*, 138 Wis. 2d 172, 179, 405 N.W.2d 724 (Ct. App. 1987). While the *Harbick* case recognized that sections 59.025, 59.026 and 59.07 require a liberal construction of county power to exercise organizational and administrative powers, it also acknowledged that those statutes do not affect duties specifically conferred on county [elective] officers by statute or performed by them on an immemorial basis. *Harbick*, 138 Wis. 2d at 172.

(Citation omitted).

It is not possible to analyze every duty related to property tax administration that might conceivably be transferred by the county board. *See* 67 Op. Att'y Gen. at 4. *Harbick* and the opinions of the Attorney General previously discussed do provide a framework for determining the extent to which the statutory functions of the county clerk concerning property tax administration generally under Wis. Stat. ch. 70 and specifically under Wis. Stat. § 70.63 may be transferred to the county auditor or to a person in the department of administration who performs audit functions. There are three limitations upon the county board's authority to transfer the duties of the county clerk.

First, the county board's ability to transfer duties by using the statutory authority granted under Wis. Stat. §§ 59.47(2) and 59.52(1)(b) is generally limited to the duties of the county clerk *as auditor*. *See* 63 Op. Att'y Gen. at 199. Those statutes do not permit the transfer of statutory duties expressly assigned to the county clerk by statute. *See Harbick*, 138 Wis. 2d at 179.

Second, the county board's ability to transfer duties by using its statutory administrative home rule authority under Wis. Stat. §§ 59.03, 59.04, and 59.51(1) generally does not extend to duties expressly assigned by statute to the clerk and other county elective officials because such statutes normally involve matters of statewide concern that uniformly affect every county. *See* 77 Op. Att'y Gen. at 115-16.

Third, the county board is constitutionally prohibited from transferring "[i]mmemorial duties performed by a constitutional officer . . ." including any immemorial duties of the county clerk that relate to property taxation. *Harbick*, 138 Wis. 2d at 179. Immemorial duties are important duties that characterized and distinguished the office of clerk at common law when the constitution was adopted. *Compare Kocken v. Wisconsin Council 40*, 2007 WI 72, ¶¶ 43-44, 301 Wis. 2d 266, 732 N.W.2d 828; *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 415 (1870). A general idea of the functions performed by the clerk at approximately the time when the constitution was adopted can be gleaned from the Revised Statutes of 1858. *See* 24 Op. Att'y Gen. at 793. The functions performed by the clerk at that time do encompass a number of items related to property tax administration, including functions related to the apportionment and equalization of property taxes about which you specifically inquire. *See* Rev. Stat. ch. 18, sec. 56 (1858):

> The clerk of the board of supervisors shall, immediately after such apportionments [of property taxes by the county board] make out two certificates of the several amounts apportioned to be assessed upon the taxable property of each town and ward, for state, county, and school purposes, one of which he shall deliver, or cause to be delivered, to the county treasurer and the other to the clerk of the proper town, or city, as the case may be; and the county treasurer shall charge the amount of state and county taxes specified in each certificate, to the proper town or city.

When the constitution was adopted, the clerk did have at least ministerial computation and notification duties. The transfer of such duties by the county board is therefore constitutionally prohibited.[1]

To the extent the Polk County Board may be considering the transfer of immemorial duties of the county clerk or duties expressly assigned by statute by the Legislature to the county clerk, your fact situation is unlike that presented in *Harbick*. *Harbick* permitted the duties of keeping accounts to be transferred to a county auditor where such duties clearly did not involve matters of statewide concern that uniformly affect every county because they were not expressly

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[1]The Legislature continued to expand the duties of the clerk with respect to apportionment. *See, e.g.*, ch. 130, sec. 111, Laws of 1868; Rev. Stat. ch. 48, sec. 1076 (1878). Additional duties of the county clerk that were mandated by the Legislature subsequent to the adoption of the constitution did not characterize and distinguish the office of clerk at common law at the time when the constitution was adopted. *See* 24 Op. Att'y Gen. at 793.

assigned by the Legislature to the elective office of county clerk and where such duties also were not immemorial duties of the county clerk. Despite the above-described limitations upon the county board's authority, however, even with respect to property tax administration the county board's statutory authority under Wis. Stat. §§ 59.03, 59.04, and 59.51(1) in combination with Wis. Stat. §§ 59.47(2) and 59.52(1)(b) does permit the board to "transfer duties of keeping . . . accounts and books of account from the county clerk to some other officer where an express statute d[oes] not require the county clerk to perform the duties" and to "authorize the . . . exercise . . . [of] indirect supervision" by the county auditor or by another appropriate county official in lieu of the county auditor where an express statute does require the county clerk to perform the function. *See* 65 Op. Att'y Gen. at 136-37. Consequently, although the statutory duties assigned by the Legislature to the county clerk under Wis. Stat. ch. 70 may not be transferred to the county auditor or another appropriate county official in lieu of the county auditor, supervisory authority over the manner in which such duties are exercised may be granted to the county auditor or another appropriate county official in lieu of the county auditor.

CONCLUSION

I therefore conclude that (a) although the county board chair appoints the county auditor under civil service procedures, the county board could instead establish a department of administration and assign audit functions to that department in which case the appointment and removal of the person in the Department of Administration who performs audit functions could be delegated to an appropriate county official such as the county administrative services coordinator or the head of the Department of Administration and (b) the statutory duties assigned by the Legislature to the county clerk under Wis. Stat. ch. 70 may not be transferred to the county auditor or another appropriate county official in lieu of the county auditor, but supervisory authority over the manner in which such duties are exercised may be granted to the county auditor or another appropriate county official in lieu of the county auditor.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:FTC:cla