

CONFIDENTIAL LEGAL MEMORANDUM

ATTORNEY-CLIENT PRIVILEGED

TO: Mark D. O’Connell, Executive Director
Kyle Christianson, Director of Government Affairs
Wisconsin Counties Association

FROM: Andrew T. Phillips, Ryan P. Heiden, Bennett J. Conard
von Briesen & Roper, s.c.

RE: September 1, 2017 Attorney General’s Opinion re Authority of a County Board to
Appropriate Funds to Nonprofit Organizations

DATE: November 5, 2017

BACKGROUND

On September 1, 2017, the Attorney General issued an opinion (the “Opinion”), and concluded that county boards do not possess authority to appropriate funds to a private nonprofit corporation whose sole mission is to operate a food pantry in the county for the benefit of the county’s citizens.

Under Wisconsin law, counties only possess limited administrative home rule authority. This means that counties only possess the powers expressly conferred upon them or necessarily implied from the powers expressly given. The Attorney General determined that the statutes granting power to county boards do not expressly or impliedly authorize appropriations to nonprofit corporations for the purposes of operating a food pantry.

Although the Opinion was drafted in response to an inquiry related specifically to private nonprofit food pantries, the practical implications of the Opinion arguably extend further. The Attorney General’s conclusion also implies that county boards may only appropriate funds to nonprofit organizations, regardless of their purpose, if express or implied authority exists for a county board to do so.

As set forth below, we have concerns with the Attorney General’s analysis. Nonetheless, as more fully explained below, we believe methods of complying with the opinion exist while still allowing counties to appropriate funds to private nonprofit organizations.

ANALYSIS

A. Summary of the Attorney General's September 1, 2017 Opinion

The Attorney General issued the Opinion in response to an inquiry from Shawano County's Corporation Counsel with respect to whether the county board possesses the authority to appropriate funds to private nonprofit organizations whose sole mission is to operate a food pantry for the benefit of Shawano County's citizens. In response to the inquiry, the Attorney General began his analysis by noting that, under Wisconsin law, "a county board has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power." *Town of Vernon v. Waukesha Cty.*, 102 Wis. 2d 686, 307 N.W.2d 227 (1981).

The Attorney General next reviewed the plain language of the relevant statutes to determine whether such an express or implied conferral of authority exists with regard to a county board appropriating funds to a private nonprofit organization. See *State ex rel. Kala v. Circuit Court of Dane Cty.*, 2004 WI 58, ¶ 45 (stating that statutory analysis begins with reviewing the plain language of the statute).

In this context, the Attorney General first concluded that, pursuant to Wis. Stat. § 59.51(2), county boards have general authority to "represent the county, have the management of business and concerns of the county in all cases where no other provision is made, apportion and levy taxes and appropriate money to carry into effect any of the board's powers and duties." The Attorney General interpreted the plain language of Wis. Stat. § 59.51(2) as limiting a county board's power to appropriate money to the extent that the appropriation assists with carrying into effect any of the board's powers and duties. Absent the existence of such a duty or power, a county board may not appropriate money.

The Attorney General then examined Wis. Stat. § 59.53 to determine whether such a duty or power expressly exists with regard to nonprofit food pantries. Wis. Stat. § 59.53 grants county boards the authority to perform many different functions with respect to health and human services. However, the Attorney General concluded that none of the 25 subsections contained within Wis. Stat. § 59.53 expressly authorize the appropriation of funds to private nonprofit food pantries.

The Attorney General also noted that Wis. Stat. § 59.53(21) specifically addresses the creation and operation of relief programs by county boards. Specifically, Wis. Stat. § 59.53(21) states:

(21) Operation of relief programs. The board may establish and operate a program of relief for a specific class or classes of persons residing in that county, except that in a county with a population of 750,000 or more, the county executive shall be in charge of the operation of the program of relief. The county may set such eligibility criteria to obtain relief, and may provide such services, commodities or money as relief, as the county determines to be reasonable and necessary under the circumstances. The program may include work components. The county may enact any

ordinances necessary or useful to the operation of a relief program under this subsection. Counties may use vehicle registration information from the department of transportation in determining eligibility for relief programs under this subsection.

The Attorney General determined that while Wis. Stat. § 59.53(21) grants a county board the authority to establish and operate its own relief programs (such as a program aimed at providing adequate food to those in need), it does not expressly confer authority to appropriate funds to a private nonprofit food pantry to accomplish this task.

Moreover, the Attorney General further stated that “[b]ecause the statute specifically addresses a county board’s authority in this area without granting the authority to make appropriations to nonprofits, county boards do not have the authority, either express or implied, to make such appropriations.” OAG-01-17, ¶ 4. In other words, the Attorney General believes that counties are precluded from finding authority to make appropriations to a private non-profit food pantry because the creation of relief programs is explicitly covered by Wis. Stat. § 59.53(21) without granting county boards the authority to make such an appropriation.

The Attorney General next analyzed Wis. Stat. § 59.53(3) and (11)(c), which authorize appropriations to nonprofits for other specified purposes, in order to determine whether these provisions contain implied authority to appropriate funds to a nonprofit food pantry. The Attorney General noted that, according to the rules of statutory construction, the absence of an item from an enumerated list suggests the Legislature did not intend to include it. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶¶ 35-37.

The Attorney General stated that, given the Legislature’s express authorization of appropriations to nonprofits in certain circumstances, that the Legislature would have also specifically included non-profit food pantries if it intended to grant such authority. For this reason, the Attorney General concluded that Wis. Stat. § 59.53 cannot be read to imply a power conferred upon county boards to appropriate funds to nonprofit food pantries.¹

Furthermore, the Attorney General addressed the scope of authority granted by Wis. Stat. § 59.54(6). Wis. Stat. § 59.54(6) provides that a county board may “enact and enforce ordinances to preserve the public peace and good order within the county . . . and provide a forfeiture for a violation of the ordinances.” The Attorney General concluded that powers granted by this section involve direct public safety issues, and do not include things like appropriations to private non-profits.

For these reasons, the Attorney General concluded that county boards do not have the authority to make appropriations to private non-profit food pantries because county boards only have the powers expressly conferred or necessarily implied by statute. The Attorney General determined that the statutes outlining the powers of county boards cannot be read to grant such authority. As

¹ The Attorney General also cited *Pugnier v. Ramharter*, wherein the Wisconsin Supreme Court held that a town board was prohibited from appropriating money to charitable organizations because nowhere in the provisions setting forth the town board’s authority was a grant to expend money from the town treasury for charitable purposes. 275 Wis. 70, 74, 81 N.W.2d 38 (1957).

stated above, this conclusion has far reaching practical implications beyond appropriations to nonprofit food pantries.

B. Legal Analysis of the Attorney General's Opinion

The Attorney General's conclusion that Wis. Stat. § 59.53(23) does not contain either express or implied authority for a county board to appropriate money to a nonprofit food pantry is arguably overbroad. In general, Wis. Stat. § 59.53(23) grants counties broad authority to give relief to a specific class or classes of persons. Whether this authority entails appropriations to nonprofit food pantries depends on what it means to "establish and operate a program of relief."

It is possible that a properly drafted appropriation may meet this burden because the powers granted under Wis. Stat. Chapter 59 "shall be broadly and liberally construed and limited only by express language." Wis. Stat. § 59.51(2). An appropriation setting out the need for relief and providing simple standards for the use of the money may be enough to meet this burden.

While the statutes do not grant counties express authority to make appropriations to private nonprofit food pantries, the Attorney General also asserted that the statutes cannot be read to imply such authority. Specifically, the Attorney General argued that because Wis. Stat. § 59.53 contains provisions specifically authorizing appropriations to other nonprofits for specified purposes, that this prohibits a finding of any implied authority to make an appropriation to a nonprofit for a different purpose. OAG-01-17, ¶ 5.

In concluding implied authority does not emanate from Wis. Stat. § 59.53, the Attorney General relied upon *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶¶ 35-37. However, the court in *Milwaukee Journal Sentinel* interpreted a very specific list of items and tasks for which a governmental authority may charge in response to a public records request. The public records statutory scheme discussed in *Milwaukee Journal Sentinel* is not necessarily comparable to Wis. Stat. § 59.53 (or Chapter 59 in general), as Wis. Stat. § 59.53 provides 25 different grants of authority that are generally related to health and human services.

The Attorney General is correct that authority to appropriate money to a nonprofit food pantry cannot be implied from Wis. Stat. §§ 59.53(3) and 59.53(11)(c), which grant a county board authority to appropriate to other nonprofits for specified purposes. However, it does not necessarily follow that no other provision of Wis. Stat. § 59.53 contains implied authority to make an appropriation to other nonprofits. Wis. Stat. § 59.53 is not an exhaustive list of nonprofits to which county boards may appropriate funds. Rather, it provides a framework of many different health and human services powers granted to county boards.

The Attorney General further argued that cities and villages are granted broad general and police powers, but that county boards do not have a similarly broad grant of powers. OAG-01-17, ¶¶ 8-12. While Wis. Stat. §§ 61.34(1) and 62.11(5) possibly provide a broader grant of general and police powers to cities and villages than Wis. Stat. § 59.51(2) does to counties, the Attorney General ignored Wis. Stat. § 59.51(1). This section provides:

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” (emphasis added).

Two conclusions can be derived from this section. First, county boards are not in any way limited by Wis. Stat. § 59.53 in their authority regarding health and human services. The power conferred by Wis. Stat. § 59.53 is in addition to all other grants of authority.

Second, a county board’s powers and authority granted by Wis. Stat. Chapter 59 must be broadly and liberally construed. This includes Wis. Stat. § 59.53(21) which grants county boards authority to create relief programs, including providing money as relief. Moreover, Wis. Stat. § 59.51(2) grants county boards broad authority to “appropriate money to carry into effect any of the board’s powers and duties.”

Counties also operate as an arm of the state, and, therefore, exercise the state’s police power which extends to the public safety, health, morals, and general welfare. *County of Milwaukee v. Williams*, 2007 WI 69, ¶68, 301 Wis. 2d 134, 169, 732 N.W.2d 770, 788 (2007). Ensuring adequate food for a county’s residents who are in need is likely a valid exercise of the state’s police power. The courts have often recognized that they will not interfere with the exercise of the state’s police power “unless the illegality of the exercise is clear.” *Id.*

For the reasons stated above, the Opinion may be an overly restrictive interpretation of Wis. Stat. § 59.53 and Chapter 59 as a whole.

C. Options for County Boards in Light of the Attorney General’s Opinion

Despite the arguable flaws in the Opinion’s analysis and conclusion, it may be more effective for counties to comply with the Attorney General’s conclusion given its broad scope. Counties may comply with the Opinion and still provide charitable contributions in the following ways.

First, pursuant to Wis. Stat. § 59.53(21), county boards are granted the express authority to “establish and operate a program of relief for a specific class or classes of persons residing in that county.” Wis. Stat. § 59.53(21) further grants county boards the authority to “set such eligibility criteria to obtain relief, and may provide such services, commodities or money as relief, as the county determines to be reasonable and necessary under the circumstances.” Under Wis. Stat. § 59.01, counties possess the authority 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.”

Taken together, these two statutory provisions permit a county board to establish a generic relief program which seeks to assist various classes of persons residing in the county. For example, a relief program could aim to assist single, low-income parents, as well as those with physical or mental disabilities. Once a county “establishes” such a program under Wis. Stat. § 59.53(21), a county could then contract with one or more private nonprofit organizations pursuant to Wis. Stat. § 59.01 to then run the daily operations of the relief program.²

These nonprofit organizations could be charged with assisting the county board in identifying eligibility criteria for assistance, ensuring the resources are delivered to those deemed eligible, and complete any other operational aspects of a relief program that a county board may address by contract. Such an organizational structure would allow county boards to be minimally involved with the operational aspects of the relief organization while still being able to provide the nonprofit organizations with funds to assist with relief for county citizens in compliance with Wis. Stat. § 59.51(2). Of course, this organizational structure would require that a contract between a county board and any nonprofit organizations shift programmatic responsibility to the nonprofit organization, as the purpose of the structure is to avoid having county boards enter into the business of running relief organizations.

Another option available to county boards is to simply limit their charitable contributions to those expressly permitted under the Wisconsin Statutes. As the Attorney General stated in his Opinion, Wis. Stat. § 59.53 alone provides for various express delegations of authority with regard to a county board’s ability to appropriate funds to nonprofit organizations (*i.e.*, domestic violence victims and elderly and handicapped individuals requiring homemaking services). While this particular approach admittedly limits a county board’s options as to charitable contributions, county boards are nonetheless still able to participate in charitable giving if they would like to do so.

If you have any questions surrounding this memorandum, please do not hesitate to contact us. We appreciate the opportunity to be of service to the Association and its member counties.

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² There is no formal process that a county must follow to “establish” a program. Therefore, the program and appropriation for a contract to perform under the program could likely be contained in the same resolution. The specifics of any resolution in this regard should be discussed in detail with corporation counsel.