

**1732 MISCONDUCT IN PUBLIC OFFICE (BY EXERCISE OF DISCRETIONARY POWER FOR A DISHONEST ADVANTAGE) — § 946.12(3)**

**Statutory Definition of the Crime**

Misconduct in public office, as defined in § 946.12(3) of the Criminal Code of Wisconsin, is committed by one who is a (public officer) (public employee) and who, in (his) (her) capacity as an (officer) (employee), exercises a discretionary power in a manner inconsistent with the duties of (his) (her) (office) (employment) (the rights of others) and with intent to obtain a dishonest advantage for (himself) (herself) or another.

**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).<sup>1</sup>
2. The defendant, in (his) (her) capacity as a public (officer) (employee) exercised a discretionary power of (his) (her) office.<sup>2</sup> The defendant may exercise discretionary power either by doing something or by failing to do something.<sup>3</sup>

[The discretionary powers of a (position) include: \_\_\_\_\_.]<sup>4</sup>

3. The defendant exercised a discretionary power in a manner inconsistent with (the duties of (his) (her) office) (the duties of (his) (her) employment) (the rights of others).

[The duties of a (position) include \_\_\_\_\_.]<sup>5</sup>

4. The defendant exercised discretionary power with intent to obtain a dishonest advantage for (himself) (herself) (or) (another).<sup>6</sup>

The phrase "with intent to" means that the defendant had the mental purpose to obtain a dishonest advantage or was aware that (his) (her) conduct was practically certain to cause that result.<sup>7</sup> You cannot look into a person's mind to find intent. While this intent to obtain a dishonest advantage must be found as a fact before you can find the defendant guilty, it must be found, if found at all, from acts and words and statements, if any, bearing upon intent.

### **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 1732 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. "Discretionary powers of office" are not limited to expressly conferred powers but apply to de facto powers which arise by custom and usage. State v. Tronca, 84 Wis.2d 68, 80, 267 N.W.2d 216 (1978). Tronca held that an "alderman's privilege" allowing the veto of any liquor license in his district constituted a discretionary power of office under the statute. Tronca also upheld the constitutionality of § 946.12(3) in the face of challenges claiming it was vague and overbroad.

In State v. Schwarze, 120 Wis.2d 453, 457, 355 N.W.2d 842 (Ct. App. 1984), the court discussed the difference between mandatory and discretionary powers, citing State v. Dekker, 112 Wis.2d 304, 332 N.W.2d 816 (Ct. App. 1983).

3. This statement is intended to be a more understandable equivalent of the statutory phrase: "whether by act of commission or omission."

4. The discretionary powers 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 powers in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's discretionary powers 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 was exercising the powers 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.

5. The 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 official 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 was performing the duty in the particular case.

In State v. Schwarze, 120 Wis.2d 453, 355 N.W.2d 842 (Ct. App. 1984), the court 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 a duty existed. 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.

6. In State v. Jensen, 2007 WI App 256, \_\_\_ Wis.2d \_\_\_, 743 N.W.2d 468, the court of appeals reversed a conviction under § 946.12(3) because it concluded that the trial court erred in adding the following to the jury instruction on the fourth element: "The use of a state resource to promote a candidate in a political campaign or to raise money for a candidate provides to that candidate a dishonest advantage." The court held that this had the effect of directing a verdict against the defendant on the

element of the crime requiring that the defendant exercise discretionary power with intent to obtain a dishonest advantage. Jensen, ¶14.

Jensen also held that ". . . the court erred in excluding Jensen's testimony as to his understanding of the use of state resources for campaigns by other legislators, because the testimony was relevant to the contested issue of Jensen's intent." Jensen, supra, ¶40.

7. "Intentionally" is defined in § 939.23(3). See Wis JI-Criminal 923A and 923B.