



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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April 9, 2013

OAG-01-13

Ms. Juliana M. Ruenzel
Corporation Counsel
Brown County
Post Office Box 23600
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Dear Ms. Ruenzel:

¶ 1. Your predecessor asked for an opinion concerning two questions involving the authority of the Brown County Board of Supervisors (“Brown County Board”) to employ a private attorney who acts independently of the county’s salaried corporation counsel and his or her staff: (1) whether Wis. Stat. § 59.42(3) authorizes a county board to retain a private attorney to provide legal services in civil matters to the county board and the human resources department in addition to the services provided by the county’s salaried corporation counsel and his assistants; and (2) whether the county board has the authority to execute contracts for such services from a private attorney.

¶ 2. I conclude that a county board has the authority to authorize and approve such contracts. The county board must authorize, approve, and establish the parameters for such contracts; contract negotiation, and administration are duties performed by the county executive.

¶ 3. The first question is whether Wis. Stat. § 59.42(3) authorizes the Brown County Board to retain a private attorney to provide civil legal services to the county board and human resources department apart from the services provided by corporation counsel’s office.

¶ 4. Brown County, with a population of less than 500,000, has a county executive and a salaried corporation counsel. The county board has at times approved written proposals from a private attorney to furnish legal services in civil matters to the county board and human resources department. Your predecessor did not indicate whether the appointing authority was the county executive or the county board, but corporation counsel did not supervise or review the private attorney’s services. Your predecessor advised that the county board maintains that Wis. Stat. § 59.42(3) grants the county board broad general authority to obtain such services.

¶ 5. Wisconsin Stat. § 59.42(3) provides:

CORPORATION COUNSEL; ATTORNEY DESIGNEE. In lieu of employing a corporation counsel under sub. (1) or in addition to employing a corporation counsel under sub. (1) or (2)(a), a board shall designate an attorney to perform the duties of a corporation counsel as the need arises. Two or more counties may jointly designate an attorney to perform the duties of a corporation counsel. If an attorney has been designated to perform the duties of a corporation counsel, that person may exercise any powers and perform any duties of the corporation counsel.

¶ 6. Your predecessor suggested that Wis. Stat. § 59.42(3) is inapplicable to Brown County because he was appointed by the county executive under Wis. Stat. § 59.42(1)(b) rather than by the county board under Wis. Stat. § 59.42(1)(a). Wisconsin Stat. § 59.42(3) applies where corporation counsel is employed under “sub (1) or (2)(a),” language which includes subsection (1)(b).

¶ 7. Your predecessor also asserted that a designated attorney may be retained only if corporation counsel determines there is a need for legal services beyond those provided by the corporation counsel’s office, based on the language in Wis. Stat. § 59.42(3) providing for retention of counsel “as the need arises.”

¶ 8. Wisconsin Stat. § 59.42(3) empowers the county board to retain a designee in addition to hiring a salaried corporation counsel. There is no language in Wis. Stat. § 59.42(3) that accords salaried corporation counsel a role in determining whether a need for such retention exists or whether a designee should be retained. The phrase “as the need arises” requires the county board to assure that the county obtains legal services in civil matters whenever such services are needed. That framework may consist of a salaried corporation counsel and his or her assistants, a private practitioner, or some combination of the two.

¶ 9. Your predecessor pointed to several attorney general opinions that concluded that, under statutory language predating the enactment of Wis. Stat. § 59.42(3), a county board could retain the services of an attorney who acts independently of the county’s salaried corporation counsel only where expressly authorized to do so by statute. *See* 72 Op. Att’y Gen. 114, 116 (1983): “[U]nless otherwise specifically provided by statute, the duty to provide or supervise the provision of legal services in civil matters is vested exclusively in the district attorney or corporation counsel.” *Accord* 70 Op. Att’y Gen. 136, 137-38 (1981) (county department of social services or public welfare may not retain an attorney from its own funds unless the attorney is supervised by the corporation counsel); 65 Op. Att’y Gen. 245, 247-50 (1976) (county board may not retain an attorney to act as police legal advisor to the sheriff’s department unless the attorney is supervised by the corporation counsel). *See also* 73 Op. Att’y Gen. 8, 13-15 (1984). These opinions also stated that “[i]n general, the district attorney or corporation counsel assumes office

cum onere and is required to provide all needed legal services.” 72 Op. Att’y Gen. at 117, citing 70 Op. Att’y Gen. at 138.

¶ 10. Those opinions relied on statutory language that has been superseded. 1989 Wisconsin Act 31 reduced or eliminated the duties of district attorneys in numerous county civil matters and prohibited fulltime district attorneys from acting as corporation counsel. Wis. Stat. § 978.06(3). The Legislature required counties with populations of under 500,000 without salaried corporation counsel to designate an attorney to provide the kinds of civil legal services that a salaried corporation counsel provides. Wis. Stat. § 59.457 (1989-90). The Legislature permitted counties to meet this requirement by allowing a county board to retain an attorney designee in addition to employing a salaried corporation counsel. The Legislature left the determination of how to meet a county’s needs for civil legal services to the county board.

¶ 11. Your predecessor’s second question is whether a county board may execute a contract for the services of a private attorney under Wis. Stat. § 59.42(3). Wisconsin Stat. § 59.01 grants a county board the authority to “make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it.” The county board thus may decide to enter into a contract for the services of a private attorney. The county board establishes the parameters of the contract pursuant to its policy-making function. *See* 80 Op. Att’y Gen. 49, 50 (1991),

¶ 12. A county board’s organizational and administrative power is subject to power granted to a county executive or county administrator. Wis. Stat. § 59.51(1). In a county with a county executive, Wis. Stat. § 59.17(2)(a) grants the county executive the authority to “[c]oordinate and direct all administrative and management functions of the county government not otherwise vested by law in other elected officers.” The “elected officers” referred to in Wis. Stat. § 59.17(2)(a) are those enumerated in subchapter IV of Wis. Stat. ch. 59 and do not include county board supervisors.

¶ 13. Selecting or appointing an individual to perform a particular task or function is an organizational or administrative power. *Harbick v. Marinette Cnty.*, 138 Wis. 2d 172, 176-77, 405 N.W.2d 724 (Ct. App. 1987). Thus, within the parameters of a contract articulated by the county board, the county executive negotiates the contract and administers the contract. *See* 80 Op. Att’y Gen. 40, 50 (1991). Just as the county executive’s administrative and management functions include supervision of a salaried corporation counsel, they include supervision of an attorney designee. Other administrative and management functions are also performed by the county executive. It is not possible in this opinion to anticipate or identify what all of those functions might be. *See* 80 Op. Att’y Gen. at 51.

¶ 14. I conclude that, in a county with a population of under 500,000 with a county executive and a salaried corporation counsel, the county board may retain the services of a private attorney to provide legal services in civil matters to the county board and human resources

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department. The county board must authorize, approve, and establish the parameters for such contracts; contract negotiation and administration are duties performed by the county executive.

Sincerely,

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Attorney General

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