

**STATE OF WISCONSIN
BEFORE THE ELECTIONS COMMISSION**

**CYNTHIA WERNER, ROCHAR C.
JEFFRIES, MARK AZINGER, DAVE
BOLTER, and DANIEL JOSEPH MILLER,**

Complainants,

v.

**Administrator MEAGAN WOLFE, Mayor
TOM BARRETT, and JIM OWCZARSKI,**

Respondents.

SUR-REPLY OF RESPONDENTS BARRETT AND OWCZARSKI

Respondents Mayor Tom Barrett and Jim Owczarski, (collectively, “Respondents”), by and through Assistant City Attorneys James M. Carroll and Kathryn Z. Block, hereby submit the following sur-reply to the Reply filed by Cynthia Werner, Rochar C. Jeffries, Mark Azinger, Dave Bolter, and Daniel Joseph Miller, (collectively, “Complainants”) with the Wisconsin Elections Commission (“Commission”).

INTRODUCTION

The City of Milwaukee, (“City” or “Milwaukee”), accepted grants from the Center for Tech and Civic Life, (“CTCL”), over a year ago, for an election held on November 3, 2020, to elect a President who was sworn in over eight months ago. Complainants cite, with approval, a

report from the Foundation for Government Accountability, concluding that allowing grants of this type was fraught, but advising that the proper remedy in that event was to follow the lead of other states: “Wisconsin can and should prohibit local jurisdictions from accepting funds from private organizations....” (Reply App. p. 896) Rather than seek a legislative remedy, Complainants have filed this untimely Complaint that fails to set forth probable cause to believe a violation of any election law occurred, against two Respondents who are not election officials.

As Respondents have previously noted¹, Complainants’ Reply primarily relies on facts having nothing to do with the named Respondents, or even Milwaukee generally, and raises entirely new legal arguments unalleged in their Complaint. For the reasons previously stated in the Response, and herein, that Complaint must be dismissed.

FACTUAL BACKGROUND

Respondents rely primarily on the Factual Background provided in their Response. However, Respondents wish to point out the ways in which the Statement of Facts in Complainants’ Reply, (“Statement of Facts”) which comprises nearly half of their 90 page filing, in no way pertains to Respondents² and is otherwise factually inaccurate.

Note that at no time in the 45 page Statement of Facts are the actions of Respondents Barrett or Owczarski mentioned by name. The actions of “the Mayors” of five Wisconsin municipalities are mentioned generally, but only the actions of the Mayors of Green Bay and

¹ See Objection to Complainants’ Reply filed August 26, 2021.

² After filing a joint reply to five pending complaints, Special Counsel directed Complainants on August 12, 2021 to file a separate reply which “shall address the facts and pleadings pertaining to the particular matter for which it is submitted.”

Madison are specifically cited. Similarly, in the 1,077 page Appendix accompanying the Reply, Owczarski's name never appears. Barrett's name appears only as a recipient of a handful of e-mails.

Complainants' falsely identify Milwaukee, along with Kenosha, Green Bay, Madison, and Racine as "the self-proclaimed Wisconsin 5."³ In fact, there are no fewer than 200 references to the "Wisconsin 5" in the Statement of Facts. Two of these other four municipalities are mentioned more frequently than Milwaukee in the Statement of Facts.⁴ Entire sections of the Statement of Facts make no reference to Milwaukee.⁵ Much of the Statement of Facts carelessly conflates Milwaukee and the cities of Kenosha, Green Bay, Madison, and Racine.⁶ Additionally, several sections of the Statement of Facts mention Milwaukee but give equal time to the other four municipalities.⁷ All of this is a blatant attempt to confuse the issue in this case – whether Respondents violated an election law.

With regard to specific allegations leveled against the City, Complainants raise a novel legal argument in their Reply: That by agreeing to the Wisconsin Safe Voting Plan ("WSVP"), the City agreed to spend money to increase voter turnout in a manner targeted to certain

³ Reply at p.1 (*but see*, Reply at p. 24, where Complainants cite one instance of a CTCL employee referring to the five cities as the "WI-5" for the proposition that the cities proclaimed themselves to be this, or even ever referred to themselves in this manner).

⁴ Milwaukee is mentioned in the Statement of Facts 44 times, Kenosha 33 times, Green Bay 62 times, Madison 37 times, and Racine 47 times.

⁵ See Reply at E. 6, 7, 9 (there is a reference to Milwaukee in this section but Respondents could not locate the e-mail referenced in the Appendix), 10, and 13.

⁶ At several points in the Reply, Complainants state something was done by the "Wisconsin 5" but then cite as evidence something that happened in only one municipality that is not Milwaukee and certainly not conduct either Respondent engaged in. For instance, the Reply cites conditions the CTCL placed on "Wisconsin 5 cities" but then cites conditions that allegedly applied to Green Bay only. (Reply at p. 34)

⁷ See Reply at C. 4, 7, 8, 9, and D.

geographic and demographic classifications and thus violated the equal protection clause.⁸ Of course, even if something was included in the WSVP, that does not mean the City did not otherwise intend to engage in the activity (Milwaukee has had early voting sites for many years prior to receiving CTCL grants), or actually did engage in the activity (Milwaukee Public Libraries were closed due to COVID in the relevant timeframe in 2020 and therefore no training of library staff took place). Complainants have not provided any evidence as to which, if any, of the allegedly improper activities mentioned in the WSVP took place.

Complainants disingenuously represent the record. For instance, without citation, the Reply states: “[T]he consideration for the second contract was that the Wisconsin 5 cities were to use CTCL’s ‘partners’ for election administration....” (Reply at p. 28) There is simply no support for this suggestion in the record. There is ample support for the proposition that the Executive Director of Milwaukee’s Election Commission (“MEC”) expressed an interest in increasing middle management staffing, and sought assistance from CTCL in that regard.⁹ The

⁸ In particular, Complainants cite the use of CTCL funds: “[For] a communications effort [that] would focus on appealing to a variety of communities within Milwaukee, including historically underrepresented communities such as LatinX and African Americans, and [that] would include a specific focus and the re-enfranchisement of voters who are no longer on probation or parole for a felony;” “[T]o promote and train Milwaukee Public Library branch staff prior to each election to assist any potential Milwaukee absentee voters with applying, securing, and uploading images of their valid photo ID;” [T]o install secure 24-hour drop boxes at all 13 Milwaukee Public library branches;” and “[T]o set up 3 in-person early voting locations for two weeks prior to the August election and 15 in-person early voting locations and 1 drive-thru location.” (Reply at pp. 13,17,18, and19)

⁹ Complainants misrepresent the nature of the assistance sought from CTCL with creative editing. Compare the original e-mail, “In last week’s call, you mentioned an interest in adding middle-management staff capacity. Noah (Elections Group) has a lead on an experienced elections staffer that could potentially embed with your staff in Milwaukee in a matter of days and fill that kind of role.” with Complainants’ editing of that quote “an experienced elections staffer [from the Elections Group] that could potentially **embed** with your staff in Milwaukee in a matter of days and fill that kind of a role.” (Reply App. at 626; Reply at p. 35) The clear implication of the original being that the Elections Group could provide MEC a lead to an employee – the clear implication of the edited version being that an employee of the Elections Group would embed at MEC.

record also demonstrates that while Milwaukee was involved with the National Vote at Home Institute (“NVAHI”), (a CTCL “partner”), it is not clear from the record that the CTCL pushed this involvement, and indeed the record implies otherwise. It is clear that the Wisconsin Election Commission, (“WEC”), was aware of NVAHI and shared their contact information with other cities. (Reply App. at p. 600) While Complainants make much of NVAHI’s involvement in the City’s election, the record demonstrates the MEC made appropriate decisions about what involvement was and was not proper. (Reply App. at p. 659)¹⁰

Clearly, Complainants would like to make this Complaint a vehicle to air their policy arguments about CTCL grants, and while Respondents could raise any number of other policy arguments in support of those awards or attempt to poke holes in Complainants perceived disparities in the grants awarded to some cities relative to others, they recognize this isn’t the proper forum for that discussion and therefore turn to the merits of Complainants’ legal arguments.

ARGUMENT

The Commission should dismiss the instant Complaint for the reasons previously stated. The arguments raised by Complainants for the first time in their Reply do not save their fatally-flawed Complaint.

I. Respondents are not Election Officials within the meaning of Wisconsin Statutes and the Complaint does not Establish Probable Cause

¹⁰ In light of Complainants failure to follow the admonition of Special Counsel to file a Reply which “shall address the facts and pleadings pertaining to the particular matter for which it is submitted,” Respondents request that all portions of the Statement of Facts and Appendix pertaining to the cities of Kenosha, Green Bay, Madison, and Racine be stricken from the record.

Complainants have in no way addressed Respondents' primary argument: Respondents are not "election officials" as that term is used under Wis. Stat. § 5.06¹¹, and therefore the Complaint fails to state a claim. If for no other reason, the Complaint must be dismissed for this fundamental failure.

Similarly, Complainants have failed to respond to the argument that the Complaint fails to make a showing of probable cause that the Respondents violated any election law. Beneath the litany of allegations, all of Complainants' legal arguments center around the acceptance of the CTCL grant funds and how those funds were to be used. Complainants ignore the critical fact that neither the Mayor nor the City Clerk, in any of their professional capacities, had authority to accept the CTCL grant or expended any of the funds at issue. The named Respondents are not synonymous with the entire City government; they have specific roles within it, and those roles do not include authority to accept the CTCL grant funds or the expenditure of those funds. The Common Council and the MEC and its Executive Director took those actions, but they are not named Respondents. Complainants therefore have not established probable cause that *Respondents* have violated any election law. An adjudicator may take failures to respond to the merits of an argument during briefing as a concession. *See, Schlieper v. DNR*, 188 Wis. 2d 318, 322 (Ct. App. 1994).

II. The Complaint was Untimely

¹¹ All references to the Wisconsin Statutes are to the 2019-2020 version unless otherwise indicated.

With regard to timeliness, Complainants make the somewhat unusual argument that they may have uncovered an open meetings violation. While that assertion is of dubious merit¹², it is undeniably true that the proper venue to allege such a violation is in circuit court. Wis. Stat. § 19.97

Complainants also argue they only learned of the Milwaukee's "implementation" of Milwaukee's WSVP in 2021 in response to public records requests. This contention is of course belied by the factual record, which indicates Complainants have relied on the WSVP as written, rather than any actual aspects of the WSVP that were or were not implemented.

III. Complainants have Misapplied Wis. Stat. § 7.15 in the Context of Home Rule

Complainants' arguments regarding Wis. Stat. § 7.15¹³ are nonsensical. They first appear to argue that Wis. Stat. § 7.15 is a delegation of authority to municipal clerks over elections which usurps the ability of the common council to accept the CTCL grants. Aside from the fact that neither the MEC, its executive director, the Milwaukee Common Council, or any of its members are Respondents, Complainants misunderstand those entities' respective roles. It is always the case that the Common Council is responsible for the funding of a departmental budget (and therefore to an extent, an election), no matter the source of the funds, and the MEC

¹² There is no apparent indication that a meeting of five mayors was a "local agency, board, commission, council, department or public body corporate and politic created by rule or order" so as to constitute a "governmental body."

¹³ Note that the City has a municipal board of election commissioners per Wis. Stat. § 7.20(1) and therefore all of the duties assigned to the municipal clerk under Wis. Stat. § 7.15 are actually given to the municipal board of election commissioners or its executive director per Wis. Stat. § 7.21(1).

and its executive director are responsible for the conduct of an election. *See*, Wis. Stats. §§ 62.11¹⁴ and 7.15 Those are separate and distinct duties and one does not supplant the other.

Complainants also cite Wis. Stat. § 7.15 and argue it provides an exclusive list of duties delegated to election clerks (and does not include the power to accept the CTCL grants).

However, Wis. Stat. § 7.15(1) clearly provides, in part: “The clerk shall perform the following duties *and any others* which may be necessary to properly conduct elections or registration....”

(Emphasis added)

IV. Complainants’ Public Policy Argument Fails

Once again, Complainants ask the WEC to exceed their authority. Complainants now argue for the first time that the WSVP is against public policy, citing case law where courts have declared certain contracts void as against public policy. Whatever the merits of the public policy argument are, it appears clear that the WEC cannot declare a contract void pursuant to Wis. Stat. § 5.06; it may only rule on whether an election official violated state law. As has been previously argued, policy determinations are not within the scope of the WEC’s review here.

V. Complainants’ Equal Protection Argument is without Merit

Complainants raise an additional new legal argument in their Reply: That the WSVP violates the Wisconsin Constitution’s equal protection clause.¹⁵ However, as Respondents have noted, Complainants’ argument relies on what activities the City might have undertaken pursuant

¹⁴ Wis. Stat. § 62.11(5), provides, in relevant part, “the council shall have the management and control of the city...finances....” Furthermore, Complainants’ citation to Wis. Stat. § 20.907(1) has no applicability here (pertaining to the acceptance of grants *by the state or an agency thereof*). The City has an analogous provision in its Code pertaining to the acceptance of grants: Milwaukee Code of Ordinances § 304-81.

¹⁵ *See* Footnote 8 *infra* for a description of the alleged factual basis for this claim.

to the WSVP, in theory; not the activities that actually occurred.¹⁶ Regardless of the proper level of scrutiny that would apply in properly assessing an equal protection claim, the City certainly had a compelling governmental interest in “safely administer[ing] elections to reduce the risk of exposure to coronavirus for our residents as well as our election officials and poll workers.” (Reply Appendix at p. 974) Lastly, Complainants cannot properly raise an equal protection claim on behalf of voters outside Milwaukee.¹⁷ Any city can only properly act with respect to the people who reside within its borders, and certainly. Relatedly, Milwaukee certainly could not control which municipalities within this state or any other sought grant funds from the CTCL.¹⁸

CONCLUSION

The Complaint is fatally deficient. Respondents are not election officials within the meaning of Wis. Stat. § 5.06 and have not been alleged to have acted in any way with respect to the CTCL grants or WSVP so that a finding of probable cause can be made with respect to the Complaint. Further, all of Complainants legal claims fail, including those raised for the first time in their Reply.

¹⁶ Without debating the specifics of what activities the City actually undertook with CTCL funds, for that is not the City’s burden, Respondents note for the record that Milwaukee has been a covered jurisdiction for Spanish-heritage citizens under Section 203 of the Voting Rights Act since 2010, and that this places upon the City certain affirmative duties to provide registration and voting notices, forms, instructions, assistance, and other materials and information relating to the voting process in Spanish as well as English.

¹⁷ Somewhat confusingly, Complainants attempt to raise an equal protection claim, while at the same time admitting elsewhere in their brief “the Complainants do not assert how the voters were prejudiced...” (Reply at p. 56)

¹⁸ In any event, in light of Complainants failure to follow the admonition of Special Counsel to file a Reply which “shall address the facts and pleadings pertaining to the particular matter for which it is submitted,” Respondents request that Complainants’ public policy and equal protection arguments be stricken from the record, having been raised for the first time in their Reply brief.

For the foregoing reasons, Respondents respectfully request that the Commission dismiss the Complaint on its merits, with prejudice.

Dated this 27th day of September, 2021.

Respectfully submitted,

s/ Kathryn Z. Block

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VERIFICATION

I, KATHRYN BLOCK, being first duly sworn upon oath, state that I personally read the above verified Response, and that the above Response and attached Exhibits are true and correct based upon my personal knowledge.

Dated June 15, 2021

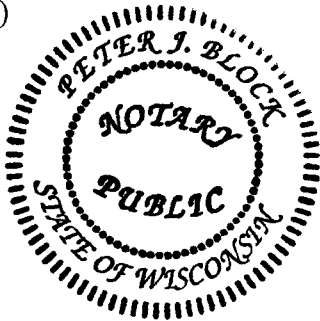
Kathryn Z. Block

Kathryn Z. Block
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STATE OF WISCONSIN)
)ss.
COUNTY OF MILWAUKEE)

Signed and sworn before me this 27th day of September, 2021, by Kathryn Block

(Seal)



P. J. Block

Signature

Assistant City Attorney

Title

My commission expires: is permanent