

1734 MISCONDUCT IN PUBLIC OFFICE (BY UNLAWFUL SOLICITATION OR ACCEPTANCE OF ANYTHING OF VALUE) — § 946.12(5)**Statutory Definition of the Crime**

Misconduct in public office, as defined in § 946.12(5) of the Criminal Code of Wisconsin, is committed by one who is a (public officer) (public employee) and who, under color of (his) (her) (office) (employment) intentionally solicits or accepts for the performance of any service or duty anything of value which (he) (she) knows is greater or less than fixed 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 intentionally solicited or accepted anything of value² for the performance of any service or duty.

"Intentionally" means that the defendant had the mental purpose³ to solicit or accept anything of value for the performance of any service or duty.

[The (services) (duties) of a (position) include _____.]⁴

3. The defendant knew that the amount (solicited) (accepted) was greater or less than is fixed by law.
4. The defendant acted under color of (his) (her) (office) (employment).⁵

"Under color of (office) (employment)" means to act under the apparent authority of the (office) (employment).⁶

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 1734 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 nonsubstantive changes to the text.

The constitutionality of subsec. (5) of § 946.12 was upheld in *Ryan v. State*, 79 Wis.2d 83, 255 N.W.2d 910 (1977). See notes 2 and 5, below.

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 "anything of value" standard is specific enough to be constitutional. Ryan v. State, 79 Wis.2d 83, 255 N.W.2d 910 (1977). "There is a standard and it is simple. Anything of value which is accepted and known to be greater or lesser than what is fixed by law for a particular duty or service subjects the public officeholder to prosecution for violation of this section. This does not mean that the public officeholder can never accept a gift. Section 946.12(5), Stats., is only violated when that which was accepted was 'for the performance of any service or duty.'" 79 Wis.2d 83, 92.

3. "Intentionally" is defined in § 939.23(3) to include not only "mental purpose" but also "is aware that his 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.

4. 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.

5. Ryan v. State, note 2, supra, involved the acceptance of \$600 worth of gift certificates by an alderman allegedly in return for his not exercising his veto power over liquor license applications. The court rejected Ryan's claim that the statute did not apply to him because no fees were set by law for aldermanic approval of licenses and that the statute was intended to cover only public employees holding administrative positions. The court concluded that "Ryan had a duty as an alderman to vote upon the recommendations of the license committee, which he did. His salary was fixed by law. The jury could infer that he accepted \$600 worth of certificates as a greater compensation than was fixed by law for his services as an alderman." 79 Wis.2d 83, 93.

6. Black's Law Dictionary, (7th ed., 1999), offers the following definition of "color of office": "The authority or power that is inherent in an office, esp. a public office. Acts taken under the color of an office are vested with, or appear to be vested with, the authority entrusted to that office."