

BEFORE THE
STATE OF WISCONSIN
ELECTIONS COMMISSION

RICHARD CARLSTEDT,
et al.,

Complainants,

v.

Case No. EL 21-24

MEAGAN WOLFE, et al.,

Respondents.

MARTIN PRUJANSKY,
et al.,

Complainants,

v.

Case No. EL 21-29

MEAGAN WOLFE, et al.,

Respondents.

BRIAN THOMAS, et al.,

Complainants,

v.

Case No. EL 21-30

MEAGAN WOLFE, et al.,

Respondents.

CYNTHIA WERNER, et al.,

Complainants,

v.

Case No. EL 21-31

MEAGAN WOLFE, et al.,

Respondents.

YIPING LIU, et al.,

Complainants,

v.

Case No. EL 21-33

MEAGAN WOLFE, et al.,

Respondents.

**ADMINISTRATOR MEAGAN WOLFE’S REPLY BRIEF IN SUPPORT
OF MOTIONS TO DISMISS ALL CLAIMS AGAINST HER IN THE
FIVE COMPLAINTS¹**

INTRODUCTION

The Complaints in these matters make only a few vague and conclusory allegations regarding Administrator Wolfe that do not come close to showing

¹ Although the five Complaints at issue here have not been consolidated, the allegations against Administrator Wolfe in those complaints and the arguments directed at her in Complainants’ briefs are essentially identical. The Administrator moved to dismiss all claims against her in all five cases and filed a single brief in support of those motions. Complainants, on August 19, 2021, filed five briefs which included their responses to the Administrator’s motions to dismiss. Although each of Complainants’ briefs is captioned as “Complainants’ Reply,” the portions of those briefs directed at Administrator Wolfe actually comprise their *response* briefs in opposition to the Administrator’s motions to dismiss. Accordingly, the present brief is captioned as the Administrator’s “Reply Brief” in support of those motions.

probable cause to believe that she has violated any Wisconsin election law or abused the discretion vested in her by law. They allege that the Administrator “publicly supported” the decision by the respondent municipalities to accept certain election-related grant funding—and accompanying conditions—from a private, nonprofit organization, and their decision to use private, nongovernmental consultants to assist in the local administration of the November 2020 election. (Carlstedt Compl. 2 and ¶ 100; Prujansky Compl. 2 and ¶ 65; Thomas Compl. 2 and ¶ 77; Liu Compl. 2 and ¶ 95; Werner Compl. 2 and ¶ 84.) But the Complaints do not identify any actual actions through which she purportedly provided such public support, other than legislative committee testimony that she gave almost five months after the 2020 election had taken place, and even longer after the municipalities had received and used the funds in question. Nor do they allege any facts concerning any non-public actions by the Administrator. Complainants nonetheless assert, in conclusory fashion, that her unspecified actions violated state and federal law by diverting the authority to control the administration of the election out of the channels statutorily designated by the Wisconsin Legislature. (Carlstedt Compl. 3–4; Prujansky Compl. 4; Thomas Compl. 4; Liu Compl. 2–3; Werner Compl. 4.)

Administrator Wolfe moved to dismiss all claims against her, arguing in primary part that the Complaints failed to state a claim against her under Wis.

Stat. § 5.06 because they presented only conclusory legal allegations; did not identify any actual statements or actions by her that supported the legality of the municipalities' disputed actions; and generally failed to allege facts sufficient to show probable cause to believe that the Administrator violated any election law. (*See* Administrator Wolfe's Br. in Support of Motions to Dismiss ["Administrator's Brief"] 4, 10–15.) The Administrator also argued that, under Wisconsin law, neither the content of her legislative hearing testimony nor the fact that she gave such testimony could form the basis of a complaint against her under Wis. Stat. § 5.06. (*See* Administrator's Br. 9–10.)

Complainants have presented three arguments in opposition to the Administrator's motions to dismiss. (*See* Green Bay Reply 85–88; Racine Reply 85–87; Kenosha Reply 86–88; Madison Reply 85–87; Milwaukee Reply 85–87.) First, they argue that because the Wisconsin rules of civil procedure do not apply in this administrative proceeding, the Administrator cannot move to dismiss the claims against her for failure to state a claim. Second, they argue that the allegations in the Complaints are sufficient to show probable cause that the Administrator gave the municipalities advisory opinions without statutory authority, in violation of Wis. Stat. § 5.05(6a). Third, they argue that even if their claims against the Administrator cannot be directly based on the substantive content of her legislative testimony, that testimony still can be considered here as a source of factual evidence that she gave the municipalities

unauthorized advisory opinions about the legality of their actions. Each of those arguments fails.

First, regardless of the rules of civil procedure, it is indisputable that the Commission can dismiss a complaint if its allegations, assumed to be true, fail “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).

Second, the vague and conclusory allegations about Administrator Wolfe in the Complaints plainly fail to show probable cause to believe that she engaged in any conduct falling within the advisory opinion statute, Wis. Stat. § 5.05(6a), upon which Complainants rely.

Third, Complainants have pointed to nothing in the Administrator’s legislative hearing testimony that supports their contention that she gave the municipalities any legal opinions—much less unauthorized advisory opinions—about the legality of their actions.

The Administrator’s motions to dismiss all claims against her should be granted.

ARGUMENT

I. A complaint that does not include allegations showing probable cause can and should be dismissed for failure to state a claim under Wis. Stat. § 5.06.

Administrator Wolfe contended, in her opening brief, that the Commission should apply the same legal standard² for stating a claim for relief that applies in civil actions in Wisconsin courts. (See Administrator’s Br. 4, 10–15.) Complainants counter that their claim under Wis. Stat. § 5.06 cannot be dismissed for a failure to state a claim because “Wisconsin Statutes § 802.02(1) and common law” do not apply here. (Green Bay Reply 87; Racine Reply 86; Kenosha Reply 87; Madison Reply 86; Milwaukee Reply 86.) In their view, “[t]he Commission’s codified procedures provide sufficient guidance for the Commission to determine whether the allegations meet probable cause to perform its statutory duties.” (Green Bay Reply 88; Racine Reply 87; Kenosha Reply 88; Madison Reply 87; Milwaukee Reply 87.)

It is true that the rules of civil procedure do not, as such, apply to administrative agencies. See *Verhaagh v. Lab. & Indus. Rev. Comm’n*, 204 Wis. 2d 154, 161, 554 N.W.2d 678 (Ct. App. 1996) (“In general, with

² Complainants’ use of the term “standard of review” is not proper. “Standard of review” is a term used to describe the extent to which an appellate tribunal will examine the correctness of legal and factual determinations made by a lower tribunal. See Heffernan, *Appellate Practice and Procedure in Wisconsin* App. C–8–9. Here, the Commission is called upon not to conduct appellate review, but to determine in the first instance whether the Complainants have filed valid complaints under Wis. Stat. § 5.06.

exceptions not applicable here, the rules of civil procedure apply to the courts of this state but are not applicable to administrative agency proceedings.”). The Administrator’s argument, however, is that the Commission nonetheless should apply a similar legal standard here because, like a court complaint, a complaint under Wis. Stat. § 5.06 must allege facts which, if true, would entitle the complainant to relief.

More specifically, a complaint filed with the Commission must “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); *see also* Wis. Admin. Code EL § 20.03(3) (“The complaint . . . shall set forth the facts which are alleged to establish probable cause.”). Complainants emphasize the word “*allegations*,” as if to suggest that any complaint that includes allegations is legally sufficient. (Green Bay Reply 87; Racine Reply 86; Kenosha Reply 87; Madison Reply 86; Milwaukee Reply 86) (citing EL § 20.02(3)). That is plainly incorrect. While allegations are obviously necessary, not all allegations suffice. Rather, a valid complaint must allege facts which, if true, would provide probable cause to believe that the law has been or will be violated. *See* Wis. Stat. § 5.06(1). If the allegations in a complaint do not meet that standard, then the complaint is statutorily insufficient.

In addition, the Commission has by rule defined “probable cause” 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.” Wis. Admin. Code EL § 20.02(4). The Commission has further provided that “[i]nformation which may establish probable cause includes allegations that set forth which persons are involved; what those persons are alleged to have done; where the activity is believed to have occurred; when the activity is alleged to have occurred and who are the witnesses to the events.” Wis. Admin. Code EL § 20.03(3). Those provisions establish a pleading standard for complaints under Wis. Stat. § 5.06 that actually is significantly *higher* than the pleading standard under the rules of civil procedure, which requires only that “[p]laintiffs must allege facts that, if true, plausibly suggest they are entitled to relief.” *Data Key Partners v. Permira Advisers, LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 849 N.W.2d 693. That standard for a civil complaint in circuit court does not require either the degree of mental conviction demanded by Wis. Admin. Code EL § 20.02(4) or the degree of factual specificity described in Wis. Admin. Code EL § 20.03(3).

It is likewise clear that, procedurally, the Commission may dismiss a complaint that does not meet the pleading standard under Wis. Stat. § 5.06(1). The Commission’s administrative rules expressly provide both for preliminary review of a Wis. Stat. § 5.06 complaint to determine “whether the complaint is

timely, is sufficient as to form and states probable cause,” Wis. Admin. Code EL § 20.04(1), and for rejection of a complaint, if it is untimely, insufficient as to form, or fails to state probable cause, Wis. Admin. Code EL § 20.04(2).³ Those provisions contemplate the very relief sought by Administrator Wolfe’s motions to dismiss: (1) preliminary review of the legal sufficiency of the allegations against her in the Complaints; and (2) to the extent those allegations are found insufficient, dismissal of the claims against her. Complainants have cited no legal authority that would preclude the Commission from providing that requested relief.

II. The Complaints fail to state a claim against Administrator Wolfe for improperly issuing an advisory opinion under Wis. Stat. § 5.05(6a).

All of the claims against Administrator Wolfe in the five Complaints should be dismissed because the complaints do not allege facts sufficient to show probable cause to believe that the Administrator violated any election law.

Administrator Wolfe’s motion to dismiss emphasized that the Complaints did not identify any actual statements or actions by her to support

³ Under Wis. Admin. Code EL § 20.04(1)–(2), these preliminary tasks are assigned to the Administrator. Here, because Administrator Wolfe is a party, the tasks may be performed by the Commission’s appointed legal counsel, acting under the authority delegated to them by the Commission.

the assertions that she had endorsed the legality of either the municipalities' acceptance of private grant funds or their use of outside consultants. (See Administrator's Br. 4, 10–15.) Complainants have not even tried to directly respond to that contention by pointing to factual allegations in the Complaints that purportedly show that she did anything unlawful. To that extent, they have effectively failed to dispute the Administrator's contention that the Complaints lacked sufficient factual allegations regarding her conduct.

Instead, Complainants have now made an essentially new argument, contending that the Administrator—without first obtaining proper authorization from the Commission—gave the municipalities an advisory opinion under Wis. Stat. § 5.05(6a), a statute that was not cited in the Complaints, but that generally allows requests to the Commission for an advisory opinion about election-related matters. The Complainants now argue that the Administrator issued such an advisory opinion without the Commission's consent. That action, they maintain, usurped the Commission's statutory authority over such opinions and thereby unlawfully diverted a portion of the Commission's authority over the conduct of the 2020 election. (See Green Bay Reply 86–87; Racine Reply 85–86; Kenosha Reply 86–87; Madison Reply 85–86; Milwaukee Reply 85–86.)

Complainants' new argument under Wis. Stat. § 5.05(6a) fails for the same reason that the Complaints generally fail to state a claim against the Administrator. They assert, in conclusory fashion, that the Administrator expressed views endorsing the municipalities' disputed actions, but they do not allege any facts at all about communications she may have had with municipal employees, nor do they allege any other pertinent facts about her actual conduct. The Complaints thus do not even come close to alleging any activity that might fall within the scope of the advisory opinion statute, Wis. Stat. § 5.05(6a).

Under that statute, an individual, organization, or governmental body may ask the Commission for an advisory opinion regarding the propriety of matters arising under Wisconsin's election statutes. Wis. Stat. § 5.05(6a)(a)1. Upon receiving "a request for an advisory opinion," the Commission "shall review [the] request . . . and may issue a formal or informal written or electronic advisory opinion to the person making the request." *Id.* If such an advisory opinion is issued, it must cite the legal authorities upon which it is based and must "specifically articulate or explain which parts of the cited authority are relevant to the commission's conclusion and why they are relevant." Wis. Stat. § 5.05(6a)(a)2. A person who acts in good faith reliance upon an advisory opinion that is supported by proper legal authority is

not subject to criminal or civil prosecution for so acting. Wis. Stat. § 5.50(6a)(a)2.–3.

This advisory opinion statute has several features that make it plainly inapplicable here.

First, the statute is triggered only if the Commission receives a request for an advisory opinion from an individual, organization, or governmental body. Wis. Stat. § 5.05(6a)(a)1. Here the Complaints do not allege that any of the relevant municipal officials submitted any such request or in any way asked the Commission for a legal opinion about their receipt of private funding or their use of nongovernmental consultants. The Complaints thus fail at the threshold to allege facts sufficient to bring Wis. Stat. § 5.05(6a) into play.

Second, an advisory opinion issued under Wis. Stat. § 5.05(6a)—whether formal or informal—must be “written or electronic.” Wis. Stat. § 5.05(6a)(a)1. The Complaints here do not allege that the Administrator issued any written or electronic opinion to any of the municipalities at issue.

Third, an advisory opinion must cite supporting legal authorities and must explain the relevance of those authorities to the opinion. Wis. Stat. § 5.05(6a)(a)2. The Complaints here are devoid of any allegations that the Administrator provided any municipal official with any opinion that included such supporting legal authority and explanation.

Fourth, the practical consequence of the advisory opinion procedure is to provide a safe harbor that allows a requester to act in good faith reliance upon such an opinion without risking civil or criminal liability. *See* Wis. Stat. § 5.05(6a)3. Here, there are no allegations that any municipality has claimed that it acted in good faith reliance on any legal opinion by the Administrator, and no allegations that the Administrator issued the type of opinion on which any such reliance could be based.

In addition to failing for lack of supporting factual allegations, Complainants' new argument under Wis. Stat. § 5.05(6a) also fails because it is premised upon an incorrect interpretation of that statute. Statutory language must be "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

Complainants here violate that principle by construing Wis. Stat. § 5.05(6a) in a way that would require the Administrator (or any member of the Commission's staff) to always obtain authorization from the Commission before expressing to local officials any views at all about how the election laws apply to some practice. Such a sweepingly restrictive interpretation of Wis. Stat. § 5.05(6a) is absurd and contrary to other, closely related election statutes

that specifically authorize Commission staff to routinely communicate with local officials about the meaning and application of election laws. *See, e.g.*, Wis. Stat. § 7.08(11) (requiring the Commission to assign staff to respond to inquiries from local election officials and to coordinate election-related activities with them) ; Wis. Stat. §§ 5.05(7), 7.31, and 7.315 (authorizing the Commission to provide training and information to local election officials and to explain the election laws to them). It would obviously be impossible, as a practical matter, for the Administrator or other Commission staff to regularly train local election officials throughout the state, explain the election laws to them, respond to their routine inquiries, and coordinate election-related activities with them, if each such action had to be preceded by specific authorization from the Commission itself under Wis. Stat. § 5.05(6a).

As noted above, the Complaints here do not allege any facts about communications between Administrator Wolfe and municipal election officials, including the types of routine communications authorized under Wis. Stat. §§ 7.08(11), 5.05(7), 7.31, and 7.315. Those factual deficiencies of the Complaints alone provide sufficient grounds for dismissing all claims against Administrator Wolfe. Nevertheless, Complainants' interpretation of Wis. Stat. § 5.05(6a) also should be rejected because it would place absurd and unreasonable restrictions on routine and statutorily authorized communications between an administrator and local election officials.

III. The Administrator’s legislative hearing testimony provides no evidentiary support for the claims against the Administrator.

The only concrete factual allegation about Administrator Wolfe’s conduct in the Complaints is the allegation that, in testimony to a legislative committee on March 31, 2021, she endorsed the legality of the municipalities’ acceptance of private grant funds and their use of outside consultants.⁴ In support of her motions to dismiss, the Administrator argued that, under Wis. Stat. § 13.35(1), the content of her legislative hearing testimony could not be the basis for finding a violation of law or an abuse of discretion by her in the present complaint proceedings. (*See* Administrator’s Br. 9–10.)

In response, Complainants do not dispute the Administrator’s argument about the effect of Wis. Stat. § 13.35(1), but they nonetheless contend that, even if liability cannot be directly premised upon the substantive content of her legislative testimony, that testimony still can be considered as a source of factual evidence that the Administrator gave the municipalities unauthorized advisory opinions about the legality of their actions. (Green Bay Reply 86;

⁴ Administrator Wolfe disputes the truth of that allegation. (*See* Administrator’s Br. 10 n.3; *see also* Wolfe’s Resp. to Carlstedt Compl. ¶ 100; Wolfe’s Resp. to Prujansky Compl. ¶ 65; Wolfe’s Resp. to Thomas Compl. ¶ 79; Wolfe’s Resp. to Liu Compl. ¶ 95; Wolfe’s Resp. to Werner Compl. ¶ 84.) For purposes of the present motion to dismiss, any factual allegations in the Complaints are provisionally assumed to be true. Should any of the claims against her survive dismissal, however, the Administrator will prove that her legislative testimony took no position on the legality of the municipalities’ actions.

Racine Reply 86; Kenosha Reply 87; Madison Reply 86; Milwaukee Reply 86) (“It is Wolfe’s own testimony that provide the facts necessary to assert claims against her to meet the standard for ‘probable cause.’”).

But that bare assertion is unavailing because, even if the legislative testimony is considered as a potential source of factual information about other conduct by the Administrator, the Complaints do not point to anything in that testimony that supplies the types of factual information contemplated by the Commission’s administrative rules—such as information about what the Administrator is supposed to have said to municipal officials, to whom she made any such statements, on what occasions the statements were supposedly made, or any supporting context, such as who may have witnessed the relevant events. *See* Wis. Admin. Code EL § 20.03(3) (“Information which may establish probable cause includes allegations that set forth which persons are involved; what those persons are alleged to have done; where the activity is believed to have occurred; when the activity is alleged to have occurred and who are the witnesses to the events.”).

Further, Complainants’ inclusion in their Complaints of an internet link to video of the Administrator’s legislative testimony does not make up for the factual deficiencies of their pleadings. (*See, e.g.*, Carlstedt Compl. ¶ 100 n.7; Prujansky Compl. ¶ 65 n.5; Thomas Compl. ¶ 79 n.10; Liu Compl. ¶ 95 n.10; Werner Compl. ¶ 84 n.10.) They have not supplied a copy of the video, and the

internet link they provided is not publicly accessible without a paid subscription to Wisconsin Eye. And even if the video had been provided, Complainants have not identified the points in the video at which relevant testimony is supposedly located. Nor have they identified any relevant statements in the Administrator’s written legislative hearing testimony, which—unlike the video—is publicly available.⁵

In sum, Complainants’ unsupported conclusory assertion that “Wolfe’s own testimony . . . provide[s] the facts necessary to assert claims against her,” (Green Bay Reply 86; Racine Reply 86; Kenosha Reply 87; Madison Reply 86; Milwaukee Reply 86), does not come close to setting forth facts “sufficient to justify a reasonable, prudent person, acting with caution, to believe that” Administrator Wolfe issued an unauthorized advisory opinion under Wis. Stat. § 5.05(6a) or otherwise violated any election law. Wis. Admin. Code EL § 20.02(4).

CONCLUSION

For the above reasons and those set forth in her opening brief, Administrator Wolfe respectfully asks the Commission to grant her motion to dismiss all claims against her in the five Complaints.

⁵ See *Testimony of Meagan Wolfe to the Assembly Committee on Campaigns and Elections*, March 31, 2021, <https://elections.wi.gov/sites/elections.wi.gov/files/2021-04/Testimony%20of%20Meagan%20Wolfe%20for%20March%2031%202021%20Assy%20Elections%20Committee%20Hearing.pdf> (last accessed September 20, 2021).

Dated this 27th day of September 2021.

SIGNING AS TO ALL LEGAL ARGUMENT:

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SIGNING AND CERTIFYING AS TO ALL FACTUAL STATEMENTS:

"I, Meagan Wolfe, being first duly sworn upon oath, state that I personally read the above answer and that the above factual statements in response to the complaint are true and correct based on my personal knowledge."



MEAGAN WOLFE
Administrator, Wisconsin Elections
Commission

Respondent

Subscribed and sworn to before me
this 27 day of September 2021.



Notary Public, State of Wisconsin
My Commission expires: 11/3/2023

