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July 9, 2013

Honorable J.B. Van Hollen
Wisconsin Attorney General
Wisconsin Department of Justice
114 East State Capitol
Madison, WI 53707-7857

RE: Request for an Informal Opinion

Dear Attorney General Van Hollen:

Pursuant to Wisconsin Statutes Section 59.42(1)(c), our office requests an informal opinion concerning the County Executive and department head's responsibility to have positions confirmed by the Milwaukee County Board.

QUESTION: Excluding heads of departments as set forth in Wisconsin Statutes 59.17(2)(bm), and 59.38(5), or the Corporation Counsel position set forth in 59.42(2)(a), can a county ordinance require that the County Executive, or a department head under the County Executive, obtain the County Board's confirmation of an appointment to other county positions?

FACTS, LAW and ANALYSIS:

Facts:

A county ordinance requires the Milwaukee County Board to confirm all of the County Executive's department head appointments. In addition, the ordinance requires the Milwaukee County Board to confirm certain appointments made by the County Executive's department heads. Currently at issue is the appointment of a Behavioral Health Division Administrator. The appointment was made by the County Executive's Director of the Department of Health and Human Services. The Milwaukee County Committee of Health and Human Needs recommended rejection of the appointment. The full County Board voted to refer the matter back to the Health and Human Needs Committee for additional information. It is expected that the full County Board will vote on the division administrator appointment during its July County Board meeting. In 2004, a prior Corporation Counsel opinion was written addressing the issue of appointments requiring confirmation. In that opinion, the conclusion was that the Milwaukee County Board was within its authority to require appointments subject to County Board confirmation for most department head positions, in addition to some administrator positions. Given the pending action by the County Board on the administrator position, questions related to appointments requiring confirmation have been raised again. Specifically, at issue is whether the County Executive's department head is required to have an appointment confirmed by the Milwaukee County Board, and to what extent the County Executive is required to have department head appointments confirmed.

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Law:

The duties and powers of the Milwaukee County Executive relative to department head appointments and supervision is set forth in Wisconsin Statutes 59.17(2)(b)(1). Specifically, that section of the statute provides that the County Executive shall appoint or supervise the heads of all departments except where the statutes provide that the appointment be made by a board or commission or by other elected officers. Section 59.17(2)(bm) of the statutes explicitly states which department heads the County Executive is to appoint. Pursuant to that section, the County Executive in a county with a population of 750,000 or greater shall appoint the following positions: the director of parks, recreation and culture under s.27.03(2), the director of the county department of human services under s.46.21(1m)(a), the director of the county department of administration under s.59.52.(1)(a), the director of personnel of the county civil service commission under s. 63.02(2), and the director of transportation under s.83.01(1).

Department head appointments made by the Milwaukee County Executive pursuant to section 59.17 require confirmation of the Milwaukee County Board unless the County Board, by ordinance, elects to waive confirmation. As set forth in statute, once appointed, the department head is supervised by the County Executive. Specifically, section 59.17(2)(b)(1) states: “[e]xcept for a statutory provision which specifies that a board or commission or the county board shall supervise the administration of a department, the county executive shall administer, supervise, and direct all county departments, including any person who negotiates on behalf of the county.”

In addition to the positions indicated in section 59.17, the statutes explicitly set forth two other positions requiring appointment subject to confirmation by the County Board. Wisconsin Statutes section 59.38(5) requires the County Executive in a county with a population greater than 500,000 to appoint a Medical Examiner, subject to confirmation by a majority of the County Board. Likewise, section 59.42(2)(a) requires a County Executive in a county with a population greater than 500,000 to appoint a Corporation Counsel, subject to County Board confirmation. While Wisconsin Statutes do not specifically require the County Executive to have any other county positions confirmed by the County Board, section 303.17(1) provides the County Board authority to control the management of the House of Corrections by County Ordinance. The ordinance adopted by the Milwaukee County Board requires the County Executive to appoint a Superintendent for the House of Corrections, subject to County Board confirmation.

Notwithstanding the duties and powers of the County Executive set forth in Wisconsin Statutes, and authority specifically provided to the County Board relative to the House of Correction Superintendent, the Milwaukee County Board has adopted ordinances requiring the County Executive to appoint additional positions for County Board confirmation. Section 17.30 of the Milwaukee County General Ordinance provides: “[t]o ensure appropriate review of appointments to positions in the unclassified service all positions in the unclassified service which meet the following criteria shall require county board confirmation for a term of office as noted in subsections (2) and (3) of this section: (a) [p]ositions of department head and the position(s) which performs the duties of the department head in his/her absence, (b) [m]anagers of functions which could organizationally be structured as a separate department, or responsible for the day-to-day oversight of significant county expenditures and policies, (c) [t]hose positions which require county board confirmation in accordance with provisions of the state statutes.” Per this Milwaukee County Ordinance, in addition to the positions set forth in statutes (above), the County Executive has a duty to have the following positions confirmed by the County Board: Chief Information Officer, Director of Child Enforcement, Airport Director, Director of County Economic Development, Behavioral Health Administrator, Director Department of Aging, Zoological Gardens Director, Director of Employment Benefits, Director of Family Care, Fiscal and Budget Administrator, Deputy Director of Child Support Enforcement (administration), Chief Deputy Medical Examiner, Chief Of Operations, Deputy Director DPW/Transportation, Director of Highway Engineering and Operations, Deputy Airport Director (Operation/Maintenance), Chief of Recreation Services, and Deputy Zoological Director.

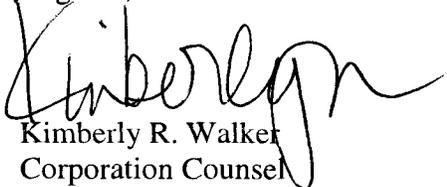
Analysis:

The legislative intent concerning the County Executive's duty and authority for appointments seems clear. Given the specificity in Wisconsin Statutes regarding department head appointments by a County Executive with a population greater than 500,000 or 750,000 respectively, it follows that no other department head position requires County Board confirmation. Moreover, even if the statutes were construed to mean that all of the County Executive's department head appointments require confirmation, positions below the level of a department head should not require confirmation by the County Board. The County Executive is given the authority and responsibility to supervise and direct the day to day administration of county department heads. That responsibility and authority seems to include overseeing a department head's decision related to an appointment or hire. While the County Executive is generally charged to see that Milwaukee County General Ordinances are observed, the ordinances adopted by the Milwaukee County Board, requiring department heads to appoint positions for County Board confirmation appears to infringe upon the County Executive's authority to provide direction and supervision, contrary to Wisconsin Statutes. Furthermore, with the exception of the department head positions specifically set forth in state statutes requiring the County Executive to appoint subject to County Board confirmation, Milwaukee County General Ordinances requiring the County Executive to appoint all department head positions for County Board confirmation appears to exceed the County Board's authority.

Our office would very much appreciate receiving an informal opinion addressing this question as soon as practically possible.

Should you have additional questions, please feel free to contact Mark Grady, Deputy Corporation Counsel directly. Thank you for your attention to this matter.

Regards,



Kimberly R. Walker
Corporation Counsel