

**Testimony of Kevin J. Kennedy
Director and General Counsel
Wisconsin Government Accountability Board**

Joint Legislative Audit Committee

January 14, 2015

Room 411 South, State Capitol

Public Hearing

Audit Report 14-14: Government Accountability Board

Chairpersons Cowles and Kerkman and Committee Members:

Thank you for the opportunity to comment on the Legislative Audit Bureau's recent report on the Government Accountability Board. I am joined here today by three Board Members: newly selected Chair Judge Gerald Nichol; Judge Timothy Vocke, a member of the agency audit committee; and former Vice-Chair Judge Harold Froehlich. I expect that two other Board Members, former Chair Judge Thomas Barland and newly selected Vice-Chair, Judge Elsa Lamelas; may participate by telephone.

Introduction

The Government Accountability Board is a Wisconsin success story. This is a legislative initiative the public and the Legislature should be proud of. Since its creation by the Legislature in 2007, G.A.B. has been recognized nationally and locally as a model for nonpartisan administration of elections and ethics laws. More importantly, the agency has been a steadfast, consistent presence in the midst of a politically turbulent time which has enabled the public to readily access key information about the sources of support of those trying to influence election campaigns and policy making. The G.A.B. has facilitated full citizen participation in the extraordinary number of elections over the past five years.

Wisconsin's nonpartisan G.A.B. and nonpartisan municipal clerks consistently run America's best elections. Since the G.A.B.'s inception, Wisconsin has ranked in the top four states on the Pew Elections Performance Index for 2008, 2010 and 2012. Wisconsin continues to be a leader in voter participation, including the recently concluded 2014 general election.

From the outset, the agency management team has embraced the LAB audit. As with any organization, we knew we could always improve and build on our past performance. The audit report gives the Board an unbiased, nonpartisan outside analysis and a road map of what we need to do to improve our operations.

Many of the recommendations in the Audit Report are about things the Board and its staff were not able to get done. Let me remind the Committee that the four years covered by the Audit Report were one of the most politically tumultuous periods in any state capitol in America. During this period there were 19 recall elections, one statewide Supreme Court recount, legislative redistricting and related lawsuits, implementing a new voter ID law and defending that law against numerous lawsuits, implementing the federal MOVE Act along with a federal consent decree, and implementing and dismantling the Impartial Justice law that funded the 2011 Supreme Court campaign.

These extraordinary events forced the Board and me to make tough decisions about how to allocate and where to deploy our resources. We had to set priorities, and we had to be flexible.

I will discuss several points raised in the audit report: Board-Staff Communication, Post-Election Felon Voting Audits, Imposition of Penalties for Late Filing, Administrative Rulemaking, Complaint Tracking and Agency Staffing. Board members will also have comments following my presentation. I will also be happy to respond to any questions.

Board-Staff Communications

The Government Accountability Board is a part-time, citizen board that sets policy for the staff to carry out. The Board meets between eight and 12 times a year. The Board members in attendance today may talk about their own perceptions of their role, but it is not feasible for Board members to be involved in every day-to-day decision.

The staff provides a great deal of information to Board members for meetings as well as between meetings. During the four years covered by the audit, their agenda packets averaged more than 150 pages, but they can often run to more than 300 pages of reports and information about staff activities. During this four year period, staff provided Board members with over 7,800 pages of informational materials for meetings. This does not include email communications, news articles, court filings and other documents given to Board members to keep them fully informed of the issues surrounding the agency between meetings.

Pursuant to the Board's annual delegation of authority to me, I communicate weekly – and sometimes daily – with the Board Chair on a variety of matters. The Chair and I decide whether a matter is important enough to call a special meeting of the Board.

Many of these communications are not documented in Board minutes or meeting materials, and as a result, the LAB audit does not completely reflect when Board members were informed about certain matters.

The LAB report mentions that in some cases, the staff had not kept the Board fully informed of certain developments, and some critics have latched on to that comment to spin a narrative that the Board has a “rogue staff.” That particular characterization is nowhere in the Audit Report. In fact, LAB interviewed all current Board members as well as several past members for the audit, and did not report any complaints about staff communication or activity that was not authorized by the Board. LAB reported, “Members indicated that between meetings, staff provide them with regular updates about ongoing issues and staff activities.” (Page 10).

That said, we can and will do an even better job of communicating with the Board in the future. The Audit Report gives us direction for how to more fully inform the Board members, and the Board will decide in the future what level of detail it wants.

Felon Voter Audits

The LAB Audit Report highlighted delays the agency encountered in conducting post-election felon voting audits. What was not discussed is that throughout the period, the agency was matching felon records with voter registration records to keep ineligible felons from voting. I have included with my testimony a copy of a recent guest editorial penned by former Board Chair Judge Thomas Barland about our efforts to prevent and detect felon voting.

The LAB Audit Report discusses the staff's efforts to improve the effectiveness and efficiency of the post-election felon voting audit, but that detail has somehow gotten lost in the public discussion. The G.A.B. takes illegal voting seriously. Strong protections, in addition to the post-election audit, were in place to prevent felons from voting in Wisconsin. In the relatively few cases where felons have voted in recent years, they will not escape prosecution solely due to a delay in the felon voting audits conducted by the G.A.B.

State statutes require the G.A.B. to do a simple match between voting records and the Department of Corrections list of active felons under supervision. We learned that a simple match was not good enough. Innocent people were being matched as felon voters and referred to District Attorneys for prosecution. In one case an innocent man was charged, and the DA had to make a public apology.

District Attorneys told us the process was not reliable or useful. In some cases they told us not to send them any more referrals. As a result, we temporarily suspended the audits while we fixed the problem. The new system is more efficient and provides more accurate results.

With the new system in place, our staff caught up on 16 post-election audits in nine months. The audits identified 110 cases to investigate out of 16 million votes cast. We have completed the post-election felon audit for the August partisan primary and are poised to begin the audit for the November general election.

Imposition of Penalties for Late Filing

The LAB Audit Report criticized staff's efforts in seeking voluntary payment of civil penalties, often referred to as forfeitures, for late filing. Our Board's philosophy has never been that collecting forfeitures is an end in itself. The Board and staff's primary focus is to ensure timely filing of disclosure reports. Civil penalties are one tool to ensure people file their reports on time.

The purpose of campaign finance reports, lobbying reports and statements of economic interest is to provide the public with information about who supports candidates, who is trying to influence government, and where public officials get their financial support. Each year there are a minimum of four and as many as six campaign finance filings, two lobbying filings and a series of SEI filing deadlines.

Our staff regularly exceeds the statutory minimum for notification of filing requirements. We primarily focus our efforts on making sure all reports get filed on time to provide full disclosure. We send out numerous reminders by email before and after the deadlines.

Our staff spends countless hours on the phone helping campaign treasurers, many of whom are volunteers, file their reports. We provide state public officials, who must file a Statement of Economic Interests, with a pre-filled form containing the prior year's information. We provide online filing of campaign finance and lobbying reports.

Our focus is on securing compliance with filing disclosure reports. If the Board instructs staff to more strictly follow its guidelines for seeking penalties without regard to individual circumstances, we will do so.

Administrative Rulemaking

The Audit Report noted that agency staff was far behind in promulgating, amending and repealing certain administrative rules. This was a resource allocation issue. In light of some of the extraordinary events that occurred over the last four years, one of the things that had to be delayed was promulgation of several administrative rules.

The agency has two staff attorneys. During the audit period the attorneys primary focus was to work with the Department of Justice and other attorneys on the myriad of lawsuits challenging agency actions as well as Legislative actions such as redistricting and voter ID. Since 2013, we have also been down an attorney at separate times as we recruited to fill vacancies.

When the Legislature passes a new law, the agency's first focus is to make sure that local election officials and other people affected by that new law have the proper procedures to carry out the law. What that means to the G.A.B. is developing manuals, guidance and training tools. In many cases, the requirement to promulgate an administrative rule provides a legal backstop in the event a local election official fails or refuses to follow the law. While this is certainly important, we have never been in a position where we needed, but did not have, an administrative rule in place to compel a local election official to act in conformance with the law.

The administrative rulemaking process is very labor intensive and requires outreach and consultation with groups affected by the rule and Legislative Committees. The agency spent considerable resources in 2013 and 2014 on our Election Observer Rules (GAB Chapter 4) because those were a priority to ensure orderly elections. Over the course of two public hearings and numerous discussions with Legislative staff, the Board refined its original proposals incorporating almost every suggestion offered. Because the Legislature failed to act, the agency must now begin again to promulgate this rule.

I would be hard pressed to say we should have prioritized administrative rules over more immediate demands such as the implementation and subsequent dismantling of the

Impartial Justice Act, all the work of marshalling resources and setting up an offsite location to review recall petitions, implementing the on-again off-again voter ID law and developing detailed procedures for local election officials to administer the numerous election law changes adopted by the Legislature in the past two sessions.

Complaint Tracking

Another area the LAB Audit Report highlighted is the G.A.B. performance in dealing with the wide variety of complaints it receives. The Audit Bureau recommended the staff do a better job of tracking complaints. Unlike some larger state agencies, the G.A.B. does not have a complaints division. The same program staff and staff attorneys who handle complaints also conduct other agency business.

Frankly many of the complaints we receive are not substantiated or not germane. Prisoners regularly complain about the conditions of their incarceration, the effectiveness of their attorneys and the fairness of their judge. Other complaints come from people who do not agree with legitimate decisions made by local and state public officials. If you will remember, the G.A.B. received, evaluated and ultimately dismissed hundreds of complaints about actions of legislators and the Governor in 2011 in the fight over Act 10.

One area we have jurisdiction over that generates many complaints is the failure to include disclaimers on yard signs. We try to resolve these kinds of complaints while it matters during the campaign. Many complaints filed with the Board are confidential, so many are resolved without public notice.

The fact that LAB recommended better complaint tracking methods does not mean the staff did not take complaints seriously and deal with all of them in a consistent and professional manner. The staff brought all significant complaints to the Board, which dealt with them appropriately.

Our staff is developing a tracking system, as recommended by LAB, and it is nearly complete. It will categorize complaints and provide a better method of reporting on their status and disposition.

Staffing

The audit report notes the dilemma facing the Board –the vast majority of the work on election administration is done by our federally funded employees who will not be authorized to work after June 30, even though federal funds are available. Simply put, without these staffing resources, every aspect of election administration will be in jeopardy. This presents the most real and immediate risk to the integrity of elections in Wisconsin.

We have funds available to continue staffing through June 30, 2017 because we carefully managed those federal funds given to Wisconsin to implement federal law and administer federal elections.

Part of the reason for the agency's success is its use of IT resources that allow staff to work more efficiently. These projects include the Canvass reporting system used by County Clerks, the nationally recognized Election Data Collection system, our newly developed post-election felon voter audits dashboard, the Badger Voters election data purchasing application and MyVote Wisconsin, which provides online ballot delivery to military voters. None of these would be possible without the work of our federally funded program staff.

It takes years for a new election specialist to be fully trained and effective. We have lost experienced and talented staff because their positions are not permanent, and we are extremely concerned about continued attrition due to the June 30 expiration of these project positions.

Confidentiality

Let me address some issues that were not raised directly in the LAB Audit Report, but which have become part of the public discussion since the report was released.

The Board and its staff have been unfairly criticized for following the confidentiality laws which govern our investigation records. With limited exceptions, Section 12.13(5) of the Statutes strictly prohibits the Board and its staff from disclosing any information about complaints or investigations involving campaign finance or ethics matters. Any violations of this prohibition can be prosecuted as crimes and subject our staff and Board members to a fine of \$10,000 or 9 months in jail, or both.

Since the start of the G.A.B. in 2008 we have taken that prohibition very seriously. Our staff comes to work every day with that threat of criminal prosecution in mind. There are certainly other agencies that handle confidential information or data, but I do not know of another agency whose staff is subject to criminal prosecution for releasing confidential investigation information.

When the issue of confidential records arose during this audit, I told the State Auditor that we would like to share all records with the Audit Bureau but we first needed to obtain the opinion of the Attorney General. After all, the State Auditor cannot protect our staff from criminal prosecution. As the Committee knows, in July the Attorney General concluded that the Statutes did not permit us to share confidential investigation records with the LAB. Attorney General Van Hollen commented that it would be hard to imagine a more powerful way of saying that the Legislature really meant what it said about the confidentiality of G.A.B. records than by imposing criminal penalties for improper disclosure.

So with all due respect, it seems more than a bit disingenuous for some to be repeatedly criticizing the G.A.B. for following the state's confidentiality laws for investigations. This is especially true when the critics are the people who have the power to change the

laws under which we operate. It is unfair to the dedicated public servants who are doing their jobs as directed by the Legislature, and being accountable to the Statutes.

Accountability

I am disappointed that some critics of the agency have used this nonpartisan audit to make political points rather than focusing on how we can work together to maintain Wisconsin's excellent record and reputation for running elections and transparency in government.

A bipartisan Legislature created the G.A.B. as a nonpartisan watchdog. But it is not surprising to hear people ask: Who watches the watchdog? That question has several answers.

We are accountable to the Governor, who appoints the six members of the Board from nominations submitted by a committee of current Court of Appeals judges. Five of the six current members were appointed by Governor Walker. We are accountable to the Senate, which has the power to confirm or reject the Governor's appointments.

The Board is also accountable to the Joint Committee on Legislative Organization under Section 5.05 (5f), which says that the committee "shall be advisory to the board on all matters relating to operation of the board." Every two years the G.A.B. is accountable to the Governor and Legislature through the Biennial Budget. The Legislature has the power of the purse, and the power to approve positions. The Board is accountable to the Statutes which govern its responsibilities and authority, just as much as to any individual legislator or political party.

My staff and I are accountable to a Board of six former judges who between them have more than 100 years of experience as nonpartisan judges, and who know what it means to be accountable to the voters. These judges are trained decision makers who are pillars of their community. Ethically, they are beyond reproach. As the director, I am accountable to the Board. I serve at their pleasure and audition for my job every day. If four of the

six Board members are unhappy with my performance, I am gone. The same is true for my two Division Administrators.

Finally, there is accountability created by the transparency of Board meetings and the opportunity for any member of the public or the Legislature to offer comments directly to Board members. This is rare in executive agencies. The recommendations and decisions of our staff and Board are subject to regular public evaluation and critique.

Conclusion

We are grateful the audit has highlighted these issues and given us a road map for further improvement. The Legislature should be proud of the Board, not only for its nonpartisan nature, but for its accomplishments and performance over the first seven years in existence.

Wisconsin has among the highest voter turnout in America, and one of the reasons for that consistent record is that voters have confidence in the fairness of our elections. Wisconsin consistently ranks near the top in national evaluations of effective election administration.

Among the most important tasks in our democracy are ensuring fair and honest elections, ensuring that everyone plays by the same rules and providing the public with detailed information to assist in making informed decisions.

In Wisconsin, the Legislature has entrusted those responsibilities to the Government Accountability Board, an agency as far removed from politics as any state in the country. The Legislature ought to be proud of that, not shy away from it.

I am happy to respond to any questions.

Thank you for inviting me to participate today.

Respectfully submitted,

A handwritten signature in black ink that reads "Kevin J. Kennedy". The signature is written in a cursive, flowing style.

Kevin J. Kennedy
Director and General Counsel
Wisconsin Government Accountability Board

608-261-8683
608-267-0500 (Fax)

Kevin.Kennedy@wi.gov