

Meeting of the Board

Thursday, January 12, 2012

9:00 A.M.

Teleconference Meeting

G.A.B. Conference Room

212 East Washington Avenue, Third Floor

Madison, Wisconsin

Agenda

Open Session

Thursday, January 12, 2012

9:00 A.M.

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A. Call to Order

B. Director’s Report of Appropriate Meeting Notice

C. Selection of Board Officers

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D. Delegation of Certain Authority to Director and General Counsel

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E. Personal Appearances

(Note the Board will be hearing only from individuals with issues concerning ballot access for the 2012 Spring Elections)

F. Election Administration - Ballot Access Report

G. Administrative Rules

1. Approve Scope Statement for Proposed Rule Permitting Use of Technical College Student Identification Cards for Voting

8

H. Report on Recall Petition Review Preparations

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.

19.85 (1) (g)

The Board may confer with legal counsel concerning litigation strategy.

19.851

The Board’s deliberations concerning investigations of any

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.

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 20 and Wednesday March 21, 2012 at the Government Accountability Board offices, 212 East Washington Avenue, Third Floor in Madison, Wisconsin beginning at 9:00 a.m. on Tuesday, March 22, 2012 and 9:00 a.m. on Wednesday March 23, 2012.

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.

State of Wisconsin\Government Accountability Board

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



JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

Date: For the January 12, 2012 Meeting

To: Government Accountability Board Members

From: Kevin J. Kennedy, Director and General Counsel

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. Wis. Stats. §15.07(2). 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. Wis. Stats. §15.07(2)(b). 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 2012 officers at the January 12, 2012 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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Chair

KEVIN J. KENNEDY
Director and General Counsel

Date: For the January 12, 2012 Meeting
To: Government Accountability Board Members
From: Kevin J. Kennedy, Director and General Counsel
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 Wis. Stats. §5.05 (1), the election law gives the Board a series of specific, quasi-judicial and litigative powers in addition to its plenary authority. Under Wis. Stats. §5.05(1)(e), 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 legal 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.*

On December 10, 2007, the Board designated Kevin J. Kennedy as Wisconsin's chief election official pursuant to Wis. Stats. §5.05 (3)(g). On January 28, 2008, the Government Accountability Board voted to use the working title of "Director and General Counsel" for its chief administrative officer rather than the statutory title "Legal Counsel" because it was consistent with other agencies in other states handling similar functions.

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. Wis. Stats. §5.05 (1)(b), (2m)(c)4., 6.a.

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 to 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 litigation authority to the Director and General Counsel:

- To intervene in actions under the provisions of Wis. Stats. §5.05(9);
- To issue compliance review orders under the provisions of Wis. Stats. §5.06;
- To exempt municipalities from polling place accessibility requirements pursuant to the provisions of Wis. Stats. §5.25(4)(a);
- To exempt municipalities from the requirements for the use of voting machines or electronic voting systems pursuant to the provisions of Wis. Stats. §5.40(5m);
- To authorize the non-appointment of an individual who is nominated to serve as an election official under the provisions of Wis. Stats. §7.30(4)(e);
- 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.
- To make determinations on any motions or requests following a Board hearing regarding the sufficiency of nomination papers or qualifications of candidates.
- To communicate with litigation counsel representing the Board and to make timely necessary decisions regarding Board litigation.
- To make a finding pursuant to Executive Order #50, Sec. IV(8), that a proposed rule does not have an economic impact.

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, and 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 staff anticipates acting on requests to permit a municipality to use paper ballots instead of electronic voting equipment in 2012 recall elections if ordered. There are a number of municipalities who will be unable to clear voting equipment memory devices from the spring election, or may need to have voting equipment memory devices cleared and available following a recall election for the Partisan Primary and General Election. Given that a recall election may have only three contests on the ballot at the most, permitting a municipality to use paper ballots instead of electronic voting equipment will be the most practical means of tabulating votes for those municipalities. In addition, this will assist with preservation of the ability to use voting equipment memory devices for the Partisan Primary and General Election.

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 2013 or the first meeting in 2013.

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 Wis. Stats. §5.05(9);
- 2) To issue compliance review orders under the provisions of Wis. Stats. §5.06;
- 3) To exempt municipalities from polling place accessibility requirements pursuant to the provisions of Wis. Stats. §5.25(4)(a)
- 4) To exempt municipalities from the requirements for the use of voting machines or electronic voting systems pursuant to the provisions of Wis. Stats. §5.40(5m);
- 5) To authorize the non-appointment of an individual who is nominated to serve as an election official under the provisions of Wis. Stats. §7.30(4)(e);
- 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.

- 10) To make determinations on any motions or requests following a Board hearing regarding the sufficiency of nomination papers or qualifications of candidates.
- 11) To communicate with litigation counsel representing the Board and to make timely necessary decisions regarding Board litigation.
- 12) To make a finding pursuant to Executive Order #50, Sec. IV (8), that a proposed rule does not have an economic impact.

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.

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KEVIN J. KENNEDY
Director and General Counsel

Date: For the January 12, 2012 Meeting

To: Government Accountability Board Members

From: Kevin J. Kennedy, Director and General Counsel

Subject: Approve Scope Statement for Proposed Rule Permitting Use of Technical College Student Identification Cards for Voting

At the November 9, 2011 meeting, the Government Accountability Board specifically approved the use of technical college identification cards to meet the photo identification requirements of Act 23, reversing a previous Board action. Following the Board's actions on November 9, 2011, the Joint Committee for Review of Administrative Rules immediately scheduled a public hearing and an executive session for November 15, 2011 to discuss the Board's actions. In executive session, JCRAR adopted a motion requiring the G.A.B. to promulgate an emergency rule on the use of technical college student identification cards to meet the voter identification requirements of 2011 Wisconsin Act 23.

On November 22, 2011 the G.A.B. staff submitted the attached proposed scope statement for the proposed rule to the Governor for approval. The Governor approved the scope statement on December 2, 2011 and it was published in the December 30, 2011 edition of the Administrative Register. The statement of scope must appear in the Administrative Register for 10 days before the Board can affirmatively approve it. This Board meeting is the first opportunity for the Board to affirmatively approve the statement of scope. Only after affirmative approval of the statement of scope by the Board, may staff begin drafting the emergency rule.

Assuming the Board approves the scope statement, staff can prepare an emergency rule for consideration by the Board, but the Board will have to schedule a special Board meeting to approve the draft emergency rule. Once the Board approves a proposed emergency rule, we will have to submit it to the Governor for approval.

Assuming the Governor approves the emergency rule, we can then publish the rule in the newspaper and file it with the Legislative Reference Bureau. Usually, it takes a minimum of a couple of weeks to accomplish publication of a rule and the emergency rule would not take effect until it is published (and on file with the LRB.) On this schedule, the earliest this emergency rule could be effective is likely the end of February. Both the Governor and the Legislature have an opportunity to block the emergency rule and this schedule presumes that neither will do so.

As this schedule shows, even with the approval of the statement of scope regarding the technical college identification card emergency rule, it is unlikely that an emergency rule would be effective prior to the February 2012 primary, even if the Governor and the Legislature do not object to the rule. The date will likely be later for the other two outstanding emergency rules. With the limited staff resources and the large number of priority tasks to address, staff will still continue to move these three emergency rules along as quickly as possible; however, special Board meetings likely will be necessary to avoid more significant delays.

Proposed Motion:

The Government Accountability Board approves the attached proposed statement of scope for an emergency and permanent rule permitting the use of Technical College student identification cards for voting and directs staff to prepare a proposed rule for the Board's consideration at a later meeting.

Statement of Scope

Use of Technical College System Student Identification Cards for Voting

Subject

Creates GAB Chapter 10 - Voter Identification and specifies that a Wisconsin Technical College System (WTCS) student identification card may be used for voting.

Objective of the Rule

The proposed rule implements a directive from the Joint Committee for the Review of Administrative Rules (JCRAR). The directive requires the Government Accountability Board (G.A.B.) to promulgate an emergency rule specifying that a Wisconsin Technical College System (WTCS) student identification card may be used as acceptable identification for voting.

Policy Analysis

The proposed rule clarifies that a WTCS student identification card is included in the description of student identification cards that may be used as acceptable identification in order to receive a ballot. In 2011 Wisconsin Act 23, the Legislature established a voter identification requirement for electors to receive a ballot. The legislation delineates the types of identification that may be used to meet the requirement. Wis. Stats 5.02 (6m). These types of identification are:

1. An operator's license issued under ch. 343;
2. An identification card issued under s. 343.50;
3. An identification card issued by a U.S. uniformed service;
4. A U.S. passport;
5. A certificate of U.S. naturalization;
6. An unexpired driving receipt under s. 343.11;
7. An unexpired identification card receipt under s. 343.50;
8. An identification card issued by a federally recognized Indian tribe in this state;
9. An unexpired identification card issued by a university or college in this state that is accredited as defined in s. 39.30 (1)(d).

On November 9, 2011, the G.A.B. made a determination that a Wisconsin Technical College System institution is accredited under s. 39.30 (1)(d). Based on that determination, the Board directed staff to include WTCS student ID cards as an acceptable form of identification for voting in its training and educational materials as part of the agency's responsibility to administer the voter identification law pursuant to Wis. Stats. §5.05 (1).

The Board's analysis applied judicially accepted rules of statutory interpretation. It looked first to the plain language of the statute. The Board determined that WTCS

institutions are accredited under s. 39.30 (1)(d). In the absence of an applicable statutory definition of college or university, the Board relied on commonly used dictionary definitions of college which included institutions similar to the WTCS.

In applying the plain language of the statute as required by law, the Board chose not to rely on a staff analysis which traced the legislative history of the student identification card provision. The Board pointed out that a comparison of the new identification requirement with statutory provisions related to the use of student identification cards for voter registration was not applicable because the separate reference to technical colleges was a result of a revisor's correction to harmonize the terms technical college and technical institution.

The Board did not determine whether permitting the use of WTCS student ID cards for voting was good public policy. It determined that the law as written included WTCS institutions. As a result 400,000 WTCS students have an alter means of providing the required identification to receive a ballot.

Statutory Authority

Section 5.05(1)(f) provides explicit authority for the G.A.B. to promulgate rules to ensure the proper administration of elections. Section 227.11(2)(a), Stats.

Comparison with Federal Regulations

The 2002 federal Help America Vote Act (HAVA), 42 USC 15301 et seq., contains a provision requiring states to receive identification from individuals who register for the first time by mail. HAVA Section 303 (b)(20(A)(i)(I). That requirement is a voter registries requirement and is much more general than the state identification requirement for receiving a ballot. The federal requiem simply refers to a "current and valid photo identification." It does not delineate specific types of photo identification like the Wisconsin statute.

Entities Affected by the Rules

All students at a WTCS institution will be affected by this rule as well as Wisconsin's 1,851 municipal clerks responsible for administering elections and approximately 25,000 poll workers who staff voting locations on Election Day.

Estimate of Time Needed to Develop the Rules

10 hours.