

**CONFIDENTIAL LEGAL MEMORDANDUM**  
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**TO:** Wisconsin Counties Association

**FROM:** Attolles Law, s.c.

**RE:** Authority of a Register of Deeds to Appoint Deputies; Assignment of Duties and Conditions of Employment

**DATE:** February 27, 2023

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**EXECUTIVE SUMMARY**

The Association requested an analysis of (a) a Register of Deeds' authority to appoint and supervise a deputy Register of Deeds; (b) a Register of Deeds' authority to supervise other employees; and (c) correspondingly, a county board's authority with respect to such appointments, including the authority to establish wages, hours, job duties, and other conditions of employment.

Importantly, the Register of Deeds maintains statutory authority to appoint a deputy (or deputies) and to supervise and assign job duties to the deputy to the extent necessary to "aid the register in the performance of the register's duties..." However, the register of deed's authority to appoint and supervise deputies (and to supervise other employees) is not unlimited. Indeed, statutes and relevant caselaw are clear that the county board retains the authority to determine the number of deputies that a Register of Deeds may appoint (and the number of other employees assigned to an office), and that the board may determine a deputy's compensation, hours, duties (subject to the above), and other conditions of employment. Further, counties (through the authority of the county board, county executive, county administrator, or county administrative coordinator, as applicable) possess the authority to hire, fire, and establish conditions of employment for regular employees.

This memorandum provides an analysis of the issues identified above and also provides answers to specific questions presented by the Association.

**ANALYSIS**

The office of Register of Deeds is considered a constitutional office under Wis. Const., art. VI, § 4. As such, a Register of Deeds' duties are prescribed by statute. In addition to the duties set by statute, courts recognize that there are certain other "important duties" that have been performed on an "immemorial basis" that cannot be transferred by county board action. *See Wisconsin Prof Police Ass'n v. County of Dane*, 106 Wis. 2d 303, 310-12, 316 N.W.2d 656, 660 (1982); *State ex rel. Milwaukee County v. Buech*, 171 Wis. 474, 481-82, 177 N.W. 781, 784 (1920). In essence, the precedent confirms that "[s]tatutory powers and duties conferred upon a county officer cannot be narrowed, enlarged, or taken away by a county board unless the legislature has authorized such action." *Harbick v. Marinette County*,

138 Wis. 2d 172, 405 N.W.2d 724 (Ct. App. 1987)(citing *Reichert v. Milwaukee County*, 159 Wis. 25, 35, 150 N.W. 401, 403-04 (1914)).

Based upon these principles, an analysis of the respective powers of the Register of Deeds and their intersection with those of the county board as they relate to appointment authority for deputies, and the establishment of job duties and other conditions of employment, follows.

## **I. Number of Deputies Permitted; Authority to Appoint**

A Register of Deeds has statutory authority to appoint a deputy (or deputies) to fill open deputy positions. However, the county board has discretion to establish the number of employees in any department or office, *including deputies to elective officers* (e.g., the Register of Deeds), so long as, in the case of a constitutional officer like the Register of Deeds, the county board provides enough financial resources to such officer to fulfill his or her constitutional duties.

### **A. A County Board May Establish the Number of Deputies that a Register of Deeds May Appoint**

With respect to a Register of Deeds' authority to appoint a deputy (or deputies), Wis. Stat. § 59.43(3) provides:

*Every register of deeds shall appoint one or more deputies, who shall hold office at the register's pleasure.* The appointment shall be in writing and shall be recorded in the register's office. The deputy or deputies shall aid the register in the performance of the register's duties under the register's direction, and in case of the register's vacancy or the register's absence or inability to perform the duties of the register's office the deputy or deputies shall perform the duties of register until the vacancy is filled or during the continuance of the absence or inability. (emphasis added).

Section 59.43(3) appears on its face to permit a Register of Deeds broad authority to appoint as many deputies as he or she sees fit (and also the authority to terminate such appointments). However, a Register of Deeds' authority to appoint deputies is not unlimited. Indeed, the county board may "[e]stablish the number of employees in any department or office including deputies to elective offices." Wis. Stat. § 59.22(2)(c)1.b. While a county board's authority under this section seemingly directly conflicts with a Register of Deed's authority to "appoint one or more deputies," the statutes provide that the county board's authority granted under Wis. Stat. § 59.22(2)(c)1.b. prevails to the extent of the conflict. Wis. Stat. § 59.22(4).

Indeed, the Wisconsin Supreme Court has concluded that a county board's authority under Wis. Stat. § 59.22(2)(c)1.b. prevails in this case. In *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, the Court held that a county sheriff does not have unilateral statutory authority under Wis. Stat. § 59.26(2) to determine the total number of deputies to be appointed (despite similar authorizing language to that of the Register of Deeds). 2016 WI App 56, 370 Wis. 2d 644, 883 N.W.2d 154. Rather, such authority lies with the county board because Wis. Stat. § 59.22 "plainly provides that the county board may '[e]stablish the number of employees in any department or

office including deputies to elective officers” and any conflict with the board’s authority in this regard is resolved in favor of the county board. *Id.*

Despite this, a county board must also provide a Register of Deeds with enough financial resources to perform his or her duties. A governing body may not “through the exercise of its budgetary and fiscal controls...render impossible the performance of the duties which devolve upon a constitutional officer because of the officer’s constitutional status.” *Wisconsin Pro. Police Ass’n/L. Enf’t Emp. Rels. Div. v. Dane Cnty.*, 149 Wis. 2d 699, 710–11, 439 N.W.2d 625, 629–30 (Ct. App. 1989). “This principle was recognized in *Schultz v. Milwaukee County*, 250 Wis. 18, 26 N.W.2d 260 (1947), where the court concluded that the county board could not set the salary of the coroner so low that it would amount to a *de facto* abolishment of the office.” *Id.* Additionally, the Wisconsin Attorney General has opined that the relevant caselaw “can ... be considered as negating any implied power on the part of the county board to effect any change in the substance of the sheriff’s constitutional powers while preserving to him the shadow of such powers but without the manpower or appropriation necessary to carry the same into effect.” *Id.* (quoting 35 OAG 474, 475).

Importantly, the applicable standard when determining whether a constitutional officer has enough resources to perform his or her constitutional duties is based on whether the constitutional officer has enough *fiscal* resources and whether the county budget is arbitrary or unreasonable. *Milwaukee Deputy Sheriffs’ Ass’n*, 2016 WI App 56, ¶ 18; 77 OAG 113. Significantly, this does not necessarily translate to specific deputy or employee headcount. The *Milwaukee Deputy Sheriffs’ Ass’n* Court concluded that:

Sheriff Clarke does not argue that he does not have enough financial resources; he argues that he does not have enough law enforcement officers. In fact, Sheriff Clarke concedes that the County provides enough financial resources to carry out his constitutional duties through the use of overtime. We agree with the circuit court that the use of overtime might not be the best fiscal option. However, because the County’s 2015 budget does not prohibit Sheriff Clarke from fulfilling his constitutional duties—albeit through the use of overtime—and because Sheriff Clarke does not have constitutional or statutory authority to hire as many law enforcement officers as he sees proper, we conclude that the County’s 2015 budget is not arbitrary or unreasonable. 2016 WI App 56, ¶ 18.

These same principals apply to the constitutional office of Register of Deeds because the Register of Deeds is also a constitutional officer and is afforded similar statutory authority as the sheriff with respect to the appointment of deputies. As such, county boards must be careful to ensure that they provide a Register of Deeds with adequate financial resources to perform his or her constitutional duties. While this does not mandate a county board to provide a certain number of positions (including deputies), counties should make sure budgeted employee headcounts are supported by objective data to ensure that they do not exercise “their budgetary and organizational authority so arbitrarily and unreasonably as to effectively narrow or frustrate the proper exercise of the constitutionally or statutorily mandated officers duties of [constitutional officers].” 77 OAG 113, 119. Neither Wisconsin courts nor the Wisconsin Attorney general have suggested a test or

overall objective criteria that must be considered, and, as such, this analysis must be performed on a case-by-case basis. *Id*

### **B. A Register of Deeds Generally Retains Authority to Appoint Deputies When a Position is Available**

Despite a county board's authority under Wis. Stat. § 59.22(2) to establish the number of employees (including deputies) for any office and conditions of employment, a Register of Deeds generally retains the authority to actually appoint deputies to open positions.

Crucially, Wisconsin courts have concluded that a Register of Deeds appointment authority under Wis. Stat. § 59.43(3) is unimpaired by the county board's authority under Wis. Stat. § 59.22(2)(c)1.b. because the county board is only granted authority to establish the number of deputies to be appointed, and not the authority to appoint such deputies in place of a Register of Deeds. *See Crawford Cnty. v. Wisconsin Emp. Rels. Comm'n*, 177 Wis. 2d 66, 77, 501 N.W.2d 836, 841 (Ct. App. 1993).

The *Crawford County* Court analyzed these conflicting statutes in the context of whether a county board could contract away the Register of Deeds' appointing authority via a collective bargaining agreement, and concluded that a Register of Deeds "...while having a 'local presence,' perform to a significant degree the business of the people of the state. *Crawford Cnty. v. Wisconsin Emp. Rels. Comm'n*, 177 Wis. 2d 66, 77, 501 N.W.2d 836, 841 (Ct. App. 1993). The Court's analysis was based on:

...the constitutional origins of the offices themselves, the statutory provisions authorizing their appointed deputies to carry out the functions of the offices in the event of vacancy or inability of the officeholder to serve, and by the various provisions of the Wisconsin Constitution and state statutes which, in distinction to local officers, give other *state* officials a role in their appointment, resignation and removal. *Id.* at 78.

In light of this analysis, but also recognizing a county board's corresponding authority to regulate county employment matters, the *Crawford County* Court concluded "that while the county has the authority to establish the pay and regulate other conditions of employment of its employees...that authority does not extend to bargaining away the statutory power of the clerk of court and register of deeds to appoint and discharge deputies." *Id.*<sup>1</sup>

Therefore, the authority to appoint (or terminate) deputies to deputy positions established by the county board generally remains with the Register of Deeds.

However, the preceding analysis likely differs for counties with a civil service system established under Wis. Stat. § 59.52(8). A civil service system established pursuant to that section "may be made applicable to all county personnel, except the members of the board, constitutional officers

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<sup>1</sup> However, such appointment authority likely only applies to a "chief deputy" and other deputies with managerial or supervisory authority. *Eau Claire County v. AFSCME Local 2223*, 190 Wis. 2d 298, 526 N.W.2d 802 (Ct. App. 1994).

and members of boards and commissions.” Wis. Stat. § 59.52(8)(a). Importantly, the excepted positions *do not* include deputies to constitutional officers, only the constitutional officers themselves. In other words, the deputies are considered classified employees in counties with a civil service system and are in all respects subject to the requirements of such civil service system.

The Wisconsin Attorney General has also opined that a county civil service system enacted under Wis. Stat. § 59.52(8)(a) may apply to all county personnel not expressly excluded from that section. 63 Atty. Gen. 147 (citing 35 OAG 69). The Attorney General has specifically concluded that a county civil service system enacted under Wis. Stat. § 59.52(8)(a) establishing a procedure to be followed prior to the discharge of a classified employee, supersedes and modifies a clerk of court’s authority under Wis. Stat. § 59.40(1)(a) to discharge deputies at will. 63 Atty. Gen. 147. Importantly, the authority granted to a clerk of courts under Wis. Stat. § 59.40(1)(a) is analogous to a Register of Deeds authority under Wis. Stat. § 59.43(3) (*i.e.*, the same conclusion may be reached with respect to the appointment authority of a Register of Deeds).

Conversely, a county civil service system that is instead established pursuant to Wis. Stat. ch. 63 *does not* apply to a deputy Register of Deeds. A deputy Register of Deeds is expressly included from the unclassified employee class under such a system by Wis. Stat. § 63.03(2)(g). Therefore, the analysis in Section A above would still apply in counties with a civil service system established pursuant Wis. Stat. ch. 63.

## **II. Wages, Hours, Duties, and Other Conditions of Employment**

### **A. General Authority to Establish Conditions of Employment**

Except for a Register of Deeds’ authority to appoint certain deputies as discussed above, and the Register’s authority to assign duties and supervise employees with respect to the Register’s constitutional and express statutory duties, the County Board (and/or the County Executive or County Administrator, as applicable) maintains authority to establish employee (including deputy) wages, hours, and other conditions of employment.

As noted above, the office of Register of Deeds is considered a constitutional office under Wis. Const., art. VI, § 4. In addition to the duties set by statute, courts recognize that there are certain other “important duties” of constitutional officers that have been performed on an “immemorial basis” that cannot be transferred by county board action. *See Wisconsin Prof Police Ass’n v. County of Dane*, 106 Wis. 2d 303, 310-12, 316 N.W.2d 656, 660 (1982); *State ex rel. Milwaukee County v. Buech*, 171 Wis. 474, 481-82, 177 N.W. 781, 784 (1920). Importantly, “[s]tatutory powers and duties conferred upon a county officer cannot be narrowed, enlarged, or taken away by a county board unless the legislature has authorized such action.” *Harbick v. Marinette County*, 138 Wis. 2d 172, 405 N.W.2d 724 (Ct. App. 1987) (citing *Reichert v. Milwaukee County*, 159 Wis. 25, 35, 150 N.W. 401, 403-04 (1914)).

Section 59.43, Wis. Stats. describes the duties of a Register of Deeds. Most of the duties identified in the statute relate to the ministerial functions associated with accepting and filing certain records related to real property within a county. Indeed, the Attorney General has recognized that the duties of registers of deeds are statutory and, therefore, ministerial. OAG

16-80 (citing Annot., 94 A.L.R. 1303 (1935); *Youngblood v. United States*, 141 F.2d 912 (6<sup>th</sup> Cir. 1944); *State ex rel. Preston v. Shaver*, 172 Ohio St. 111, 173 N.E.2d 758 (1961)). In this regard, we are aware of no precedent suggesting that a register of deeds possesses any “important duties” that have been performed on an “immemorial basis” other than the specific duties associated with real property records set forth in statute, the limited statutory authority related to hiring and firing of certain personnel and the relatively inconsequential supervisory duties with respect to aiding the Register in the performance of the Register’s duties (as also discussed in part above).<sup>2</sup> However, the authority to establish most conditions of employment is vested in the county board.

In *Winnebago County v. Winnebago County Courthouse Employees Ass’n*, 196 Wis. 2d 733, 540 N.W.2d 204 (Ct. App. 1995), the Court of Appeals recognized that an elected official’s power to appoint and supervise deputies does not equate to a power to regulate conditions of employment. *Id.* at 739. Instead, the authority to establish working conditions vests solely with the county board pursuant to Wis. Stat. § 59.22.<sup>3</sup> This statute provides (in relevant part):

**(2) Appointive officials; deputy officers; and employees.** (a) Except for elective offices included under sub. (1), supervisors and circuit judges, the board has the powers set forth in this subsection, sub. (3) and s. 59.03(1) [administrative home rule] as to any office, department, board, commission, committee, position or employee in county service created under any statute, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.

(c) 1. Except as provided in subd. 2. and par. (d), the board may do any of the following:

- a. Provide, fix or change the salary or compensation of any office, board, commission, committee, position, employee or deputies to elective officers that is subject to sub. (1) without regard to the tenure of the incumbent.
- b. Establish the number of employees in any department or office including deputies to elective officers.
- c. Establish regulations of employment for any person paid from the county treasury.

(emphasis added). As noted above, to the extent that Wis. Stat. § 59.22 and § 59.43 conflict, § 59.22 controls. Wis. Stat. § 59.22(4).

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<sup>2</sup> See Wis. Stat. § 59.43(3) (providing that a Register of Deeds shall appoint one or more deputies, who shall hold office at the Register’s pleasure, and that such deputy or deputies shall aid the Register in the performance of the Register’s duties under the Register’s direction).

<sup>3</sup> See also *supra* Section I.B. The *Crawford County* Court concluded “that...the county has the authority to establish the pay and regulate other conditions of employment of its employees...”

Section 59.03(1) Wis. Stats., provides that “[e]very 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.” In other words, the county board also generally maintains the authority to assign administrative functions to other departments and/or offices (which is generally accomplished by transferring such functions to the county executive, county administrator, or county administrative coordinator, as applicable).

The following sections address specific questions the Association has posed regarding certain job assignments, duties, and other conditions of employment.

### **B. A Single Employee May Simultaneously Serve as Deputy Register of Deeds and Deputy to another Officer With the Consent of the Affected Officers**

A single employee may generally simultaneously serve as deputy Register of Deeds and deputy to another officer so long as such positions are not incompatible and so long as the Register of Deeds and the other affected officer agree to appoint such employee as deputy.

This situation may arise if a county board determines that the Register of Deeds and another officer each only require part-time assistance in order to perform their duties,<sup>4</sup> but prefer to fill the position with one full-time employee. This result may be more easily achieved by simply assigning a regular employee to split their time between the two offices as the county board could simply create the position, establish the number of hours the position will be assigned to each office, and hire a qualified candidate. However, it may be preferable for such employee to be deputized by both officers so that the employee is able to temporarily assume the duties of the respective officers in the event of incapacity or vacancy. As discussed in detail above, though, constitutional officers likely retain some appointment authority over *deputy* positions (though not regular employee positions). Given this, a dual deputization would require the consent, and formal appointment to deputy by, both the Register of Deeds and the other affected officer.

Additionally, a case-by-case analysis may be needed to ensure the two deputy positions are not incompatible. In Wisconsin, offices are incompatible when “one office was superior in some respect to another, so that the duties exercised under each might conflict to the public detriment.” *Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 396 (1984) (citing *State v. Jones*, 130 Wis. 572, 575-76 (1907)).<sup>5</sup> The doctrine of incompatibility also applies when “the nature and duties of two offices were such as to render it improper from considerations of public policy for one person to discharge the duties of both.” *Id.* (quoting *Martin v. Smith*, 239 Wis. 314, 326 (1941)). Such a situation exists, for example, when a person holds offices or positions with duties that might conflict. *Id.* Incompatibility exists if “substantial conflicts might arise that would be detrimental to the public.” *Id.* at 397. “Incompatibility may exist even if the duties of the offices would conflict

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<sup>4</sup> Provided that such determination is not arbitrary and unreasonable as discussed in the Section I.A. above captioned “A County Board May Establish the Number of Deputies that a Register of Deeds May Appoint.”

<sup>5</sup> The concept also applies to government employees in addition to officers. *See Otradovec*.

only on rare occasions.” Letter to Hon. Walter Kunicki, OAG 14-93, 81 Wis. Op. Atty. Gen. 90, 1993 WL 467840 (Wis. A.G. Nov. 4, 1993).

While a fact specific analysis of assigned job duties is required to reach a definitive conclusion, the position of deputy Register of Deeds is unlikely to be considered incompatible with another deputy position (*e.g.*, deputy Treasurer or deputy Clerk) due to the fact that the Register of Deeds’ duties are almost entirely ministerial and there is unlikely to be any issue of superiority of offices or conflicting duties between the office of Register of Deeds and another officer.<sup>6</sup>

### **C. A County May Transfer Administrative Duties and/or Re-Assign Non-Deputized Employees from One Office/Department to Another**

As mentioned in the immediately preceding sections, counties have authority to re-assign non-deputized employees among various offices and departments, and to assign or re-assign duties from one office or department to another to the extent they are not constitutionally or statutorily protected duties (*e.g.*, administrative duties).

A county board maintains authority under Wis. Stat. § 59.22(2) to establish conditions of employment and the power under Wis. Stat. § 59.03(1) to “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.”

Based upon such authority, it is our recommendation that any county determining that the administrative functions of the Register of Deeds should be transferred to other county personnel, or that other county personnel should be assigned (in part or in full) to assist the Register of Deeds, should have formal action from the County Board transferring the responsibilities to the county executive (Wis. Stat § 59.17), county administrator (Wis. Stat § 59.18), or county administrative coordinator (Wis. Stat § 59.19), as applicable.

### **D. Non-Deputy Employees May Assist the Register of Deeds with the Register’s Constitutional and Statutory Duties**

Importantly, a county board need not provide for any deputy positions for the Register of Deeds if the financial resources provided are otherwise sufficient to allow the Register of Deeds to perform his or her constitutional duties. As discussed above, Wis. Stat. § 59.22(2)(c)1.b. provides that it is within the exclusive authority of the county board to establish the number of employees, including deputies, for any department or office. *See also Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee County*, 2016 WI App 56.

For example, if a Register of Deeds refuses to deputize an employee assigned to the office on a part-time basis under the scenario discussed in Section B above, a county board may choose to proceed with assigning the employee part-time under a normal employee designation (*i.e.* non-

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<sup>6</sup> We are also aware of concerns regarding inter-office personnel assignments and compliance with vital records procedures. Similar to the incompatibility analysis, counties must ensure any personnel assigned inter-office duties involving vital records receive appropriate training and that proper safeguards are implemented to ensure ongoing compliance.



deputized). Significantly, nothing in the relevant statutes requires that a Register of Deed's constitutional and statutory duties be performed only by the Register or his or her deputy(ies). Rather, Wis. Stat. § 59.43(1c) provides that a Register of Deeds shall "record or cause to be recorded" documents required to be recorded with the Register. Again, there is no requirement as to who the Register of Deeds may supervise in causing such documents to be record. In fact, the protections provided to a Register of Deeds from liability under slander of title actions (Wis. Stat. § 706.13) are also afforded to "other government employees," and not only to deputies.

## **CONCLUSION**

A Register of Deeds possesses some statutory authority to appoint and supervise deputies and to otherwise supervise standard employees assigned to their office. However, a county board has discretion to determine the number of employees (including deputies) assigned to any department or office (including the office of the Register of Deeds), provided that adequate financial resources are provided to allow the Register of Deeds to perform his or her constitutional duties. Additionally, a county board possess the authority to establish wages, hours, and other conditions of employment.

Therefore, it is generally within the purview of the county board to establish positions, assign personnel, and to establish working conditions with regard to the office of the Register of Deeds.

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