

# State of Wisconsin\Government Accountability Board

212 East Washington Avenue, 3<sup>rd</sup> Floor  
Post Office Box 7984  
Madison, WI 53707-7984  
Voice (608) 266-8005  
Fax (608) 267-0500  
E-mail: [gab@wisconsin.gov](mailto:gab@wisconsin.gov)  
<http://gab.wi.gov>



JUDGE THOMAS H. BARLAND  
Chair

KEVIN J. KENNEDY  
Director and General Counsel

---

## Wisconsin Government Accountability Board

212 East Washington Avenue  
Madison, Wisconsin  
January 14, 2014  
9:00 a.m.

### Open Session Minutes

<u>Summary of Significant Actions Taken</u>	<u>Page</u>
A. Selection of Board Officers	2
B. Delegated Certain Authority to the Director and General Counsel	2
C. Approved Ballot Access Report	5

Present: Judge Michael Brennan in person. By telephone, Judge Thomas H. Barland, Judge Harold Froehlich, Judge Elsa Lamelas, Judge Gerald Nichol and Judge Timothy Vocke.

Staff Present: Kevin Kennedy, Jonathan Becker, Michael Haas, Shane Falk, Sharrie Hauge, Diane Lowe, David Buerger and Reid Magney

#### **A. Call to Order**

Judge Brennan called the meeting to order at 9:01 a.m.

#### **B. Director's Report of Appropriate Meeting Notice**

Director and General Counsel Kevin Kennedy informed the Board that proper notice was given for the meeting. One member of the public was present at the meeting.

#### **C. Minutes of December 17, 2013 Meeting**

**MOTION:** Approve the minutes of the December 17, 2013 Board Meeting.

Judge Vocke noted a typographical error at the bottom of Page 3. Moved with correction by Judge Barland, seconded by Judge Nichol. Motion carried unanimously.

**D. Selection of Board Officers**

The selection of Board Officers was done by lot. Judge Brennan drew Judge Barland's name to be G.A.B. Chair for 2014. Judge Barland asked Judge Brennan to continue chairing the meeting. Judge Brennan then drew the name of Judge Froehlich to be G.A.B. Vice-Chair and his own name to be G.A.B. Secretary for 2014.

**E. Delegation of Certain Authority to the Director and General Counsel**

Director Kennedy introduced the annual memorandum regarding the Board delegating certain authority to the Director and General Counsel.

**MOTION:** Adopt the proposed motion on Pages 13 and 14 of the Board materials. Moved by Judge Vocke, seconded by Judge Nichol.

Discussion.

Judge Barland raised the issue of whether the Board should delegate to general counsel the power to intervene in civil lawsuits, which is item 1) in the motion.

Judge Lamelas asked about item 6) delegating the authority to sign or enter contracts on behalf of the Board, and suggested limiting it to a certain dollar amount.

Director Kennedy said the main reason intervention in civil lawsuits under item 1) has not been in the hands of the Board is because of the practice of the Board Chair and the Director discussing intervention first. There can be a timeliness issue when the Board must intervene if a circuit court judge gets a local decision wrong, or if the Attorney General asks the Board to intervene. He said it is not something that happens often.

Director Kennedy said that under item 6) the contracts that staff enter into can involve hiring investigators or special prosecutors and running day-to-day agency business, such as agreements for information technology development which can often exceed \$100,000. He said the Board is involved in decisions about large projects.

Judge Lamelas asked about hiring investigators and special prosecutors.

Ethics Division Administrator Jonathan Becker said that the Board must decide to hire specific investigators, and any time the amount paid to an investigator exceeds \$10,000 it must be authorized by the Board.

Judge Lamelas said none of that information is reflected in the delegation of powers. Judge Brennan noted that it is in the statutes.

Director Kennedy said the biggest contract expenses are for information technology support staff, and those contracts are executed according to state procurement rules and procedures,

which he reviewed. He said that having the Board Chair weigh in on several different IT contractors each year is problematic.

Mr. Becker said vendors need proof that Director Kennedy has the authority to sign contracts, and it makes some sense to indicate who has that authority.

Director Kennedy said the Board could establish an upper limit for contract authority, which needs to be seven figures.

Judge Lamelas said she was thinking about a lower limit of \$50,000. Contracts between \$50,000 and \$100,000 could be signed by the Director after consultation with the Board Chair. Board approval would be required for contracts of more than \$100,000. She said that while Director Kennedy needs the ability to move the agency forward, she would hate to wake up and find out we've entered into an open ended contract to pay someone a huge amount of money.

Judge Nichol said that in his six years on the Board that has never been a problem.

Director Kennedy said that a year's employment contract for an information technology contractor can be \$170,000, and these workers transition on a yearly basis.

Judge Froehlich expressed concern that contracts with investigators need to go to the Board for approval.

Judge Brennan asked Judge Froehlich whether he would be happy with inserting a reference into item 6) to the statutory provision in Section 5.05(2m) Wis. Stats., and Judge Froehlich said he was satisfied.

Judge Barland said he believed that would be appropriate. He expressed concern that the Board not require the Board Chair's physical signature on contracts over \$100,000, and Judge Lamelas said she agreed. Judge Barland called Judge Brennan's suggestion to add the Section 5.05(2m) language a sound compromise.

Mr. Becker summed up the discussion so far, to amend item 6) of the motion to state that the Director has authority to enter into and physically sign contracts on behalf of the Board, except those under Section 5.05(2m), and except those over \$100,000 when the Director shall consult with the Board Chair and receive approval.

Director Kennedy noted that IT contracts are actually purchase orders, not contracts, but they are binding.

Judge Lamelas said Mr. Becker's summation of an amendment sounds like an appropriate resolution.

Judge Vocke said he was withdrawing his motion to approve, and will let someone else make a motion.

Judge Lamelas said she has two other questions, first about the delegation of authority in item 8) regarding voting system modifications. She said the Board has the power to approve voting systems and she does not wish to give away that power. Second, she asked about authority under item 10) to communicate with litigation counsel and whether that included the authority to settle.

Director Kennedy explained that the voting system modifications deal with routine technology changes such as when new parts as simple as labels on cases are added to a voting system, known as engineering change orders (ECO). He said that at the October 2013 meeting the Board was presented with a report on ECOs approved during the year.

Staff Counsel Shane Falk said such changes are de minimis.

Director Kennedy said that regarding settlement of litigation, the Board is always consulted; however, when the Board is represented by the Attorney General, the Board has no final approval in settlement decisions. If the Board is represented by outside counsel, there would be no settlement without the Board being involved.

Judge Lamelas said she understands the reasons for those delegations of authority.

Judge Barland asked about item 5) regarding the non-appointment of an election official.

Director Kennedy explained that item has to do with situations in which a political party has nominated a poll worker who a municipality does not want to appoint for cause. State law allows the G.A.B. to override the party's nomination. He said these situations arise very rarely, tend to be personality driven issues, and have never resulted in the Board or the Director taking official action. He suggested it is not the kind of issue the Board wants to become involved with.

Judge Barland asked whether the language in the motion might be amended to better describe the situation.

Mr. Falk said that the language comes from statute, and Judge Barland said he had no other issues.

**MOTION:** Adopt the proposed motion on Pages 13 and 14 of the Board materials with amendments. Moved by Judge Nichol, seconded by Judge Froehlich.

Further discussion regarding language of the amendment.

Judge Lamelas restated the amendment to item 6): “To sign contracts on behalf of the Board, except as provided in Section 5.05(2m), and for any contract involving a sum over \$100,000 the Director must first consult with the Board Chair. In accordance with the foregoing, the Director has the authority to execute and sign contracts.”

Judge Brennan called the question. Motion carried unanimously.

#### **F. Personal Appearances on Ballot Access**

There were no personal appearances.

#### **G. Election Administration – Ballot Access Report**

Division Administrator Michael Haas introduced Lead Elections Specialist Diane Lowe who presented an oral and written report regarding ballot status issues. Staff received 52 sets of nomination papers. Ms. Lowe reviewed a few minor irregularities in nomination papers, none of which affected ballot status. No challenges were filed, and all Statements of Economic Interests were timely filed. Dunn and Waupaca counties are the only counties where circuit court judge primaries will be held.

Judge Barland asked why the Waupaca County judgeship is vacant. It is a new seat.

**MOTION:** Certify ballot status for all the candidates listed on the Candidates on Ballot reports, starting on Pages 19 through 30 of the G.A.B. meeting materials of January 14, 2014. Moved by Judge Vocke, seconded by Judge Barland. Motion carried unanimously.

#### **H. Report on Voting Equipment Audit and Ballot Review Issues**

Division Administrator Haas provided an oral and written report, starting on page 31 of the G.A.B. meeting materials of January 14, 2014. At the December 17, 2013 meeting, the Board received a report on results of the voting equipment audits completed after the 2008, 2010 and 2012 general elections. At that meeting, some Board members had further questions about the scope of the voting equipment audits and whether they ought to encompass the equipment's ability to read ballots cast by voters who did not follow the instructions for proper ballot marking. Additionally, the Board heard public comments from individuals who want election inspectors to have the option to verify the accuracy of voting equipment on Election Night. At the December meeting, the Board directed staff to prepare a summary of issues raised for possible further discussion at the January meeting.

Mr. Haas said the summary identifies a number of issues discussed at the December meeting. He said staff recommends that the Board not pursue or direct staff to spend significant time or efforts to change Election Night procedures, and that the Board not tinker with voting equipment audit procedures. He said that what has been requested for Election Night is not required or authorized by statutes, and that the Board risks a mass exodus of election inspectors if hand counts on Election Night to verify voting equipment are required or authorized. He noted that individuals or groups sometimes come to the Board to lobby for election procedures which are a matter of policy, such as voter photo ID, and that the Board's position has been that policy matters should be taken up with the Legislature.

Regarding the voting equipment audits, Mr. Haas said that the number of improperly marked ballots is small, and that if the election results are close, the losing candidate has a right to a recount, when all the ballots will be examined to determine voter intent.

Judge Froehlich asked why the staff cannot make a simple calculation to find out how many people are not marking ballots correctly by reporting the total number of ballots cast and the total number of ballots counted by machine.

Mr. Haas said that information is already reported by clerks on the Election Voting and Registration Statistics Report, also known as the GAB-190 form. Director Kennedy said the numbers are reconciled as part of the audit process.

Judge Froehlich said he wants to know how many people voted and their ballots were not counted.

Judge Lamelas said Election Night verification of voting equipment was impractical and impossible, but with respect to the audit, Section 7.08(6) Wis. Stats. states that following each election the Board is to audit the performance of each system and to determine the error rate of all ballots cast. She said her sense is that in a recount situation, a ballot from which the voter's intent can be determined is a validly-cast ballot. Therefore, the statute is telling us to audit whether the voting system is counting validly cast ballots. She said that to ignore validly cast ballots is not something she can sign onto.

Mr. Haas said it is impossible to read statutes to require voting equipment to count ballots that it cannot read. For the purpose of the audit, a valid ballot is a ballot that can be read by the equipment. If we are finding that equipment has an unusually large number of unread ballots, the Board needs to look at the certification of that equipment. He said the purpose of the recount is to examine every ballot, but that's different than the purpose of the audit.

Mr. Falk said not a single piece of voting equipment would pass the error rate if the statutes required us to see if the machine is counting every ballot.

Electronic Voting Systems Elections Specialist Sherri Ann Charleston said the G.A.B. asks municipalities to provide the Board with the total number of ballots cast and the number of electors in order to determine if there are any missing ballots, so that information is in-house. She said municipal panels conducting the audits look at the total number of voters registered and compare that to the votes, and then go through the ballots looking for explainable errors. They look to see if the equipment is performing to standards. If a vendor says a machine will not count red marks on a ballot, that is an explainable error. If, after finding explainable errors, there is more than one error in 500,000 ballots, staff would reach out to the vendor.

Judge Froehlich said he wants to look at how many votes were cast – the raw figures – and the number of votes counted.

Ms. Charleston said it is possible to get the Board those figures, which are part of the data review process, but staff does not include them in the report.

Judge Lamelas said staff's interpretation of Section 7.08(6) is not consistent with the statutes. If a ballot is validly cast by electors, that's what we should be looking at.

Mr. Haas said that whether or not that interpretation is legally correct, that has never been the interpretation of the staff before. He said a ballot that has not been properly marked cannot be counted by voting equipment that has been certified and approved by the Board.

Judge Lamelas said she understands Mr. Haas' point, but that she does not believe the G.A.B is complying with the statute if we ignore ballots that are legally cast. She said a post-election audit should include an examination of physical ballots cast. She said that if one system does a better job of counting ballots than another, the G.A.B. ought to know that.

Ms. Charleston said that federal requirements are configured to differentiate between the ballot and voting equipment. A ballot may be validly cast because the elector is qualified to vote, but the ballot is not filled out correctly. Federal guidance on best practices directs election officials to look at the specifications from the vendor and determine whether the machine is configured correctly.

**MOTION:** That the Government Accountability Board staff as a part of its post-election audit procedure examine ballots to determine how accurately a voting system is counting validly cast ballots, including ballots not cast but reflecting voter intent. Moved by Judge Lamelas. No second to the motion.

Judge Barland said the staff's report is missing what Judges Lamelas and Froehlich want, which is a determination of whether the machines are accurately processing the votes cast.

Judge Vocke said he believes Judge Lamelas' request goes beyond the ability of the staff to perform because of the amount of work that would be involved. .

Ms. Charleston provided further explanation of the staff's audit procedures.

Judge Froehlich said he is interested in determining whether the Board needs to do more voter education about the proper way to cast a ballot.

Director Kennedy said the staff will provide Board members with numbers of ballots not counted by voting equipment, and will set up a review of audit procedures before the next audit following the November 2014 election.

## **I. 2013 Annual Reports Regarding Use of HAVA Funds**

Mr. Haas introduced Elections Specialist David Buerger, who prepared written reports found beginning on page 34 of the January 2014 Board meeting materials. Board members had no questions.

## **J. Discussion of Per Diem Policy**

Director Kennedy made a brief oral presentation based on a memorandum beginning on page 60 of the January 2014 Board meeting materials regarding the policy for when Board members will be paid a per diem for attending meetings.

Judge Vocke suggested that he and Judge Lamelas be appointed by Judge Barland to a subcommittee to study the policy and report back to the Board at the regular March Board meeting.

Judge Barland noted that Judge Vocke had made many trips to Madison as Board chair outside of attending regular meetings, for which he did not receive a per diem.

Judge Lamelas said the staff memo on per diem policy is inconsistent with statutes.

Discussion regarding how many members would serve on the subcommittee. Director Kennedy said that any Board member not on the subcommittee who would like input should provide it to him, and he will forward it to the subcommittee.

#### **K. Director's Report**

Director Kennedy asked whether the Board would entertain a motion to waive per diems for the teleconference meetings of that day and of January 6, 2013. There was no motion.

Director Kennedy said the staff is working on one ballot access issue involving an appeal of a local clerk's decision to keep a county board candidate off the ballot. He said he will make the decision in consultation with the Board Chair.

#### **L. Closed Session**

Adjourn to closed session as required by statutes to deliberate on requests for advice under the Code of Ethics for Public Officials and Employees, lobbying law, and campaign finance law; to consider the investigation of possible violations of Wisconsin's lobbying law, campaign finance law, and Code of Ethics for Public Officials and Employees; to confer with counsel concerning pending litigation; and to consider performance evaluation data of a public employee over which it exercises responsibility.

**MOTION:** Move to closed session pursuant to §§5.05(6a), 19.85(1)(h), 19.851, 19.85(1)(g), and 19.85(1)(c), to deliberate on requests for advice under the Code of Ethics for Public Officials and Employees, lobbying law, and campaign finance law; to consider the investigation of possible violations of Wisconsin's lobbying law, campaign finance law, and Code of Ethics for Public Officials and Employees; and confer with counsel concerning pending litigation, and to consider employment, promotion and performance evaluation data of a public employee of the Board. Moved by Judge Lamelas, seconded by Judge Nichol.

Roll call vote:	Barland:	Aye	Brennan:	Aye
	Froehlich:	Aye	Lamelas:	Aye
	Nichol:	Aye	Vocke:	Aye

Motion carried unanimously. The Board took a brief recess and convened in closed session at 10:48 a.m.

**M. Adjourn**

The Board adjourned in closed session at 12:11 p.m.

####

The next regular meeting of the Government Accountability Board is scheduled for Wednesday, March 19, 2014, at the G.A.B. office, 212 E. Washington Ave., in Madison, Wisconsin beginning at 9 a.m. A teleconference meeting will be scheduled the week of February 25, 2014.

January 14, 2013 Government Accountability Board meeting minutes prepared by:

/s/

\_\_\_\_\_  
Reid Magney, Public Information Officer

January 23, 2014

January 14, 2013 Government Accountability Board meeting minutes certified by:

/s/

\_\_\_\_\_  
Judge Michael Brennan, Board Secretary

February 25, 2014