



Wisconsin Elections Commission

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May 18, 2021

Rick Bina
W11529 Rangeline Road
Antigo, WI 54409

Town of Ackley Clerk
N4736 River Road
Antigo, WI 54409

Sent via USPS & Email: rick@mynowire.com

Re: In the Matter of: Rick Bina v. Town of Ackley Clerk (Case No.: EL 21-23)

Dear Mr. Bina and Ms. Meeks:

This letter is in response to the verified complaint submitted by Rick Bina (“Complainant”) to the Wisconsin Elections Commission (“Commission”), which was filed in reply to actions taken by an election official leading up to the 2021 Spring Election. The complaint alleges that Clerk Meeks (“Respondent”) violated Mr. Bina’s rights and committed a violation of Wis. Stat. § 12.05 when she informed him that he did not need to run as a “registered” write-in candidate to prevail in a local election.

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 complaint, the Town of Ackley’s response, and all supporting documentation. The Commission provides the following analysis and decision. In short, the Commission has determined that the Complainant did not show probable cause to believe that a violation of law or abuse of discretion occurred with relation to Wis. Stat. § 12.05.

Complaint Allegations and Response

Mr. Bina filed a complaint with the Commission pursuant to Wis. Stat. § 5.06 alleging that the Town of Ackley Clerk violated applicable sections of Wisconsin Statutes, specifically Section 12.05 pertaining to false representations affecting elections.

The complaint alleges that the Respondent improperly advised the Complainant that he would not need to register as a write-in candidate to prevail and assume office in the local town board race. The Complainant had purposefully run as a write-in candidate and opted not to participate in the Town of Ackley Caucus earlier in the electoral process. As such, the Complainant

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Administrator
Meagan Wolfe

contacted the Respondent on March 8, 2021, to inquire if he needed to formally register in any way. The Respondent provided the following response, “Hi Rick, If you run for town board as a write-in, it’s only as a write-in. For town boards there is no registered or non-registered. I believe that is for county and state levels...”

The Complainant prevailed in the election on April 6, 2021, but he was later informed that he could not assume the office because he had not properly registered as a write-in candidate pursuant to Wis. Stat. §§ 7.50(2)(em) and 11.0202(1)(a). This action was subsequently initiated under Wis. Stat. § 5.06.

The Respondent filed an unsworn response to the complaint. The Commission has reviewed that statement and it does not factually dispute the assertions of the Complainant. Additionally, the Complainant requested an expedited timeline to try and obtain a decision before the certification of the spring election results at the state level. Due weight was given to the fact that the response was unsworn, but it is of no consequence to an analysis of the law at issue here, because the response does not dispute the facts submitted by the Complainant.

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 Mr. Bina’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

Pre-Analysis of the Requirements for Registered Write-in Candidates

On April 2, 2014, Governor Scott Walker signed into law Assembly Bill 419, which required that write-in candidates file campaign finance statements in order to have their votes formally tallied. A candidate must complete the write-in “registration” process by submitting Form #CF-1 to the Wisconsin Ethics Commission. Among other reasons, this law was enacted to prevent clerks from needlessly spending time counting “throw-away” votes for parties such as cartoon characters, and it ensured that the write-in candidate would be a legitimate party willing to assume the office.

A candidate need not be a registered write-in if no other candidate has been certified to appear on the ballot, or the certified candidate dies or withdraws. Apart from those exceptions, a candidate is required to complete Form #CF-1 to assume the office after winning the election. Wis. Stat. §§ 7.50(2)(em) and 11.0202(1)(a). The Complainant in the instant matter was involved in a contested race against a certified candidate, and thus could not assume the office despite prevailing in the election.

Pre-Analysis of Responsibility for Nomination Processes and Filings

“Each candidate for public office has the responsibility to assure that his or her nomination papers are prepared, circulated, signed, and filed in compliance with statutory and other legal requirements.” Wis. Admin. Code § EL 2.05(1). This provision largely applies to nomination papers, but the Commission has applied these affirmative requirements to ancillary nomination forms like the declaration of candidacy or CF-1 form. Additionally, the statutes analyzed above clearly spell out the responsibilities that each candidate has when proceeding as a registered write-in.

Summaries of candidate nomination requirements are readily available in a variety of non-clerk locations, including the Commission’s website and other independent sources. (*See* <https://elections.wi.gov/candidates>). The law places the burden of filing complete and accurate nomination papers on the candidates themselves, and the Complainant could not have raised a complaint under Wis. Stat. § 12.05 or any election statute that would have overcome this burden. Municipal clerks have no similar, formalized duty to ensure the proper completion of a candidate’s nomination papers. This does not absolve the Respondent of responsibility, nor say that the clerk had no professional responsibility to provide accurate information to the citizenry of the town, but rather that no violation has been alleged by the Complainant for which there is probable cause to believe a local official acted contrary to applicable election laws or abused their discretion in administering applicable election laws.

Allegations of a Wis. Stat. § 12.05 Violation

Wisconsin Statute § 12.05 provides that:

No person may *knowingly* make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election. (emphasis added)

A violation of this statute must have been knowing, or with the required knowledge/intent. Wisconsin Statutes Chapter 12 violations can be criminal in nature, because they are often tethered to some form of fraud. Chapter 12 lays out these violations (*e.g.* Class I Felonies) and penalties (*e.g.* monetary forfeiture or jail time) in Wis. Stat. § 12.60. Wisconsin Statute § 12.05 has only monetary or jail-related penalties associated with it, but in this instance the complaint was specifically brought under Wis. Stat. § 5.06 seeking administrative remedies rather than the district attorney referral and possible prosecution that occurs under Wis. Stat. § 5.05 complaints. The Complainant self-determined that Wis. Stat. § 12.05 was the most appropriate statutory vehicle by which a complaint could be brought under the fact set that precipitated this complaint.

Chapter 12 of the Wisconsin Statutes contains sections related to election fraud. While a Wis. Stat. § 12.05 violation does not constitute fraud, the fraud provisions in criminal statute are the most directly relevant place to seek out the legal standard for intent. Many of the criminal provisions related to fraud reside in Wisconsin Statutes Chapter 943. The definitions of “know” and “intent” are found in other sections of the 900-level chapters:

When criminal intent is an element of a crime in chs. 939 to 951, such intent is indicated by the term “intentionally”, the phrase “with intent to”,

the phrase “with intent that”, or some form of the verbs “know” or “believe”. Wis. Stat. § 939.23(1).

“Know” requires only that the actor believes that the specified fact exists. Wis. Stat. § 939.23(2).

“With intent to” or “with intent that” means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. Wis. Stat. § 939.23(4).

Wisconsin Criminal Jury Instructions specifically address the issue of intent on a more detailed basis:

("Intentionally") (With intent to") means that the defendant must have had the purpose to carry out the prohibited act. "Intentionally" also requires that the defendant must have acted with knowledge that the prohibited act would occur. You cannot look into a person's mind to find intent. Intent to commit the prohibited act must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent. Wis. JI—Criminal 923A (2010).

The Respondent asserts that she did not knowingly provide the inaccurate information to the Complainant. In fact, she specifically admits to having provided the incorrect guidance to the Complainant, having done so accidentally. The Complainant does not allege that the Respondent knowingly (or with intent) incorrectly advised him. Nothing in the record supports a finding that the acts, words, and statements of the Respondent, or the facts and circumstances presented, present a reason to find that the Respondent acted knowingly. The Complainant also chose to forgo the caucus process and failed to seek out the plentiful, independent information on candidate registration, thus failing in his own duties under Wis. Admin. Code § EL 2.05(1). This does not excuse the clerk from failing in her own duties, but it certainly would have mitigated the impact in this unfortunate situation.

In summary, the Commission finds that the complaint does not raise probable cause to believe that a violation of law or abuse of discretion has occurred with regard to the Respondent providing inaccurate information on the registration requirements for write-in candidates. The Commission certainly sympathizes with the Complainant’s circumstances. It is truly regrettable that a candidate would be denied a public office, having received the highest vote total for that seat.

Additional Analysis on the Commission’s Authority Under Wis. Stat. § 5.06

The Commission’s authority under the Wis. Stat. § 5.06(6) is administrative in nature:

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. The commission shall immediately transmit a copy of the order to the official. An order issued under this subsection is effective immediately or at such later time as may be specified in the order. (emphasis added)

The Commission would be legally unable to “award” the office to the Complainant, even if a decision had been rendered in his favor under Chapter 12 or any other elections-related statute. The corrective action sought by the Complainant exceeds the authority granted to the Commission by Wis. Stat. § 5.06(6). That said, the Respondent has resigned her post as clerk, thus any future interaction between the parties will be minimized. Commission staff also intend to perform training and outreach with the new clerk in the Town of Ackley when that position is filled to ensure that this type of incident does not repeat itself. The Commission further reminds all parties involved here, and outside of this matter, that its agency staff stand at the ready to answer questions like those at issue here.

Commission Decision

Based upon the above review and analysis, the Commission finds that the complaint does not raise probable cause to believe that a violation of law or abuse of discretion has occurred under Wis. Stat. § 12.05.

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 L.M. Wolfe". The signature is written in a cursive style with a large, looped 'M' at the beginning.

Meagan Wolfe
Administrator

cc: Commission Members