

1730 MISCONDUCT IN PUBLIC OFFICE (BY FAILURE OR REFUSAL TO PERFORM DUTY) — § 946.12(1)

Statutory Definition of the Crime

Misconduct in public office, as defined in § 946.12(1) of the Criminal Code of Wisconsin, is committed by a (public officer) (public employee) who intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of (his) (her) (office) (employment) within the time or in the manner required by law.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. At the time of the alleged offense, the defendant was a (public officer) (public employee). A (position) is a (public officer) (public employee).¹
2. The defendant failed to perform a mandatory, nondiscretionary, ministerial duty of (his) (her) office.

[The mandatory, nondiscretionary, ministerial duties of a (position) include:

_____ .]²

3. The defendant intentionally did not (describe duty).³

This requires that the defendant had the mental purpose⁴ to fail or refuse to perform the duty.

4. The defendant knew (he) (she) was required to (describe duty) (in the manner) (within the time) required by law.⁵

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find purpose and knowledge. Purpose and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1730 was originally published in 1966 and revised in 1990. This revision was approved by the Committee in February 2008 and involved adoption of a new format and changes to the text and footnotes.

1. The Committee believes that it is clearer to the members of the jury if they are simply instructed that, for example, "A member of the county board is a public officer."

"Public officer" and "public employee" are defined as follows in § 939.22(30):

"Public officer" means any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.

"Public employee" means any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

2. The nondiscretionary duties of some public officers and public employees are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's nondiscretionary duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person failed or refused to perform a nondiscretionary duty in the particular case. But see, State v. Jensen, 2007 WI App 256, ___ Wis.2d ___, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, ___ Wis.2d ___, 743 N.W.2d 823.

In State v. Schwarze, 120 Wis.2d 453, 355 N.W.2d 842 (Ct. App. 1984), the court (in interpreting subsec. (3) of § 946.12) held that the question of legal duty of a public employee presents an issue of law and that it is proper for the trial court to instruct the jury that such a duty existed.

In State v. Dekker, 112 Wis.2d 304, 332 N.W.2d 816 (Ct. App. 1983), the court held that a police officer's responsibility to provide first aid to an injured person in police custody is not a "mandatory, nondiscretionary, ministerial duty" under subsection (1) of § 946.12. The court discussed the meanings of those terms, referring to the Black's Law Dictionary definition of "mandatory": "[c]ontaining a command; preceptive; imperative; preemptory; obligatory." Black's Law Dictionary 867 (5th ed. 1979). "Nondiscretionary" was identified as the opposite of "discretionary" and the latter defined as: "[t]hose acts wherein there is no hard and fast rule as to course of conduct that one must or must not take and, if there is clearly defined rule, such would eliminate discretion." Black's Law Dictionary 419 (5th ed. 1979).

The Dekker court referred to statutes and case law for definition of "ministerial":

The code of ethics for public officials defines "ministerial action" as: "an action that a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to the exercise of the person's own judgment as to the propriety of the action being taken." [citing § 19.42(8), Stats.]

Our supreme court has stated that "[a] public officer's duty is ministerial only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." [Citing Cords v. Anderson, 80 Wis.2d 525, 541, 259 N.W.2d 672, 679 (1977).]

112 Wis.2d 304, 311-12.

3. See note 2, supra.

4. "Intentionally" is defined in § 939.23(3) to include not only "mental purpose," but also "is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

5. Section 946.12(1) specifically refers to failure to perform a known duty, emphasizing the presence of a knowledge requirement that also flows from the use of the word "intentionally." See § 939.23(3). The defendant must know that the duty in question was mandatory, nondiscretionary, and ministerial and that it had to be performed within a specified time or in a certain manner. The 1953 Report on the Criminal Code described the knowledge requirement as follows: "[I]t is necessary to find that the officer or employee, at the time of his refusal or failure, knew the duty existed or knew that the duty was supposed to be performed within a certain time or in a particular manner. . . . [B]ut if the officer believes in good faith that the law imposes no duty on him in the particular case, he is not guilty, for such a mistake negatives the existence of the mental element required for the crime." [Citing the rules now found in §§ 939.23 and 939.43]. 1953 Report at 175.