



Wisconsin Elections Commission

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March 25, 2021

Celeste Koeberl; John Gostovich
870 Strawberry Drive
Hudson, WI 54016

Vicki Shaw; Don Jordan
Town of Hudson
980 County Road A
Hudson, WI 54016

Sent via email to:

koeberl@mac.com; gostovich@mac.com; chairman@townofhudsonwi.com;
clerk@townofhudsonwi.com

Re: In the Matter of: Celeste Koeberl et al. v. Don Jordan et al.
Case No. EL 20-29

Dear Ms. Koeberl, Mr. Gostovich, Ms. Shaw, and Mr. Jordan:

This letter is in response to the verified complaint submitted by Celeste Koeberl (joined by John Gostovich) (“Complainants”) to the Wisconsin Elections Commission (“Commission”), which was filed in reply to actions taken by election officials during the January 4, 2021, Hudson Town Caucus. The complaint alleges that the elections officials violated Koeberl and others’ rights under Wisconsin Statutes pertaining to polling place accessibility, voter exclusion and discrimination, and caucus/voting participation. There are also various constitutional claims, and alleged violations of federal law (*e.g.* Americans with Disabilities Act, Voter Rights Act, etc.).

Complaints “...shall set forth such facts as are within the knowledge of the complainant to show probable cause to believe that a violation of law or abuse of discretion has occurred or will occur.” Wis. Stat. § 5.06(1). Probable cause is defined in Wis. Admin. Code § EL 20.02(4) to mean “the facts and reasonable inferences that together are sufficient to justify a reasonable, prudent person, acting with caution, to believe that the matter asserted is probably true.”

The Commission has reviewed the consolidated complaints/reply, the Town of Hudson’s (“Respondent”) response, and all supporting documentation. The Commission provides the following analysis and decision. In short, the Commission finds that the Complainants did not show probable cause to believe that a violation of law or abuse of discretion occurred. Specifically, the Commission does not have authority to adjudicate claims under federal law, the decision to conduct a virtual caucus is a municipal decision, the respondents provided reasonable accommodations for such a meeting, a caucus is not an “election” in the manner put forth by the complainants, and the requested relief is not within the authority of the Commission.

Commissioners

Ann S. Jacobs, chair | Marge Bostelmann | Julie M. Glancey | Dean Knudson | Robert Spindell | Mark L. Thomsen

Administrator
Meagan Wolfe

Complaint Allegations and Response

Ms. Koeberl and Mr. Gostovich filed a complaint with the Commission pursuant to Wis. Stat. § 5.06 alleging that Town of Hudson officials violated applicable sections of Wisconsin Statutes, Chapters 5 and 8, the United States Constitution, and various federal laws.

Specifically, the complaint first alleges a Wis. Stat. § 5.25(4)(a) accessibility violation, arguing that the high COVID-19 exposure and spread risks presented by in-person attendance represents non-accessibility for potential attendees with risk-factors or disabilities that place them at an even higher risk of severe symptoms or death. The Complainants further argue that elderly or handicapped voters should be afforded virtual caucus participation options here because various statutes contemplate similar accommodations or processes for such voters. (*See* Wis. Stats. §§ 5.25(5)(b) and 5.36).

The Complainants further argued that there were procedural deficiencies associated with this caucus. Specifically, Complainants allege that the caucus was scheduled too early in the cycle and should be rescheduled to allow further consideration of requests for accommodations. Wisconsin Statutes § 8.05(1)(a) provides:

The governing body shall between December 1 and January 1 decide the date of the caucus. The date of the caucus may be established between January 2 and January 21. When possible, preference should be given to having the caucus on January 21.

The Complainants allege various other violations of law or deficiencies in the Respondent's logic behind rejecting the request for a virtual caucus (*e.g.* Chapter 8 of the Wisconsin Statutes does not require secret caucus ballots, arguments drawing upon the statutory definitions of "polling place" and "ballots"). Ms. Koeberl and Mr. Gostovich filed additional complaints relating to federal laws, including the Voter Rights Act and Americans with Disabilities Act.

The Town of Hudson counters that every effort was made to protect its constituents while keeping the caucus in the designated format (*e.g.* moved to a larger venue for social distancing and ventilation/filtration upgrades, required face masks for attendees, staff wore protective equipment, contact tracing information was collected, etc.). Respondents further argued that changing the caucus to a virtual format would fundamentally alter the process, and the modification would also present security and logistical issues that would be difficult to overcome. The Respondents also contend that it would be difficult to ensure the accuracy/validity of votes cast using an electronic method, thus subjecting them to further post-caucus scrutiny.

The Respondents do not dispute that the Complainants' assessment of Wisconsin Statutes requiring polling place accessibility is correct. Respondents do, however, contend that a caucus is not a polling place or election process. Wisconsin Statute § 5.02(4) defines "election" as "...every public primary and election." Furthermore, Wis. Stat. § 8.05 describes the caucus as a nomination process, not an election.

Respondents further provided that:

If nominated at the caucus, a nominee's name will go on a ballot for the election, assuming they meet other requirements as designated by statute. Wis. Stat.

8.05(1)(j). The legislature's decision to distinguish a caucus from a primary election in Wis. Stat. § 8.05 is further evidence of the difference between a caucus and an election. Moreover, state law still does not permit online voting in an election. Wis. Stat. § 5.02(1e).

Judge Scott J. Nordstrand heard the Complainants' separate requests for declaratory relief, injunctive relief, and a writ of mandamus against the Respondents in the St. Croix County Circuit Court on January 4, 2021. *Gostovich et al. v. Town of Hudson Wisconsin et al.*, 2020CV000444 (2021). Similar arguments to those raised here were put forth by each party in that hearing. The court denied the writ of mandamus and declaratory relief requests, found that a temporary injunction would not be appropriate, and rationalized the decision by finding that the Town of Hudson made reasonable accommodations and the court cannot change electoral processes.

Commission Authority and Role in Resolving Complaints Filed Under Wis. Stat. § 5.06

Under Wis. Stat. §§ 5.05(1)(e) and 5.06(6), the Commission is provided with the inherent, general, and specific authority to consider the submissions of the parties to a complaint and to issue findings. In instances where no material facts appear to be in dispute, the Commission may summarily issue a decision and provide that decision to the affected parties. This letter serves as the Commission's final decision regarding the issues raised by Ms. Koeberl and Mr. Gostovich's complaint.

The Commission's role in resolving verified complaints filed under Wis. Stat. § 5.06, which challenge the decisions or actions of local election officials, is to determine whether a local official acted contrary to applicable election laws or abused their discretion in administering applicable election laws.

Commission Findings

Initial Analysis of Complaint Deficiencies

Ms. Koeberl and Mr. Gostovich filed a complaint with the Commission pursuant to Wis. Stat. § 5.06 alleging that Town of Hudson officials violated applicable sections of Wisconsin Statutes, Chapters 5 and 8, the United States Constitution, and various federal laws. Federal claims raised in the complaint included violations of the Voter Rights Act and Americans with Disabilities Act. It is important to note here that the Complainants raise several alleged violations that the Commission has no authority to investigate, and therefore, probable cause of a violation of those laws is not contained in the complaint. Statute only empowers the Commission to consider claims under state elections statutes. Sometimes federal laws are tethered to state law/requirements/obligations, but there is no need for additional examination here because of the inapplicability of the Complainants' federal claims to a Wis. Stat. § 5.06 complaint.

The larger issue with the complaints is that they demand relief that cannot be granted by the Commission. The Complainants requested the following relief:

1. Order the Town of Hudson Wisconsin to provide an option of remote participation and voting to all qualified and eligible electors for the January 4, 2021 Hudson Town Caucus; and
2. Order the Town of Hudson Wisconsin to create and publicize a public health protection plan for the January 4, 2021 Hudson Town Caucus sufficient to (i) ensure that the public meeting will be conducted in accord with federal, Wisconsin, St. Croix County, and

Hudson School District recommended and required public health protections against covid-19 exposure and spread risks for the benefit of Caucus attendees, and (ii) prevent the public meeting from being a covid-19 super-spreader event for the benefit of all people in the community; and

3. Order the Town of Hudson Wisconsin to postpone convening any 2021 Hudson Town Caucus until it has demonstrated satisfactory compliance with the above requirements.

Each of these requests are now moot because of the timing of this decision. That would not preclude the Commission from ordering a correction of future caucus activities in the Town of Hudson, if there were a violation of law, which there is not in the instant matter. However, the relief requested is both improper and not within the authority of the Commission. The Commission still provides relevant analysis below in the interest of being thorough and responsive, and because the Respondents did not make a motion/request to dismiss the claims based on the Commission's authority to grant the requested relief.

The first request for relief is not within the authority of the Commission. Virtual public meeting decisions are solely within the purview of the municipality, and such an order would be subject to several potential legal challenges (*e.g.* validity of the Commission's order, whether a virtual caucus is even authorized under Wisconsin law, etc.). The Commission's sole authority under a Wis. Stat. § 5.06 claim is as follows:

The commission may, after such investigation as it deems appropriate, summarily decide the matter before it and, by order, require any election official to conform his or her conduct to the law, restrain an official from taking any action inconsistent with the law or require an official to correct any action or decision inconsistent with the law. Wis. Stat. § 5.06(6).

The Respondents made several accommodations before proceeding with an in-person caucus, in accordance with state law and Commission guidance, as well as the Americans with Disabilities Act (*e.g.* moved to larger space with better ventilation/filtration, required masks, wore protective equipment, offered Complainant a curbside option, had law enforcement on site to ensure compliance, etc.). Even ignoring those accommodations, there is no lack of conformity on the part of the Respondents that would prompt an order to conduct a virtual caucus, even if such a forum is allowed under the law.

The second relief request is quite clearly outside the purview of the Commission and need not be addressed here. The final request for relief is also improper. Again, it is the Commission's contention that no lack of "satisfactory compliance" has occurred, but regardless, the Commission cannot order a municipality to cancel/postpone a compliant public meeting and nomination process.

The Complainants went on to request new forms of relief in the final reply, adding that the Commission issue guidance to the Respondents as follows:

1. The Hudson Town Caucus must be administered and conducted in a manner that encourages and facilitates full and equal participation by all Hudson Town electors;
2. In the context of the covid-19 pandemic, the Hudson Town Caucus must be conducted in full compliance with recommended and required federal, Wisconsin, and St. Croix

County public health protections against risks of infection with the highly contagious novel coronavirus that causes covid-19; and

3. In the context of the covid-19 pandemic, the Hudson Town Caucus must include a remote access and participation option to ensure opportunities for safe, full, and equal participation in the Caucus by all Hudson Town electors.

Again, the Complainants' requested relief fails for one or more of several different reasons (*e.g.* outside of the Commission's authority, represents relief that cannot be granted by the Commission, misinterprets the law, etc.). The continued analysis to follow will address these deficiencies in more detail.

Required Analysis of Caucus-Related Law

The Commission has consistently held that town caucus processes are not true election or polling place activities, but rather an alternate nomination process (*i.e.* more akin to a public meeting or nomination paper signing than a formal election). An argument that the electoral field is narrowed during a caucus, similar to a primary, only creates a superficial contention that a caucus is an election. That argument fundamentally disregards important statutory considerations. The Respondents provide sound analysis to support this position in their consideration of Wis. Stats. §§ 5.02 and 8.05. This includes an argument that Wisconsin Statute § 5.02(4) defines "election" as "...every public primary and election," not nomination processes.

The Commission would add the following to further support that contention:

When nomination papers are not used, there shall be a caucus to nominate candidates. The governing body shall between December 1 and January 1 decide the date of the caucus. The date of the caucus may be established between January 2 and January 21. When possible, preference should be given to having the caucus on January 21. Wis. Stat. § 8.05(1)(a). (**emphasis added**)

This statute clearly provides that a caucus is used as an alternative to candidate nomination processes, as opposed to a true electoral process by which electors cast a vote and candidates are furthered/selected. One need only look to the title of Chapter 8 of the Wisconsin Statutes to bolster this interpretation—"Nominations, Primaries, Elections." This title draws a clear distinction between each of these unique processes and provides an ample foundation for the Respondents' claims.

The Commission provides in its "Procedures for Nomination of Candidates by Caucus" guide (Rev. December 2020) that, "The caucus is open to the public, but only qualified electors of the municipality may nominate and vote for candidates." This is a direct reflection of the Commission's contention that a caucus is essentially a public meeting for the purposes of nominating candidates.

Public meetings can be conducted virtually, but that is a town decision, and the Commission cannot prevent the Respondents from conducting an otherwise lawful meeting in the manner it so chooses. The Wisconsin Department of Justice has also provided that reasonable access to a public meeting may not always include certain means of "meeting" that might typically render a meeting more accessible (*e.g.* phone access does not always constitute reasonable accessibility if visual plans are being reviewed during the session or the demeanor of a witness is important to

the hearing). *See* 69 Op. Att’y Gen. at 145. Conversely, this suggests that the Respondents need to evaluate the law, the character of the meeting, and then determine what is appropriate or feasible.

The Respondents have provided several sound reasons why the Town of Hudson determined the caucus would be held in person. Those reasons included security concerns, lack of adequate technology for caucus processes, a belief that the nature of “voting” does not allow for virtual participation under Wisconsin law, and verification of voter identity and vote accuracy would be difficult in a virtual environment. Thus, probable cause does not exist within the record to support the Complainants’ arguments that a caucus is an “election,” warranting additional rights and protections.

This does not relieve the Respondents of their accessibility/participation obligations in other areas of the law, such as public meetings requirements and disability provisions tethered to Wisconsin statutes in other ways. There is also an inherent obligation to accessibility that transcends the law.

The decision on whether to offer a virtual caucus option is solely a municipal decision, subject to accessibility considerations (*e.g.* is a virtual-only option actually accessible), potential legal challenges (*i.e.* this is ripe for challenge), and the need for an internal legal/compliance evaluation at the local level. The town must have adequate technological resources, otherwise adhere to all required legal/compliance requirements, and security remains of the utmost importance. Other options may also be available as an accessibility-focused alternative to virtual participation (*e.g.* a modified version of curbside voting geared towards caucus activities, providing a separate room(s) onsite for those with health concerns, etc.).

Accessibility Considerations

The complaint alleges a Wis. Stat. § 5.25(4)(a) accessibility violation. It is argued that the high COVID-19 exposure and spread risks presented by in-person attendance represent non-accessibility for potential attendees with risk-factors or disabilities that place them at an even higher risk of severe symptoms or death. This statute states:

Each polling place shall be accessible to all individuals with disabilities. The commission shall ensure that the voting system used at each polling place will permit all individuals with disabilities to vote without the need for assistance and with the same degree of privacy that is accorded to nondisabled electors voting at the same polling place. This paragraph does not apply to any individual who is disqualified from voting under s. 6.03 (1) (a).

The Complainants also put forth arguments under Wis. Stat. § 5.25(5)(b), because that section allows elderly or handicapped voters to be reassigned to another voting location that is accessible. Wisconsin Statute § 5.36 also allows any individual with a disability to notify their municipal clerk that they intend to vote and to request a specific accommodation that will facilitate their voting.

These statutes clearly deal with components of election voting that are not always applicable to caucuses for the reasons discussed previously in this analysis (*e.g.* election voting systems vs.

nominations from the floor/secret ballots, etc.). This decision need not parse words or meanings, because it would not absolve the Respondents of accessibility obligations.

The Respondents have utilized arguments such as “fear of COVID-19” not being a disability for which reasonable modifications are required under the Americans with Disabilities Act, reasonable accommodations are only required so long as they do not fundamentally alter the government activity, and the use of technology would fundamentally alter the town caucus. These arguments may have merit, but they do not warrant discussion here, as the Respondents have already successfully argued that they provided other sufficient accommodations to Ms. Koeberl and Mr. Gostovich.

Much of the discussion on “accommodation” within the legal community pertains to the labor and employment context. A reasonable accommodation is defined by the United States Department of Labor as a modification or adjustment to the environment or way of doing things that enables an individual with a disability to have an equal opportunity to successfully perform tasks to the same extent as those without disabilities (*e.g.* facility enhancements such as ramps, modified scheduling, adjusting policies or materials, etc.). *Accommodations*, U.S. Department of Labor: Office of Disability Employment Policy, <https://www.dol.gov/agencies/odep/program-areas/employers/accommodations#:~:text=Under%20Title%20I%20of%20the,done%20during%20the%20hiring%20process>. (last visited February 24, 2021).

The Commission hereby finds that the accommodations offered by the Town of Hudson during its caucus were legally sufficient to ensure equal participation for the parties to this complaint. The move to the local high school was a specific response to these Complainants’ requests. The school was recently built and would have been required to be compliant with the Americans with Disabilities Act and similar laws. The switch represented an upgrade in opportunities for social distancing and building ventilation/filtration. The town required attendees to wear masks, despite the backlash that this caused (*e.g.* the Commission has received formal/sworn complaints and informal concerns about this decision). Other accommodations also occurred.

Beyond this, the Complainants have undermined their own contentions that the Town of Hudson’s accommodation efforts were insufficient. Indeed, in a recording of the St. Croix County Circuit Court hearing obtained by the Commission, Ms. Koeberl rejected the court’s attempts to further mediate accommodations between the parties. The Respondents offered a modified curbside “voting” opportunity to the Complainants, by which they could stay in their vehicle and have information/materials brought to them by caucus volunteers. The Complainants insisted that a virtual option was the only acceptable accommodation. This despite previously authorizing Commission staff to speak to the Town of Hudson Clerk about the possibility of authorizing curbside participation or allowing the Complainants to attend the caucus from an adjoining room within the same facility.

The Respondents not only provided legally appropriate accommodation to the Respondents, but they also offered further accommodation. Based upon these actions, the Commission determines that the Complainants have not met their burden of proof that there is probable cause to believe the state’s accommodation statutes were not adhered to by the Respondents. This decision is further reinforced by the findings of the St. Croix County Circuit Court in the aforementioned hearing, as well as the disinclination of the St. Croix County District Attorney’s Office to further investigate this matter after the Complainants raised concerns to that office as well.

Commission Decision

Based upon the above review and analysis, the Commission finds that the complaints do not raise probable cause to believe that a violation of law or abuse of discretion has occurred or will occur. All claims are hereby dismissed.

Right to Appeal – Circuit Court

This letter constitutes the Commission's resolution of this complaint. Wis. Stat. § 5.06(2). Pursuant to Wis. Stat. § 5.06(8), any aggrieved party may appeal this decision to circuit court no later than 30 days after the issuance of this decision.

If any of the parties should have questions about this letter or the Commission's decision, please feel free to contact me.

Sincerely,

COMMISSION

A handwritten signature in black ink that reads "Meagan R.M. Wolfe". The signature is written in a cursive style with a large, looped initial "M".

Meagan Wolfe
Administrator

cc: Commission Members