

Meeting of the Board

Thursday, January 13, 2011 - 10:00 A.M.

Agenda
Open Session

Teleconference Meeting

G.A.B. Conference Room

212 East Washington Avenue, Third Floor

Madison, Wisconsin

Thursday, January 13, 2011

10:00 A.M.

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A. Call to Order	
B. Director’s Report of Appropriate Meeting Notice	
C. Selection of Board Officers	3
D. Approval of Minutes of Previous Meeting	
1. December 14, 2010 Meeting – Open Session	5
2. December 22, 2010 Meeting – Open Session	11
E. Delegation of Certain Authority to Director and General Counsel	15
F. Personal Appearances (Note the Board will be hearing only from individuals with issues concerning ballot access or public funding issues for the 2011 Spring Elections)	
G. Election Administration - Ballot Access Report (Staff report will be distributed January 11, 2011)	
H. Report on Impartial Justice Applications and Distributions (Staff report will be distributed January 11, 2011)	
I. Director’s Report	
J. Closed Session	

5.05 (6a) and 19.85 (1) (h) The Board’s deliberations on requests for advice under the ethics code, lobbying law, and campaign finance law shall be in closed session.

The Government Accountability Board may conduct a roll call vote, a voice vote, or otherwise decide to approve, reject, or modify any item on this agenda.

January 13, 2011 Agenda

- 19.85 (1) (g) The Board may confer with legal counsel concerning litigation strategy.
- 19.851 The Board's deliberations concerning investigations of any violation of the ethics code, lobbying law, and campaign finance law shall be in closed session.
- 19.85 (1) (c) The Board may consider performance evaluation data of a public employee over which it exercises responsibility.

The Government Accountability Board has scheduled its next meeting for Tuesday, March 22 and Wednesday March 23, 2011 at the Government Accountability Board offices, 212 East Washington Avenue, Third Floor in Madison, Wisconsin beginning at 9:30 a.m. on Tuesday, March 22, 2011 and 9:00 a.m. on Wednesday March 23, 2011.

The Government Accountability Board may conduct a roll call vote, a voice vote, or otherwise decide to approve, reject, or modify any item on this agenda.

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JUDGE GORDON MYSE
Chair

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

TO: Government Accountability Board Members

FROM: Kevin J. Kennedy, Director and General Counsel

DATE: January 13, 2011 Meeting

SUBJECT: Selection of Board Officers

Each state agency administered by a Board must elect a chairperson, vice-chairperson and secretary at its first meeting of every year. §15.07(2), Wis. Stats. The Government Accountability Board is required to select its Chairperson by lot, drawn by the current chairperson, at the first meeting of the Board in January of each year. §15.07(2)(b), Wis. Stats. There is no restriction on an individual being selected to serve as Chair more than once during the member's term. There is also no restriction limiting an individual from serving consecutive terms as Chairperson.

Each Board is required to select a chairperson, vice-chairperson and secretary. The selection process for the chairperson of the Government Accountability Board is set by statute. The selection of the other officers is not. In January 2008, the Board established the practice of selecting the other officers by lot as well.

The Board has adopted the practice of filling a vacancy in an office by having the remaining officers move up to fill the vacancy. This keeps the succession practice consistent with the statutory requirement the Board Chairperson be selected by lot. The position of Secretary is chosen by lot to fill the vacancy created by this succession practice.

The staff will prepare the materials for selection of the officers by lot. The Board will be able to proceed with the selection of its 2011 officers at the January 13, 2011 meeting.

The new Chairperson will conduct the meeting after his selection. If the new Chairperson is one of the members participating by teleconference, he may choose to have another member conduct the meeting from Madison.

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JUDGE GORDON MYSE
Chair

KEVIN J. KENNEDY
Director and General Counsel

DRAFT

Not yet
approved by
the Board

Wisconsin Government Accountability Board

212 East Washington Avenue, Third Floor
Madison, Wisconsin
December 14, 2010
9:30 a.m.

Open Session Minutes

<u>Summary of Significant Actions Taken</u>	<u>Page</u>
A. Approved GAB Chapter 4 Election Observer Rule	2
B. Approved ethics and accountability legislative initiatives	3
C. Approved implementation decisions for Impartial Justice Act	4

Present: Judge Gordon Myse, Judge Thomas Barland, Judge Gerald Nichol, Judge Michael Brennan, Judge Thomas Cane, and Judge David Deininger

Staff present: Kevin Kennedy, Jonathan Becker, Nathaniel E. Robinson, Shane Falk, Michael Haas, Sharrie Hauge, Barbara Hansen, Tommy Winkler, and Reid Magney

A. Call to Order

Chairperson Myse called the meeting to order at 9:37 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 Board Meetings

MOTION: Approve the amended minutes of the October 11, 2010 meeting of the Government Accountability Board. Moved by Judge Cane, seconded by Judge Brennan. Motion carried unanimously.

D. Public Hearing on GAB Chapter 4, Election Observers

Chair Myse opened the hearing for public comment.

1. **Mary Ann Hanson of Brookfield** appeared on her own behalf and provided a written copy of her comments in support of the proposed rule. She asked about the status of Paul Malischke’s comment about allowing observers to view the serial numbers of voting equipment prior to polls opening.
2. **Ardis Cerny of Pewaukee** appeared on her own behalf and shared with the Board her experiences as an election observer from the November 2010 election. She said that because of the configuration of polling places such as gymnasiums, election observers often have difficulty hearing interaction between voters and election inspectors.

Seeing no additional speakers, Chair Myse closed the public hearing at 9:50 a.m.

Director Kennedy introduced Aaron Frailing, who joined the staff on October 25, 2010, as an elections specialist.

E. Public Comment

Mary Ann Hanson of Brookfield appeared on her own behalf. Ms. Hanson indicated she had submitted questions in writing to the staff and had received detailed responses

F. Recognition of Barbara A. Hansen

Chair Myse recognized SVRS Director Barbara Hansen, who is retiring effective January 3, 2011. On behalf of the Board, Chair Myse presented her with a letter and a certificate of appreciation mounted on a plaque from the Board for her 21 years of service to the people of Wisconsin at the State Elections Board and the Government Accountability Board.

G. Administrative Rules

1. GAB Chapter 4, Election Observers

Director Kennedy provided a brief overview of the proposed administrative rule GAB 4, Election Observers, and said the focus of the rule is to maintain order in polling places while providing the opportunity for the public to observe the election process. Staff Counsel Michael Haas read a written comment submitted by the League of Women Voters of Wisconsin in support of making the rule permanent.

Discussion.

MOTION: Approve the Proposed Order repealing and recreating ch. GAB 4, including the underlined revisions in the staff recommendation, and direct staff to take all additional steps necessary to complete promulgation of the rule. Moved by Judge Deininger, seconded by Judge Cane. Motion carried unanimously.

2. Status Report on Pending Administrative Rules

A written report from Staff Counsel Shane Falk was included in the Board materials.

Chair Myse called a recess at 11:01 a.m. The Board reconvened at 11:11 a.m.

H. Proposed Legislative Initiatives – Ethics and Accountability Division

A written report from Ethics and Accountability Division Administrator Jonathan Becker was included in the Board packet. Mr. Becker gave an oral presentation regarding recommendations on legislative proposals in campaign finance, ethics and financial disclosure, and lobbying.

Discussion.

MOTION: To approve the principles of legislative change set forth in the report. Moved by Judge Barland, seconded by Judge Cane. Motion carried unanimously.

I. Director’s Report

Elections Division Report – election administration

A written report from Nathaniel E. Robinson was included in the Board packet. Mr. Robinson gave an oral presentation and discussed compliance with the MOVE Act, informing the Board that even without the federal consent decree, no military or overseas voters were in jeopardy of being disenfranchised. MOVE Act coordinator Katie Mueller reported that 4,048 UOCAVA ballots were sent out, including 2,553 military ballots.

Mr. Robinson also reported to the Board that in the next 30 days, staff will be closing out the \$2 million Wisconsin Election Data Collection System (WEDCS) grant. WEDCS has been getting national attention as a low-cost tool for collecting and retrieving voter participation for data analysis, determining trends, and for policy development. Mr. Robinson also reported that WEDCS is a model that can be adopted by other states.

Discussion.

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

A written report from Jonathan Becker was included in the Board packet. Tommy E. Winkler Jr., assistant administrator in the Ethics and Accountability Division, presented an oral report. He discussed lobbying registration preparations for the 2011-2012 Legislative Session, and reported that the new lobbying web application will be ready in the summer of 2011.

Discussion.

Office of Director and General Counsel Report – general administration

A written report from Kevin J. Kennedy, Sharrie Hauge and Reid Magney was included in the Board packet. Mr. Kennedy reported that a presentation he made regarding WEDCS in Austin, Texas, was very well received.

Mr. Kennedy raised the issue of the dates for the Board’s meeting in March, due to a scheduling conflict for Judge Deininger. The Board agreed by consensus to move the meeting from March 29 and 30 to March 22 and 23.

Chair Myse called a lunch recess at 12:36 p.m. The Board reconvened at 1:04 p.m.

J. Staff Report on Implementation of Impartial Justice Act

A written report from Kevin Kennedy was included in the Board packet. Jonathan Becker and Michael Haas made an oral presentation about issues the staff is working on regarding implementation of the law providing public financing to Wisconsin Supreme Court candidates from the Democracy Trust Fund (DTF).

Discussion.

MOTION: Direct staff to administer provisions of the Impartial Justice Act as follows:

1. Affirm the administrative and policy interpretations of Board staff as outlined in the memorandum.
2. The Board shall permit candidates to withdraw an application for participation in the DTF until the deadline for applying for public financing, but no withdrawal of an application shall be permitted after said deadline.
3. The Board may certify the eligibility of a candidate for a public financing grant contingent upon the candidate being certified for ballot access, and public funds shall not be made available to qualifying candidates until the Board has certified ballot access.

Moved by Judge Cane, seconded by Judge Barland. Motion carried unanimously.

Mr. Haas presented written recommendations in a supplemental memo to the Board regarding how to calculate DTF supplemental grants to participating candidates. He also provided an oral report with detailed examples of different funding scenarios.

Discussion.

MOTION: Direct staff to calculate Democracy Trust Fund supplemental grants to participating candidates consistent with staff recommendations. Moved by Judge Deininger, seconded by Judge Cane. Motion carried unanimously.

K. Closed Session

Adjourn to closed session to consider written requests for advisory opinions and the investigation of possible violations of Wisconsin’s lobbying law, campaign finance law, and Code of Ethics for Public Officials and Employees, confer with counsel concerning pending litigation, and consider performance evaluation data of a public employee over whom the Board 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 consider written requests for advisory opinions and 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 consider performance evaluation data of a public employee of the Board. Moved by Judge Brennan, seconded by Judge Barland.

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

Motion carried.

Hearing no objection, Chairperson Myse called a recess at 2:07 p.m. The Board reconvened in closed session beginning at 2:12 p.m.

Summary of Significant Actions Taken in Closed Session:

- A. Investigations and Enforcement: 14 pending matters considered; 39 matters closed; one investigation authorized; no lawsuits authorized.
- B. Litigation: Six pending matters considered.

The Board adjourned in closed session at 5:15 p.m.

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The next regular meeting of the Government Accountability Board is scheduled for Thursday, January 13, 2011, at the G.A.B. offices located at 212 East Washington Avenue, Third Floor, in Madison, Wisconsin beginning at 10 a.m.

December 14, 2010 Government Accountability Board meeting minutes prepared by:

Reid Magney, Public Information Officer

December 30, 2010

December 14, 2010 Government Accountability Board meeting minutes certified by:

Judge Gerald Nichol, Board Secretary

January 13, 2011

State of Wisconsin\Government Accountability Board

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JUDGE GORDON MYSE
Chair

KEVIN J. KENNEDY
Director and General Counsel

DRAFT

Not yet
approved by
the Board

Wisconsin Government Accountability Board

212 East Washington Avenue, Third Floor
Madison, Wisconsin
December 22, 2010
9:30 a.m.

Teleconference Meeting

Open Session Minutes

<u>Summary of Significant Actions Taken</u>	<u>Page</u>
A. Approved Emergency Rule 1.28	3

Present: Judge Gordon Myse, Judge Thomas Barland, Judge Gerald Nichol, Judge Michael Brennan, Judge Thomas Cane, and Judge David Deininger.

Staff present: Kevin Kennedy, Jonathan Becker, Nathaniel E. Robinson, Shane Falk, Michael Haas, Tommy Winkler, Nate Judnic, and Reid Magney

A. Call to Order

Chairperson Myse called the meeting to order at 9:31 a.m.

B. Roll Call

Judges Myse, Barland, Nichol, Brennan and Cane attended by teleconference. Judge Deininger attended in person. All present.

C. Director's Report of Appropriate Meeting Notice

G.A.B. Director Kevin Kennedy informed the Board that proper notice was given for the meeting.

E. Consideration of Emergency Administrative Rule GAB 1.28

Director Kennedy and Staff Counsel Shane Falk discussed the proposed emergency rule, which amends the permanent rule that took effect in August 2010. The amended rule reflects the agreement between the Board and the plaintiffs in *Wisconsin Club for Growth, Inc. v. Myse*, litigation challenging the rule filed in the Western District of U.S. District Court. The Board agreed not to enforce the second sentence of GAB 1.28(3)(b) regarding the irrebuttable presumption for determining when a communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. What this emergency rule does, upon advice of counsel, is eliminate the potential for an overbreadth attack on the rule due to the irrebuttable presumption, which may capture some communications that are susceptible of other reasonable interpretations than as an appeal to vote for or against a clearly identified candidate.

D. Public Comment

- 1. Attorney Matthew O’Neill** of Friebert, Finerty & St. John, S.C. appeared on behalf of Mary Bell and the Wisconsin Education Association Council, intervenors in *Wisconsin Prosperity Network, Inc. v. Myse, et al.* He opposed the emergency rule on the grounds that there is no emergency, the original rule is constitutional, and no court has suggested a partial repeal. He urged the Board to stand down and let the litigation in the Supreme Court run its course.
- 2. Attorney Mike Wittenwyler** of Godfrey & Kahn, S.C. appeared on behalf of Wisconsin Club for Growth and One Wisconsin Now. He supported the proposed emergency rule, and said it is consistent with the parties’ stipulation to the court in *Wisconsin Club for Growth, Inc. v. Myse*. He said the modification will allow the Board to move on to other business.
- 3. Mike McCabe** appeared on behalf of Wisconsin Democracy Campaign. He expressed concern about independent campaign spending not being disclosed, and said the people of Wisconsin need this rule to take effect and work. He said he believes the original rule to be constitutional.

E. Consideration of Emergency Administrative Rule GAB 1.28 (continued)

Discussion.

Chair Myse said the Board had made a commitment in the stipulation in *Wisconsin Club for Growth, Inc. v. Myse, et al.*, and we are not free to ignore that commitment. He said it is not the Board’s intent to apply the legal criteria found in the second sentence of GAB 1.28(3)(b) as an irrebuttable presumption.

Judge Cane noted that in the text of the proposed rule, the number “3” in the last line was not crossed out along with the other text.

Judge Brennan asked about the Attorney General’s opinion regarding the assertion that there is no emergency. Staff Counsel Shane Falk said he had spoken with the Attorney General’s office and the consensus is that we do meet an emergency finding situation because of the ongoing litigation and upcoming elections.

Judge Deininger inquired about how long it would take to complete normal rulemaking. Mr. Falk said it would take several months at a minimum.

MOTION: Pursuant to §§5.05(1)(f), 227.11(2)(a) and 227.24, Wis. Stats., the Board approves the attached Notice of Order of the Government Accountability Board (Emergency Rule Order Amending GAB 1.28, Wis. Adm. Code), as amended to strike the number “3”, and directs the staff to publish it. Moved by Judge Nichol, seconded by Judge Barland.

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

Motion carried unanimously.

MOTION: Pursuant to § 227.24(4), Stats., the staff shall schedule a public hearing to occur within 45 days of the anticipated publication date of the Notice of Order of the Government Accountability Board (Emergency Rule Order Creating GAB 1.28, Wis. Adm. Code). Moved by Judge Nichol, seconded by Judge Cane.

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

Motion carried unanimously.

MOTION: That Board members waive their per diem for this meeting. Moved by Judge Cane, seconded by Judge Nichol. Motion carried unanimously.

F. Adjournment

MOTION: To adjourn. Moved by Judge Deininger, seconded by Judge Cane. Motion carried unanimously.

The Board adjourned at 10:25 a.m.

####

The next meeting of the Government Accountability Board is scheduled for 10 a.m. Thursday, January 13, 2011 at the Government Accountability Board office, 212 East Washington Avenue, Madison, Wisconsin. This will be a teleconference meeting.

December 22, 2010 Government Accountability Board meeting minutes prepared by:

Reid Magney, Public Information Officer

December 28, 2010

December 22, 2010 Government Accountability Board meeting minutes certified by:

Judge Gerald Nichol, Board Secretary

January 13, 2011

State of Wisconsin\Government Accountability Board

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JUDGE GORDON MYSE
Chair

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

TO: Government Accountability Board Members

FROM: Kevin J. Kennedy, Director and General Counsel

DATE: January 13, 2011 Meeting

SUBJECT: Delegation of Authority to Director and General Counsel

By statute, the Government Accountability Board has plenary authority over all of the state's election laws. In separate subsections of §5.05(1), Wis. Stats., the election law gives the Board a series of specific, quasi-judicial and litigative powers in addition to its plenary authority. Under §5.05(1)(e), Wis. Stats., the Board may delegate some but not all of those specific responsibilities to the Director and General Counsel.

Section 5.05 Government Accountability Board; Powers and Duties.

(1) . . .the Board may:

(e) *Delegate to its Director and General Counsel the authority to intervene in a civil action or proceeding under [sub. \(9\)](#), issue an order under [s. 5.06](#), exempt a polling place from accessibility requirements under [s. 5.25 \(4\) \(a\)](#), exempt a municipality from the requirement to use voting machines or an electronic voting system under [s. 5.40 \(5m\)](#), approve an electronic data recording system for maintaining poll lists under [s. 6.79](#), or authorize non-appointment of an individual who is nominated to serve as an election official under [s. 7.30 \(4\) \(e\)](#), subject to such limitations as the board deems appropriate.*

Before the passage of 2007 Wisconsin Act 1, the State Elections Board was authorized to delegate this authority along with other specified powers related to the conduct of investigations and enforcement actions to its executive director. 2007 Wisconsin Act 1 removed the authorization for the Government Accountability Board to delegate authority to its chief administrative officer to issue a subpoena, apply for a search warrant or commence a legal action. Now the Board must specifically authorize these actions. Section 5.05 (1)(b), (2m)(c)4., 6.a., Wis. Stats.

On March 23, 2010, the Board delegated authority to its Director and General Counsel to accept, review, and exercise discretion to approve applications for voting systems' modifications for systems previously approved for use in Wisconsin. The Director and General Counsel is required to consult with the Board Chair to determine whether Board members should be polled or a special meeting conducted before action is taken. The Director and General Counsel is also required report, at the Board meeting immediately following

action on this delegated authority, the specifics for the action taken, the basis for taking the action, and the outcome of that action.

Recommendation

Pursuant to §5.05 (1)(e), Wis. Stats., and his role as agency head and chief state election official, I recommend the Board delegate the following quasi-judicial and litigative authority to the Director and General Counsel:

- To intervene in actions under the provisions of §5.05(9), Wis. Stats.
- To issue compliance review orders under the provisions of §5.06, Wis. Stats.
- To exempt municipalities from polling place accessibility requirements pursuant to the provisions of §5.25(4)(a), Wis. Stats.
- To exempt municipalities from the requirements for the use of voting machines or electronic voting systems pursuant to the provisions of §5.40(5m), Wis. Stats.
- To authorize the non-appointment of an individual who is nominated to serve as an election official under the provisions of §7.30(4)(e), Wis. Stats.
- To sign contracts on behalf of the Board.
- To certify and sign election related documents including candidate certifications, certificates of election on behalf of the Board.
- To apply for federal funds and sign certifications related to federal funding eligibility on behalf of the Board.
- To accept, review, and exercise discretion to approve applications for voting systems' modifications for systems previously approved for use in Wisconsin.

This delegation would be subject to the requirement that before it is exercised, the Director and General Counsel consult with the Board Chair to determine whether Board members should be polled or a special meeting conducted before action is taken. In addition, the Director and General Counsel would be required to report, at the Board meeting immediately following action on the delegated authority, the specifics of the action taken, the basis for taking the action and the outcome of that action.

The only exceptions to consultation with the Board Chair would be decisions to permit a municipality to use paper ballots instead of electronic voting equipment, to exempt municipalities from polling place accessibility requirements, to authorize the non-appointment of an individual who is nominated to serve as an election official, to sign contracts, certificates of election and federal funding certifications on behalf of the Board. These are fairly routine decisions that are predicated on unique circumstances such as the cost of programming electronic voting equipment when there is only one race on the ballot.

The delegation continues beyond the calendar year until reviewed by the Board. This specific delegation should be reviewed each January by the Board or upon any transition in the position of Director and General Counsel. The next scheduled review would be January 2011 or the first meeting in 2011.

A proposed motion is set out below

MOTION: Pursuant to § 5.05 (1)(e), Wis. Stats., and his role as agency head and chief state election official, the Government Accountability Board delegates the following authority to its Director and General Counsel:

- 1) To intervene in actions under the provisions of §5.05(9), Wis. Stats.;
- 2) To issue compliance review orders under the provisions of §5.06, Wis. Stats.;
- 3) To exempt municipalities from polling place accessibility requirements pursuant to the provisions of §5.25(4)(a), stats.;
- 4) To exempt municipalities from the requirements for the use of voting machines or electronic voting systems pursuant to the provisions of §5.40(5m), Wis. Stats.; and,
- 5) To authorize the non-appointment of an individual who is nominated to serve as an election official under the provisions of §7.30(4)(e), Wis. Stats.
- 6) To sign contracts on behalf of the Board.
- 7) To certify and sign election related documents including candidate certifications, certificates of election on behalf of the Board.
- 8) To apply for federal funds and sign certifications related to federal funding eligibility on behalf of the Board.]
- 9) To accept, review, and exercise discretion to approve applications for voting systems' modifications for systems previously approved for use in Wisconsin.

The Director and General Counsel shall consult with the Board Chair to determine whether Board members should be polled or a special meeting conducted before action is taken. The Director and General Counsel does not need to consult with the Board Chair with respect to decisions to permit a municipality to use paper ballots instead of electronic voting equipment, to exempt municipalities from polling place accessibility requirements, to authorize the non-appointment of an individual who is nominated to serve as an election official and to sign contracts, certificates of election and federal funding certifications on behalf of the Board. The Director and General Counsel shall also report, at the Board meeting immediately following action on the delegated authority, the specifics of the action taken, the basis for taking the action and the outcome of that action.

Barland	_____	Deining	_____
Brennan	_____	Myse	_____
Cane	_____	Nichol	_____