CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
266-4511

DATE: October 14, 2009

OPINION NO. 09-003

TO: Mayor David Cieslewicz

FROM: Michael P. May, City Attorney

SUBJECT: **Appointments to the Regional Transit Authority**

INTRODUCTION

2009 Wisconsin Act 28, the State Budget Bill, created new Wis. Stat. § 66.1039 allowing the creation of Regional Transit Authorities (RTA). The provisions with respect to governance of the Regional Transit Authority in Dane County provide, in Wis. Stat. § 66.1039(3)(c), that two members of the board are to be appointed by the Mayor of the City of Madison and approved by the Common Council. Other cities and villages also have the ability to appoint a member of the RTA Board.

Under the legislation, the RTA is "a public body corporate and politic and a separate governmental entity." Wis. Stat § 66.1039(2)(b)1. Once created by resolution of the Dane County Board, the RTA may enter into contracts, sue and be sued in its own name, employ agents and employees, impose a sales tax, and issue bonds.

You have asked if there are any limitations on the appointments to the RTA. The specific question presented was whether the Mayor and Common Council could appoint the Mayor or members of the Common Council to the RTA Board.

SHORT ANSWER

The common law doctrine of Incompatibility of Offices prohibits the Mayor from appointing himself or herself or any alderpersons to the RTA Board, unless modified by statute.

The modifications to the common law doctrine of Incompatibility of Offices are set out in Wis. Stat. § 66.0501(2). The statute also prohibits the Mayor and Common Council from appointing any of their own members, unless the RTA Board were found to be a City board or commission. Given the independent nature of the RTA, it appears unlikely that it would be considered a City board or commission.

DISCUSSION

A. The Common Law Doctrine of Incompatibility of Public Offices.

The common law doctrine of Incompatibility of Public Offices provides that an individual may not hold two offices when the duties might conflict, or when one office might be seen as superior to the other, such as controlling appointments or compensation.

The most recent Wisconsin case discussing the common law rule is *Otradovec v. City of Green Bay*, 118 Wis.2d 393, 347 N.W.2d 614 (Ct. App. 1984). Mr. Otradovec was an assessor at the City of Green Bay and was elected to the Common Council. The Circuit Court determined that the positions were incompatible and required Mr. Otradovec to either give up his City employment or resign from the Common Council.

The Court of Appeals affirmed that determination and discussed the nature of the common law doctrine of Incompatibility of Offices (118 Wis. 2d at 395-397):

> In *State v. Jones*, 130 Wis. 572, 575-76, 100 N.W. 431, 432 (1907), the supreme court stated that if one office was superior in some respect to another, so that the duties exercised under each might conflict to the public detriment, the offices were incompatible. In *Martin v. Smith*, 239 Wis. 314, 326, 1 N.W.2d 163, 169 (1941), the court noted that the doctrine applies "where the nature and duties of two officers were such as to render it improper from considerations of public policy for one person to discharge the duties of both."
>
> . . .
>
> As a member of the common council, Otradovec has the power to vote on contracts setting the terms of his employment. He may also vote on approval of the appointment of the city assessor in whose office he must work. These potential conflicts are substantial and establish the incompatibility of the public office and position of public employment Otradovec holds. It does not matter that he may be permitted to abstain from voting in these areas or whether conflicts exist in all or a great part of the functions of his office and position. … It is sufficient that substantial conflicts might arise that would be detrimental to the public.

While there does not appear to be an appellate court decision in Wisconsin on incompatibility caused by the appointive power, the issue has been the subject of opinions by the Wisconsin Attorney General. In fact, the common law doctrine of Incompatibility of Offices has generated literally dozens of opinions by the Wisconsin Attorney General.

An instructive opinion was issued in 1948, concerning whether a County Board member could be appointed to a County school committee, established by separate statute. The Attorney General stated (37 OAG 42, at 45-46):

> " . . . [I]t is against public policy for a board which has the power to appoint or elect individuals to public office, to appoint or elect one of its own members. Section 66.11(2) [the predecessor of current Wis. Stat. §66.0501(2), discussed below] obviously is derived from the common law rule.
>
> . . .
>
> Where a municipal board is given the power to elect or appoint a public officer it is against public policy for such a municipal board to appoint or elect one of its own members to such office.
>
> . . .
>
> In the case last cited it was also indicated that where members of a board are given the appointing power it seems necessarily implied that they will not appoint themselves.

A similar rationale was applied in 8 OAG 214 (1919), where it was found that a member of a city council could not serve on a board of education where the council had some appointing authority over the board, and in 26 OAG 582 (1937) when an alderman could not be a teacher in the school district governed by the Common Council. See also 28 OAG 516 (1939) (County Board Member may not be appointed as County Relief Director where selection is in a committee of the county board); 55 OAG 59, 60 (1966) ("in general, two offices are incompatible if there is a conflict of interest or duties, so that the incumbent of one cannot discharge fidelity and propriety of the duties of both.")

Thus, the common law doctrine of Incompatibility of Public Offices generally limits the ability of a public officer or employee from holding two public positions if the duties are in conflict, if one office has some supervisory or fiscal control over another, or if the selection of one of the offices is vested in the other office. It is the last of these that is at issue with the RTA Board.

B. Statutory Provisions on Compatibility of Offices.

The state legislature can change the common law rules of incompatibility of offices by legislation, and it has done so here. The statute that applies is Wis. Stat. § 66.0501(2), which states in part:

> (2) ELIGIBILITY OF OTHER OFFICERS. Except as expressly authorized by statute, no member of a town, village or county board, or city council, during the term for which the member is elected, is eligible for any office or position which during that term has been created by, or the selection to which is

> vested in, the board or council, but the member is eligible for any elected office. The governing body may be represented on city, village or town boards and commissions where no additional compensation, except a per diem, is paid to the representatives of the governing body and may fix the tenure of these representatives notwithstanding any other statutory provision. (Emphasis added).

On its face, this statute places significant restrictions on the ability of the Mayor or the members of the Common Council to appoint themselves to the RTA, since that position is clearly one "the selection to which is vested in" the common council. By statute, the Mayor is considered a member of the Common Council. Wis. Stat. § 62.11 (1). Similar restrictions would seem to apply to other cities and villages with respect to the RTA Board.

The statute provides two exceptions. First, if such an appointment is "expressly authorized by statute," then members of the Council could be appointed. The RTA statute has no such express authorization. Second, the rule does not apply to any body that is a "city board or commission." The question thus becomes whether the RTA Board would be a "city board or commission."

C. Is the RTA Board a City Board or Commission?

I could find no cases discussing what constitutes a "city board or commission" within the exception to Wis. Stat. § 66.0501(2). However, the matter was discussed in a 1977 Opinion of the Attorney General.

In 66 OAG 145 (1977), the question was whether members of the city council could serve on the board of the joint county-city hospital established pursuant to statute (now Wis. Stat. § 66.0927). The Attorney General found that the joint city-county hospital board was a "city" board or commission, and thus the exception for city council members applied: (66 OAG at 148):

> I am of the opinion that a joint county-city hospital board would constitute a "city board" within the meaning of [the statute], and that a council member appointed by the mayor and confirmed by the council . . . could be considered as representing the governing body of the city so that the exception would apply.

The opinion gives little guidance on what constitutes a "city board or commission." The joint county-city hospital board at that time was under Wis. Stat. § 66.47 (1975 Statutes). The current version is Wis. Stat. § 66.0927, and is not substantively different from the law at the time of the Attorney General's opinion. Under this law, the county-city hospital board is made up of appointees of the city and county, may enter into contracts, have employees and engage its own legal counsel, sue and be sued, and is funded by the city and county tax levy pursuant to a budget procedure established by statute. Other than having the power to sue and be sued, such a board is very similar to the Board of Health for Madison and Dane County established to operate the combined health departments of the City of Madison and Dane County.

While the RTA board has some similarities to the joint city-county hospital board referenced in the Attorney General Opinion, there are several very significant differences. First, the RTA is a separate body politic and corporate pursuant to statute. It is explicitly "a separate governmental entity," Wis. Stat. § 66.1039(2)(b)1. Second, it has the authority, once established, to establish a sales tax within the area of its jurisdiction. The authority to levy a tax separate from other governmental units is a strong indication that the board is not a "city board or commission." Third, it can issue bonds without the approval of the City or County. Fourth, it has a mix of appointments of the city, county and the Governor, as opposed to appointments only from the city and county.

I conclude that it is very unlikely that the RTA Board would be found to be a "city board or commission" which would allow the mayor or city council members to be appointed by the Mayor.

D. Appointments to Other Boards and Commissions.

During the course of discussing this with you, questions arose as to appointments of alders to other boards and commissions. Our office will be reviewing these in detail, but I did a preliminary check on some of these appointments.

The Madison Cultural Arts District (MCAD) is, like the RTA, a separate governmental entity. It also has a mix of appointments, including the Governor as an appointing authority. However, the MCAD statute explicitly allows, as to appointments by the City of Madison, that "not more than 3 of the appointees may be elective city officials." Wis. Stat. § 229.842(2)(c). Thus, any alder appointments fall within the first exception to Wis. Stat. § 66.0501(2), because such appointments are allowed by another statute. Similarly, the composition of the Madison Area Transportation Planning Board (MPO) is governed by federal law and subject to federal approval, and it allows for the appointment of alders. Some appointments are to private entities (e.g., Board of the Bayview Foundation, Greater Madison Convention and Visitors Bureau Board, South Madison Health and Family Center – Harambee) and are not implicated by the doctrine of Incompatibility of Offices since there is no second public office. Other appointments appear to meet the exception for a "city board or commission," such as the Henry Vilas Zoo Commission.

Our office will undertake a review of these boards or commissions that may raise the incompatibility question, and provide you with a supplemental memorandum.

CONCLUSION

The common law doctrine of Incompatibility of Offices and the restrictions in Wis. Stat. § 66.0501(2) limit the ability of Common Council Members, including the Mayor, to be appointed to the RTA Board. I conclude that it is unlikely that the RTA board would be found to be a "city board" such that the exception within Wis. Stat. § 66.0501(2) would apply.

_____
Michael P. May, City Attorney

CC: Janet Piraino
Alders
Chuck Kamp
ACA Carolyn Hogg
City Clerk

SYNOPSIS: Under the doctrine of Incompatibility of Offices and Wis. Stat. § 66.0501(2), the Mayor may not appoint himself or any other member of the Common Council to the Board of the Regional Transit Authority (RTA), unless the RTA were to be found to be a "city board or commission." The RTA is a separate and independent governmental body and thus is unlikely to be considered a "city board or commission" within the exception to the rule on Incompatibility of Offices.