

State of Wisconsin\Government Accountability Board

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



JUDGE TIMOTHY L. VOCKE
Chair

KEVIN J. KENNEDY
Director and General Counsel

Wisconsin Government Accountability Board

212 East Washington Ave.
Madison, Wisconsin
August 13, 2013
9:00 a.m.

Open Session Minutes

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Present: Judge Timothy L. Vocke, Judge Gerald C. Nichol, Judge Michael Brennan, Judge Thomas H. Barland, Judge Thomas Cane and Judge David G. Deininger (by telephone)

Staff present: Kevin Kennedy, Jonathan Becker, Michael Haas, Shane Falk, Sharrie Hauge, Sherri Ann Charleston, Diane Lowe, Allison Coakley, Christopher Doffing, Juanita Borton, Michael Nelson, and Reid Magney

A. Call to Order

Judge Vocke called the meeting to order at 9:00 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.

C. Minutes of Previous Meeting

May 21, 2013 Meeting

MOTION: Approve the Open Session minutes of the meeting of May 21, 2013 with the correction requested by Mary Ann Hanson regarding her comments about special voting deputies. Moved by Judge Nichol, seconded by Judge Barland. Motion carried unanimously.

D. Personal Appearances from Members of the Public

Mary Ann Hanson of Brookfield appeared on her own behalf to request a correction to the May 21, 2013 minutes to reflect her comment that not everyone who lives in a nursing home or a care facility is required to vote by special voting deputy. She also commented that she has submitted questions to staff regarding Agenda Item G1, Administrative Rule GAB 4. She said name tags are important for all election observers and they should identify for what purpose the observers are there, i.e. disability advocates. Regarding the 6-to-12-foot rule, she said that depending on the polling place, 6 feet can be quite a distance.

Karen McKim of Waunakee appeared on behalf of the Wisconsin Grassroots Network Election Integrity Action Team to discuss the group's report on citizen observation of post-election audits, copies of which were distributed to Board members. She said clerks performed very good audits of voting equipment at a low cost, and that every audit went well. Changes sought by the team are mostly legislative in nature and better directed to the Legislature. She said post-election audits build public confidence in election accuracy. In the coming year, the group will be encouraging clerks to go beyond the minimum requirements in post-election auditing, and she asked the Board to refrain from discouraging clerks from doing so.

Discussion between Judge Barland and Ms. McKim regarding the group's history.

Neil Ford of Lodi appeared on behalf of the Wisconsin Council of the Blind and Visually Impaired to discuss agenda Item F, the report on voting accessibility. He is also a member of the Board's Accessibility Advisory Committee. He explained that he has voted absentee for the past 12 years because he is no longer able to drive to the polling place. He said his main concern is improved accessibility of the voting process, particularly transportation to and from the polls.

Discussion between Judge Vocke and Mr. Ford regarding his experiences as a voter. He said he has participated in demonstrations of accessibility voting equipment, but has not used such equipment during an actual election.

Alicia Boehme and **John Shaw** of Madison appeared on behalf of Disability Rights Wisconsin and the Wisconsin Board for People with Developmental Disabilities, respectively, to discuss agenda Item F, the report on voting accessibility. They said the

report highlights the great work the G.A.B. has done. While the report shows there is a great deal of work still to be done, a great deal has already been done. They noted that the G.A.B.'s effort to identify issues at the polls has been very important because if the issues are not identified, they cannot be addressed. They noted that the G.A.B. often identifies simple things for clerks/election officials to implement that improve public voting by persons with disabilities. They also noted that the G.A.B. has helped to improve the situation such that they no longer consistently have the "big ticket" problems that existed 11 years ago. They said that removing barriers makes more people with disabilities want to vote. They said that anecdotally, the top problems include accessible doors being locked or not being marked, and problems with snow in the winter.

Andrea Kaminski of Madison appeared on behalf of the League of Women Voters of Wisconsin regarding Agenda Item G1, Administrative Rule GAB 4. She said the rule is a good balance between the needs of voters for privacy and an orderly process for ensuring transparency. She also commented on the accessibility report, noting that League observers noted issues with lack of signage for accessible entrances, lack of parking, and accessible voting equipment that was set up, but without privacy for voting.

Diane Hermann-Brown of Sun Prairie appeared on behalf of the Wisconsin Municipal Clerks Association, as Chair of the Election Concerns Committee, and the City of Sun Prairie to comment on accessible voting places and observer rules. She suggested the G.A.B. send out a memo to municipal public works directors reminding them of the need to plow accessible parking spaces in winter. She said Administrative Rule GAB 4 is very clearly written, which will be helpful when clerks need to work with law enforcement officials who often want black-and-white rules to enforce. She said the majority of municipalities do not have polling place issues with observers, but that some have more aggressive election observers, which is why the rules are necessary.

Discussion between Board members and Ms. Hermann-Brown regarding examples of polling place behavior and the practicality of the 6-to-12-foot rule. She said most clerks are comfortable making adjustments based on individual polling place configurations. She said most observers in Sun Prairie are local residents, and she often recruits them to become poll workers.

E. Voting Equipment Certification Issues

1. Elections Systems & Software application for approval of the ES&S Unity 3.4.0.1 (modem component)

Elections Specialist Sherri Ann Charleston presented a verbal and written report located on page 14 of the August Board Meeting materials regarding testing results and staff recommendations for conditional approval for ES&S Unity 3.4.0.1, which has not been certified by the U.S. Election Assistance Commission. The underlying system, 3.4.0.0, was approved by the Board in March 2013, and staff has tested the 3.4.0.1 equipment with an analog modem in accordance with the protocols approved by the Board in May 2013. Ms. Charleston described the testing, which occurred in Brown, Marathon, Dane

and Rock counties during July. While the equipment met 100 percent of standards for accuracy of data transmitted, it met the reliability standard 75 percent of the time because of several anomalies. Later, ES&S conducted testing in each of the four counties with its own engineering staff, and reported 100 percent reliability. Because of the scheduling for this Board meeting and the need to prepare reports on the testing, G.A.B. staff was unable to participate in the second round of testing conducted by ES&S.

Discussion.

Director Kennedy said that in consultation with the Board Chair, he made the decision not to send G.A.B. staff to the second round of testing due to limited staff resources. He said voting equipment does not get a “do-over” on election night if it fails.

Judge Barland questioned why staff would recommend conditional approval if the equipment had a 75 percent reliability score in the testing. Director Kennedy said the staff identified problems with the telecommunications infrastructure. The conditions recommended by staff address these concerns and require clerks and the manufacturer to conduct acceptance testing and functional testing, and to conduct successful test elections in the 2014 Spring Primary and 2014 Spring Election prior to final approval by the Board.

Ms. Charleston further described the issues encountered by the G.A.B. staff testing team, including problems with load testing to simulate multiple simultaneous attempts to transmit election results on election night. There were also modem sensitivity issues, possibly caused by 90 percent humidity on one of the test days, as well as line infrastructure problems.

Judge Vocke recognized Steve Pearson, vice president of Elections Systems & Software. Mr. Pearson said that the initial testing proved the system can transmit results successfully, and the infrastructure issues experienced demonstrate the challenges that counties and municipalities commonly face. He discussed ES&S’s subsequent successful testing of the system and described some of the reasons he believed the initial reliability tests failed. He said during one of the load tests, the server was connected improperly. He indicated that there was nothing atypical about the G.A.B. initial test results and those results are typical of this equipment. He indicated that the modem is not special or unique and it is an off-the-shelf item; however, he acknowledged that he just learned humidity is an issue for modeming results. He also acknowledged that analog is an aging technology and that wireless technology is more reliable.

Judge Vocke asked why the system was not set up right for the first tests. Mr. Pearson said it was an error, which is why ES&S sent a network engineer for the second tests.

Further discussion of testing issues and reliability of analog modems elsewhere in the nation. Mr. Pearson stated that “stuff happens” and acknowledged that some modems are not always reliable, but that if a clerk is able to get 80 percent to 90 percent of unofficial results in early because of modems, “that’s a nice feature for them.” He said ES&S did

not realize it could have tested the phone lines in advance of the G.A.B.'s testing. Mr. Pearson also noted that ES&S has as part of its process provided support for the integration of the system in the counties. He acknowledged that ES&S cannot control phone systems, but can assist with identification of issues with a particular phone system.

Judge Vocke recognized Brown County Clerk Sandy Juno, who appeared on behalf of Brown County to offer her observations on the testing. She said the G.A.B. testing plan did not identify the critical step of pretesting telephone lines, which is something Brown County election officials do before elections. She said the staff's recommendation for conditional approval of ES&S Unity 3.4.0.1 is a problem because buying conditionally-approved equipment does not go over well with the county's board of supervisors, attorneys, and risk managers.

Discussion regarding testing, equipment warranties, and infrastructure issues.

Judge Vocke recognized Rock County Clerk Lori Stottler, who appeared on behalf of Rock County to discuss the testing. She praised the G.A.B. staff for its efforts. She described the current Optech Eagle ballot tabulators with modems as being like an old car that can be fixed without the need for computer diagnostics. However, the software that runs them will not be supported by Microsoft starting in April 2014. She said she would prefer final approval rather than conditional approval because the equipment is transmitting unofficial results. She said she does not want to spend \$325,000 on new equipment if there is a possibility the G.A.B. will order the modems to be removed next year in the event the system is not given final approval. She did express concern that the Unity 3.4.0.1 system may not work for Rock County because they are losing so many of their analog lines.

Discussion.

Judge Vocke recognized Dane County Clerk Scott McDonell, who appeared on behalf of Dane County. He said he did not have a problem with the G.A.B.'s testing protocol, and said ES&S should have had more senior staff on site for the initial testing. If the new equipment will allow him to get 70 percent of the results by modem, that is great, he said. He is not concerned with that reliability rate. Problems occur when people call in unofficial results and there are transcribing errors. He noted that some of the county's equipment has been flood damaged and needs to be replaced, so time is of the essence.

Discussion regarding whether the county board would approve purchase of a system with only conditional approval. Clerk McDonell said it would cause some confusion. He said town clerks do not want to have to drive their results to the county on election night. He suggested mandating testing as part of the procurement process. He also said modems should be wireless, and only be able to send data, not receive.

Judge Vocke called a recess at 10:52 a.m. The Board reconvened at 11:12 a.m.

Continued discussion. Judge Cane asked staff: Why not let municipalities decide whether to purchase the equipment instead of waiting for final approval, if the equipment and analog lines will be tested? Ms. Charleston said staff was not able to determine whether the lines were the only problem, or whether there may have been problems with the modems. She said that if staff is going to recommend the Board put its stamp of approval on a piece of equipment, staff wants to ensure that it met all the standards. Recommending conditional approval gives clerks the space to make sure the modems are working before the vendor walks away from the sale.

Judge Barland said he is concerned about public confidence in the voting process, and he is not prepared to approve conditionally. Judge Deininger said he would be concerned if the state approved the system without conditions and then it is bought in quantity statewide, only to have 25 percent unreliability.

MOTION: Adopt the staff’s recommendation for conditional approval of the ES&S voting system's Application for Approval of Unity 3.4.0.1 to be sold or used in Wisconsin, including the conditions described in the staff report set out on pages 33 to 35 of the August Board Meeting materials. In addition, include the following language from page 15 of the Addendum to Item E submitted by ES&S: “Election Preparation Testing - Line and DS200 unit testing prior to each election is essential to ensure reliable and efficient data transmissions on election night. These tests should include the line specification and quality tests along with operational verification testing of each modem equipped DS200 scanner.” Furthermore, its use at a test election during the completion of the functionality and integrity testing shall be valid for all purposes as if the Board had given final approval to the voting system. Moved by Judge Deininger, seconded by Judge Nichol.

Discussion. Judge Cane said he liked the idea of one more test. Judge Brennan said it is the Board’s job to regulate elections. Judge Vocke called for a roll-call vote.

Roll call vote: Barland:	No	Brennan:	Aye
Cane:	Aye	Deininger:	Aye
Nichol:	Aye	Vocke:	Aye

Motion carried.

Judge Vocke recognized Mr. Pearson, who asked about the criteria for success in 2014 testing. Director Kennedy said the Board would publicly discuss that issue at its future meetings.

2. Prime III Voting System Presentation by Dr. Juan Gilbert of Clemson University/Research Alliance for Accessible Voting

Elections Specialist Sherri Ann Charleston introduced Dr. Juan Gilbert of Clemson University. She said staff is seeking Board approval to continue evaluating the Prime III Voting System.

Dr. Gilbert made an oral and written presentation. He described the development of the Prime III Voting System with the assistance of federal funds from the U.S. Election Assistance Commission. The goal is to create one machine everyone can vote with, including persons with disabilities. The software runs on tablet computer equipment and has a multi-modal interface, so voters can vote by touch, voice, puffing, or a switch. Once a vote has been recorded, a paper ballot is printed that can be fed into an optical scanner for tallying.

Discussion regarding pictures of candidates, auditing, and safeguards to prevent ballot-box stuffing. Dr. Gilbert said the system was tested with disabled voters in Oregon in the 2012 presidential primary.

Discussion regarding open source software. Dr. Gilbert said Clemson is not planning to sell the software, but will give it to anyone. Voting system companies can integrate the software into voting systems that they develop and sell.

Ms. Charleston said staff recommends that the Board authorize staff to continue researching the use of Prime III, including exploring ways to upload vote totals into the G.A.B.'s Canvass Reporting System.

MOTION: Direct staff to continue researching the potential use of the Prime III voting system in Wisconsin, including collaborating with Dr. Gilbert to explore how the Prime III software might be able to interface with current G.A.B. applications, including MyVote Wisconsin and the Canvass Reporting System. The Board also directs staff to seek to design a pilot program with cooperating counties or municipalities for potentially using the Prime III during the April 1, 2014 Spring Election, and to report its progress and recommendations at future Board meetings. Moved by Judge Nichol, seconded by Judge Brennan. Motion carried unanimously.

Judge Vocke called a recess at 12:30 p.m. for lunch. The Board reconvened at 1:05 p.m.

Elections Division Administrator Michael Haas introduced several new members of the training staff:

- **Allison Coakley** was permanently appointed to a project position as training coordinator. She has been with the Board since 2005.
- **Christopher Doffing** was permanently appointed to a project position as multimedia training officer. He has been with the Board since 2010.
- **Juanita Borton** has been newly appointed as a staff trainer. She has a bachelor's degree from UW-Eau Claire and a law degree from the University of Florida, and has extensive experience as a trainer in the private sector.
- **Michael Nelson** has been newly appointed as a staff trainer. He is retired from the U.S. Army, and is finishing his political science degree at UW-Madison. In the Army he was a senior human resources non-commissioned officer, and developed training for improvised explosive device safety.

F. Elections Division Report on Voting Accessibility for Persons with Disabilities and Elderly Voters

Division Administrator Haas introduced Elections Specialist Richard Rydecki, who presented an oral and written report. In July the staff submitted a report to the Legislature describing the Board's efforts to audit polling places in 2011, 2012 and 2013 for compliance with state and federal accessibility laws. While the staff has not had any feedback from the Legislature, the report generated more news media coverage than expected. The report's release has also generated more calls from clerks about accessibility issues. On average, auditors found 6.5 violations per polling place, many of which can be corrected at little or no cost to taxpayers. Accessibility supplies remain available to municipalities through a federal grant. Staff has used technology to improve and automate the auditing process. As data from the audits come in, staff is able to adjust training to reflect the issues found at polling places.

Discussion.

The Board received the report.

G. Administrative Rules

Director Kennedy made a verbal and written report. He said LTE Staff Attorney Jonathan Paliwal, who did much of the work preparing the rules before the Board today, was unable to attend the meeting due to preparation for the patent law bar exam.

1. Review Drafting Changes to GAB Chapter 4 Election Observers

Division Administrator Haas said Chapter 4 Election Observers is at the final stage, and there are slight changes from the version previously approved by the Board, based on Rules Clearinghouse office suggestions.

MOTION: Formally approve the final version of proposed Chapter GAB 4 found on page 67 of the August Board materials and direct staff to submit it to the Legislature. Moved by Judge Barland, seconded by Judge Brennan. Motion carried unanimously.

2. Approve Scope Statements for Chapters GAB 3 and 12, GAB 5, GAB 6 and 9, and GAB 20 and 21.

Division Administrator Haas presented four scope statements for the Board to approve.

MOTION: Pursuant to §§5.05(1)(f), 227.11(2)(a), and 227.135, Wis. Stats., the Board formally approves the Statement of Scope for revisions to Chapters GAB 3 and GAB 12, Wis. Adm. Code, included on page 76 of the August Board Meeting materials, and directs staff to proceed with promulgation of the rules.

MOTION: Pursuant to §§5.05(1)(f), 227.11(2)(a), and 227.135, Wis. Stats., the Board formally approves the Statement of Scope for repeal and recreation of chapter GAB 5 regarding Ballot and Electronic Voting System Security, included on page 79 of the August Board Meeting materials, and directs staff to proceed with promulgation of the proposed rule.

MOTION: Pursuant to §§5.05(1)(f), 227.11(2)(a), and 227.135, Wis. Stats., the Board formally approves the Statement of Scope for revisions to Chapters GAB 6 and 9, Wis. Adm. Code, included on page 83 of the August Board Meeting materials, and directs staff to proceed with promulgation of the rules.

MOTION: Pursuant to §§5.05(1)(f), 227.11(2)(a), and 227.135, Wis. Stats., the Board formally approves the Statement of Scope for revisions to Chapters GAB 20 and 21, Wis. Adm. Code, included on page 87 of the August Board Meeting materials, and directs staff to proceed with promulgation of the proposed rules.

All four motions moved by Judge Cane, seconded by Judge Barland. Motions carried unanimously.

H. Reconciling Ethics Code Disclosure Requirements with Attorneys' Code of Professional Responsibilities

Ethics and Accountability Division Administrator Jonathan Becker made a verbal and written presentation, which is included on page 91 of the August Board Meeting materials. He said state public officials are required to file Statements of Economic Interests, which include disclosure of the official's or immediate family members' sources of income of \$1,000 or more. If the official or family member has a 10 percent or greater ownership interest in a business, then all business sources of income of \$10,000 or more must be disclosed. Many state public officials are attorneys, and some object to disclosing the names of clients for confidentiality reasons. Mr. Becker described a series of changes in Wisconsin Supreme Court rules over the years, and said staff believes the current state of the law requires disclosure by attorneys.

Discussion. Judge Vocke said he served on a judicial committee that worked on the revision of Supreme Court rules, and that he believes attorney-client confidentiality is sacrosanct. Mr. Becker said attorneys never need to disclose the names of individuals, only organizations that are clients. He said the Board could allow attorneys who have an objection to appeal to the Board.

MOTION: Endorse staff's interpretation of SCR 20:1.6(c)(5) as it applies to the Ethics Code disclosure requirements, as described in the staff memo on page 91 of the August Board Meeting materials, except that an attorney may apply to the Board for a waiver when the attorney believes disclosure could create jeopardy for a client. Moved by Judge Cane, seconded by Judge Nichol. Motion carried on a voice vote.

I. Legislative Status Report

Division Administrator Haas said staff is monitoring the status of AB 225, the omnibus election reform bill, which passed the Assembly in June 2013 but has not been taken up in the Senate. There may be more action on AB 225 in the fall session. Director Kennedy said staff continues to hear rumblings about other elections and campaign finance legislation that may come up in the fall.

J. Proposed 2014 Government Accountability Board Meeting Schedule

Director Kennedy discussed the proposed meeting schedule for 2014. One member had a scheduling conflict for March 18, so the date was changed to March 19. The amended schedule is:

- Tuesday, January 14, 2014 (Teleconference)
- Wednesday, March 19, 2014
- Tuesday, May 20, 2014
- Tuesday, June 10, 2014
- Tuesday, August 26, 2014
- Tuesday, October 28, 2014
- Tuesday, December 16, 2014

MOTION: Adopt the proposed 2014 meeting schedule presented by the Director and as modified by Board discussion. Moved by Judge Nichol, seconded by Judge Barland. Motion carried unanimously.

K. Director's Report

Ethics and Accountability Division Report – campaign finance, ethics, and lobbying administration

Written report from Division Administrator Becker and Division staff was included beginning on Page 112 of the Board meeting packet.

Elections Division Report – election administration

Written report from Division Administrator Haas and Division staff was included beginning on Page 116 of the Board packet.

Office of General Counsel Report – general administration

Written report from Kevin J. Kennedy, Sharrie Hauge, and Reid Magney was included beginning on Page 127 in the Board packet.

Director Kennedy advised the Board that he has been invited to testify before the Presidential Commission on Election Administration at a public hearing scheduled for September 20, 2013, in Cincinnati, Ohio. He said the commission is looking for best practices in election administration, and he will share Wisconsin's experiences conducting accessibility audits and collecting cost data.

MOTION: Accept the Director's Report. Moved by Judge Brennan, seconded by Judge Cane. Motion carried unanimously.

L. Closed Session

Adjourn to closed session 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 Brennan, seconded by Judge Cane.

Roll call vote: Barland:	Aye	Brennan:	Aye
Cane:	Aye	Deininger:	Aye
Nichol:	Aye	Vocke:	Aye

Motion carried unanimously. The Board recessed at 2:05 p.m. and convened in closed session at 2:15 p.m.

M. Adjourn

The Board adjourned in closed session at 4:33 p.m.

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The next regular meeting of the Government Accountability Board is scheduled for Tuesday, October 22, 2013. The meeting will be held the Government Accountability Board office in Madison, Wisconsin beginning at 9:00 a.m.

August 13, 2013 Government Accountability Board meeting minutes prepared by:

/s/

Reid Magney, Public Information Officer

August 20, 2013

August 13, 2013 Government Accountability Board meeting minutes certified by:

/s/

Judge Michael Brennan, Board Secretary

October 22, 2013