

Supplemental Materials
For October 14th, 2016 Meeting

WISCONSIN ELECTIONS COMMISSION

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ADMINISTRATOR MICHAEL HAAS

MARK L. THOMSEN, CHAIR

MEMORANDUM

DATE: For the October 14, 2016 Commission Meeting

TO: Members, Wisconsin Elections Commission

FROM: Michael Haas
Interim Administrator

SUBJECT: Absentee Certificate Envelopes: Missing or Insufficient Witness Address

Background

As the Commission is aware, 2015 Wisconsin Act 261 (“Act 261”) contained some significant changes to the statutes governing the administration of elections, including the approval of online voter registration, the elimination of special registration deputies, and required the Commission to join the Electronic Registration Information Center (ERIC). While these were the ‘big ticket’ items which received the most publicity, many other changes were also wrapped into Act 261.

One of the changes in Act 261 that did not receive as much publicity until recently, was the creation of Wis. Stat. 6.87(6d), which states: **“If a certificate is missing the address of a witness, the ballot may not be counted.”** While the standard absentee certificate envelope has always asked for a witness to indicate their address, the real change for election administration purposes is the clear directive that if the address is missing, “the ballot may not be counted.” Prior to this statutory change, informal advice on this topic allowed the ballot to still be counted, even if the address of the witness was missing or incomplete, and a notation of an irregularity was made on the [Inspectors’ Statement \(EL-104\)](#).

Until recently, the practical impact of this legislative change on a voter’s ballot had not been at the forefront of many election officials’ minds. As the November election inches closer, and the number of absentee ballots being returned to clerk’s offices increases (some with missing or incomplete witness addresses) the potential impact of absentee ballots not being counted because of a missing or incomplete witness address has become a concern. Examples of the potential impact have been highlighted by media accounts that discuss the number of absentee ballots the City of Milwaukee Election Commission and the City of Racine have received with varying degrees of the witness address being incomplete on the certificate envelope.¹

¹ Patrick Marley, *Absentee ballots at risk of being tossed*, [Milwaukee Journal Sentinel](http://www.jsonline.com/story/news/politics/elections/2016/10/07/absentee-ballots-risk-being-tossed/91728826/), <http://www.jsonline.com/story/news/politics/elections/2016/10/07/absentee-ballots-risk-being-tossed/91728826/> (last visited October 11, 2016).

During the latter part of September, and first week of October, the number of phone calls and emails from clerks increased on this topic, asking how this statute should be interpreted, and what they could do to assist voters and help fix absentee certificates that contain no address or a partial address so that the ballot could be counted. To offer guidance and to assist local election officials in navigating this issue, the Commission posted a clerk communication on October 4, 2016 ([“Missing or Insufficient Witness Address on Absentee Certificate Envelopes”](#)).

The purpose of this memorandum is to provide the Commission with the background on the staff guidance and advice provided to clerks in the October 4, 2016 clerk communication.

Legal Framework

As referenced earlier in this memorandum, the focus of the staff guidance is on Wis. Stat. § 6.87(6d), which states: “If a certificate is missing the address of a witness, the ballot may not be counted.” The “certificate” referenced here, is the absentee ballot certificate envelope which is provided to voters that have requested to vote by absentee ballot. The contents of the certificate, including the portion of the certificate completed by a witness is provided in Wis. Stat. § 6.87(2).

Wis. Stat. § 6.87(2) states in pertinent part:

...

The certificate shall be in substantially the following form:

...

I, the undersigned witness, subject to the penalties of s. 12.60(1)(b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.

...(Name)

...(Address)**²

“If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is receive, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).” Wis. Stat. § 6.87(9). If an insufficient absentee ballot certificate is not corrected, the election inspectors or board of absentee ballot canvassers shall reject the ballot, and it shall not be counted. Wis. Stat. §§ 6.88(3)(b) and 7.52(3)(b). Based on this statutory framework, if the absentee ballot certificate is

² The asterisks that appear next to the “Address” portion of the certificate language in the statute relates to the witness requirement if the voter is served by a special voting deputy, and is not relevant to subject matter of this memorandum.

“missing the address of a witness” it is insufficient and the ballot will ultimately be rejected on Election Day if it has not been rehabilitated to include the witness’s address.

The statutory language does not provide a definition of “address” for purposes of completeness of the witness portion of the certificate envelope. Without a legislative definition of “address” and pending questions from local election officials on how to handle certificates that were missing portions of the witness address, the Commission staff looked to other potential sources, so that guidance could be issued in time for certificates to be corrected in advance of the November 8, 2016.

Wis. Stat. § 6.34 describes the documents that voters may use to establish proof of residency when they register to vote. Specifically, Wis. Stat. § 6.34(3)(b)1. and 2. state that a voter’s name and address must be contained on the document. This makes sense, as the information on a person’s proof of residence document must conform to the information contained on the person’s voter registration form, which is the point. Although in a different context (proof of residence), Wis. Stat. § 6.34(b)2. does however indicate what a complete address means: “A current and complete residential address, including *numbered street address, if any, and the name of a municipality.*” For purposes of voter registration, the statute is not as specific what elements of an “address” are required. See Wis. Stat. § 6.33(1)(...residence location, previous residence location). However, by administrative rule, the Commission does specifically set forth the contents of the voter registration form. Wis. Adm. Code EL § 3.02(2) defines the elements of the address that should be captured on the voter registration form, “The elector’s complete address, including *street, number and municipality.*”

Finally, Wis. Stat. §§ 6.84(1) and (2) provides the legislative policy and construction governing absentee voting.

6.84 Construction. (1) LEGISLATIVE POLICY. The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, *voting by absentee ballot is a privilege* exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses. (emphasis added)

(2) INTERPRETATION. Notwithstanding s. 5.01 (1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87 (3) to (7) and 9.01 (1) (b) 2. and 4. *shall be construed as mandatory*. Ballots cast in contravention of the procedures specified in those provisions *may not be counted*. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election. (emphasis added)

The “mandatory” language in Wis. Stat. § 6.84(2) referring to absentee ballot procedures is especially important, given the general construction of all other elections laws. See Wis. Stat. §

5.01 (“Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions”). “The supreme court has consistently construed election statutes as being directory, in keeping with sub. (1) directive that election laws shall be construed to give effect to the will of the electors.” *Lanser v. Koconis*, 62 Wis. 2d 86, 214 N.W.2d 425 (1974). Based on the legislative policy and interpretation as drafted by the Legislature, Wis. Stat. § 6.87(6d) shall be construed to be mandatory, and if a certificate is missing the address of a witness, the ballot may not be counted.

Current Policy and Guidance

The policy and guidance issued on October 4, 2016 was in the staff’s mind, the result of taking a common sense approach to balancing the Legislative directive and purpose, within the legal framework discussed above, against the potential rejection of many absentee ballots cast for the lack of a witness address.

Arguably, the strictest approach would have been to require a witness to provide an address that included: street number, street name, apartment or unit number, municipality, state, and zip code. If any of these elements were missing, the clerk ‘may’ if time permits, return the ballot to the voter for them to correct it and resubmit it by 8:00pm on Election Day. Based on a rigid reading of the legislative policy for absentee ballot processes set forth in statute, this could have been a defensible approach.

On the other end of the spectrum, the staff discussed what the minimum amount of information that the witness could provide as an address and still be sufficient. Staff discussed whether just a street number and street name would be sufficient. If a person provided “12 Main Street” for example, with no other information, does this provide sufficient information for a person to follow up with the witness if there is a question about the validity of a voter’s ballot?

The appropriate balance, in the minds of the staff, was that there needed to be more than just the street number and name from the witness for it to be sufficient. The staff believed the appropriate balance, was to require street number, street name and municipality. This minimum information could allow an individual to locate the witness if there was a question about the validity of the voter’s ballot. Requiring additional information, such as state or zip code could be useful in locating a witness, but the ultimate result of rejecting a ballot if such information was not present seemed overly harsh in practice.

The “Options for Correcting a Witness Address Omission or Insufficiency” provided in the staff guidance was intended to offer clerk’s additional options, above and beyond the one option provided by statute in Wis. Stat. § 6.87(9) – returning the ballot to the voter if there is time to correct it. Unlike the Wis. Stat. § 6.87(6d), the legislative policy does not specifically dictate that Wis. Stat. § 6.87(9) is a mandatory provision, and it does not state that the remedy prescribed is the sole way to rehabilitate or correct an insufficient certificate. Therefore, the staff offered suggestions that could allow a voter’s absentee ballot to be counted if the corrections are made, and the ballot is submitted and sent to the polls by 8:00pm on Election Day. However, given the language provided in Wis. Stat § 6.87(9) which contemplated the voter making the correction to

the ballot, staff believed that at a minimum, the voter be contacted by the clerk and they receive consent from the voter before any changes are made to the certificate.

Taking this approach:

1. informs the voter that there was an issue with the certificate
2. ensures a clerk is not making changes to a certificate that has been sworn and signed by a witness without the voter knowing that a change is being made

The staff continues to believe the current guidance on this issue strikes the appropriate balance between a more stringent application of absentee voting procedures as prescribed by statute against the potential rejection of many absentee ballots for containing uncorrected, insufficient certificates.

Staff Recommendation

The Commission directs staff not to modify or change the policy and procedures on the missing or insufficient witness address on absentee certificate envelope as posted October 4, 2016, which requires a witness address to contain at a minimum, a street number, street name and name of municipality for the certificate to be considered sufficient.

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ADMINISTRATOR MICHAEL HAAS

MARK L. THOMSEN, CHAIR

MEMORANDUM

DATE: For the October 14, 2016 Meeting
TO: Members, Wisconsin Elections Commission
FROM: Michael Haas, Interim Administrator
SUBJECT: Delegation of Authority to Administrator

At its June 20, 2016 meeting, the Elections Commission briefly discussed delegation of certain authority to its Administrator, and directed staff to provide a recommendation regarding an appropriate delegation of authority at its October meeting. In the interim, the Commission requested that the Administrator act consistent with the delegation of authority issued by the Government Accountability Board to its Director and General Counsel. This memorandum recommends that the Commission continue to delegate the same authority regarding various agency responsibilities.

By statute, the Wisconsin Elections Commission has general authority over the state's election laws. In various provisions of the election laws, the Commission is given a series of specific powers in addition to its general authority. Pursuant to Wis. Stat. § 5.05(3g), the Administrator of the Commission serves as the State's chief election officer, and pursuant to Wis. Stat. § 5.05(3d), the Administrator shall perform such duties as the Commission assigns to him or her in the administration of the election laws. Both the State Elections Board and the Government Accountability Board delegated certain authority to their administrative heads in order to facilitate the agency's day-to-day management and to clarify the scope of staff's authority to act without prior specific approval of the oversight body.

The enabling legislation which created the Commission removed statutory language enumerating specific authority which the Government Accountability Board could delegate to the Director and General Counsel. However, given the nature of the Commission's oversight of the agency and its schedule of meeting once every calendar quarter, it is necessary to consider what authority the Commission wishes to delegate to the Administrator in order to effectively manage the daily responsibilities of the agency while maintaining the Commission's role in making policy determinations, setting agency priorities, and directing significant staff initiatives.

It was the policy of the Government Accountability Board to review and re-issue its delegation of authority at the beginning of each calendar year or in the event of a transition in the position of the Director and General Counsel. The delegation for each year continued in effect until the subsequent year, or unless the Board acted to modify such delegation during the calendar year. The Commission may determine whether it wishes to continue the same practice or to continue its delegation of authority until such time as it wishes to revisit it.

Recommendation

Consistent with the delegation of authority last adopted by the Government Accountability Board, I recommend the Commission delegate the authority described below to the Administrator, pursuant to the Administrator's role as agency head and chief state election official. In exercising all delegated authority, the Administrator should be required to report, at the Commission meeting immediately following the delegated action, the specifics of the action taken, the basis for taking the action, and the outcome of that action.

1. The following authority should be delegated to the Administrator subject to the requirement that before it is exercised, the Administrator consult with the Commission Chair to determine whether Commission members should be polled or a special meeting conducted before action is taken:
 - To issue compliance review orders under the provisions of Wis. Stat. § 5.06;
 - To certify and sign election related documents including candidate certifications, certificates of election, and certifications of election results on behalf of the Commission;
 - To accept, review, and exercise discretion to approve applications for voting system modifications characterized as engineering change orders (ECOs) for systems previously approved for use in Wisconsin;
 - To implement the Commission's determinations regarding sufficiency of nomination papers or qualifications of candidates;
 - To communicate with litigation counsel representing the Commission in order to make timely necessary decisions regarding Commission litigation;
 - To make a finding pursuant to Executive Order #50, Sec. IV(8), that a proposed administrative rule does not have an economic impact.
 - To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), subject to the further provisions of this paragraph. The Administrator is required to request approval from the Commission for contracts involving a sum exceeding \$100,000, or for purchases from a statewide contract over \$100,000. The Administrator is required to request approval from the Commission prior to posting a Request for Proposal or Request for Bid. In addition, the Administrator may enter into a sole source contract only after obtaining approval from Commission Chair and providing five days' prior notice to the Commission regardless of the dollar amount.
2. The following authority should be delegated to the Administrator without the requirement for prior consultation with the Commission Chair before action is taken:

- To exempt municipalities from polling place accessibility requirements pursuant to the provisions of Wis. Stat. § 5.25(4)(a);
- To exempt municipalities from the requirements for the use of voting machines or electronic voting systems pursuant to the provisions of Wis. Stat. § 5.40(5m);
- To authorize the non-appointment of an individual who is nominated to serve as an election official under the provisions of Wis. Stat. § 7.30(4)(e);
- To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), for contracts involving a sum not exceeding \$100,000, or for purchases from a statewide contract involving sums not exceeding \$100,000.

In making the above recommendations, I would note the following which was relevant to the authority delegated by the Government Accountability Board. Applications for exemption from accessibility requirements are rare and generally involve last minute construction issues. Permitting a municipality to use paper ballots instead of electronic voting equipment is a fairly routine decision that is predicated on unique circumstances such as the cost of programming electronic voting equipment when there is only one race on the ballot. Post-election certifications are generally administrative in nature, time sensitive and necessary to ensure an orderly transition of leadership following an election. These election-related certifications cannot be completed while a recount or litigation challenging a recount is pending. Wis. Stat. § 7.70 (5)(a). Finally, regarding contract authority, agency purchases are governed by state procurement requirements, and very few contracts involve an amount exceeding \$100,000.

A proposed motion is set out below.

Recommended Motion: Pursuant to the Commission Administrator's role as agency head and the State's chief election official, the Wisconsin Elections Commission delegates the authority described below to its Administrator. In exercising all delegated authority, the Administrator is required to report, at the Commission meeting immediately following the delegated action, the specifics of the action taken, the basis for taking the action, and the outcome of that action.

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 - To authorize the non-appointment of an individual who is nominated to serve as an election official under the provisions of Wis. Stat. § 7.30(4)(e);
 - To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), for contracts involving a sum not exceeding \$100,000, or for purchases from a statewide contract involving sums not exceeding \$100,000.

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MARK L. THOMSEN, CHAIR

MEMORANDUM

DATE: For the October 14, 2016 Meeting
TO: Members, Wisconsin Elections Commission
FROM: Michael Haas, Interim Administrator
SUBJECT: Commission Staff Work Rules

Wis. Stat. § 5.05(4) states “All employees of the commission shall be nonpartisan.” This requirement also existed for staff of the Government Accountability Board. Apart from prohibitions against becoming a candidate for a state or partisan local office, and against making campaign contributions to a candidate for state or local office established in Wis. Stat. § 5.05(2m)(d)2., there are no statutory definitions or standards regarding actions or behavior that may be considered partisan.

Commission staff is developing a written policy to establish agency rules related to the requirement for staff to be nonpartisan. Attached is a memorandum dated September 4, 2015 issued to staff of the Government Accountability Board outlining rules regarding political activity. For comparison, also attached is an excerpt from the Department of Administration’s Employee Handbook describing permissible political activities for state employees who are not subject to more specific agency work rules.

In addition to using the Government Accountability Board memorandum as a starting point, staff is reviewing work rules of legislative service agencies, whose employees are also subject to restrictions related to partisan or political activity. Commission staff will develop a recommended policy for the Commission review at its December meeting after having an opportunity to more fully analyze the policies of legislative service agencies to determine whether any of those provisions should also be incorporated into the Elections Commission’s staff work rules.

No action is required at this time, but the Commission may wish to provide input or directions to staff regarding the development of the proposed work rules.

State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: September 4, 2015
TO: All G.A.B. Staff
FROM: Kevin J. Kennedy
Director and General Counsel
SUBJECT: Rules Regarding Political Activity

As we are all aware, the Government Accountability Board is a non-partisan agency and our staff is required to conduct itself in a nonpartisan manner, both during and outside of working hours. Whatever our individual political beliefs, it is helpful to have a periodic reminder of this restriction which is established by Section 5.05(4), Wis. Stats., especially in times of heightened political activity. With that in mind, please keep in mind and continue to observe the following work rules:

1. G.A.B. staff may not participate in partisan campaigns in support of or in opposition to state or federal candidates, including signing nomination papers. This prohibition includes participation in any efforts to recall a state or federal official elected on a partisan basis, and signing recall petitions.
2. G.A.B. staff may not participate in campaigns to support or oppose local non-partisan candidates, including running as a local candidate. This activity is not restricted because it is partisan in nature, but rather because G.A.B. staff may be in the position of ruling on matters related to ballot access of local candidates or campaign finance rules related to local candidates and campaigns.
3. G.A.B. staff may participate in rallies or demonstrations that are not solely partisan, including activities related to unions or rules governing state employees. However, because such events can also become overtly partisan, staff may not display buttons, signs, or other information related to them within the office. It is important to maintain the unbiased administration of our duties in fact as well as in appearance, and permitting such displays could undermine the confidence of our customers and the public in the non-partisan character of the Board.
4. Board staff shall refrain from making public statements regarding partisan candidates or elected officials, including in the use of any personal social media sites.

Due to the nature of our responsibilities, there have been regular efforts by parties on various sides of the political spectrum to draw the Board into partisan disputes since its inception. As a result, there is an ongoing public focus on our role in administering and enforcing laws under the Board's jurisdiction in a fair and impartial manner. In addition to complying with our statutory directive, it is important that all of us take care to maintain and aggressively guard the nonpartisan manner in which we conduct our business, as that is a key factor in the credibility that attaches to the Board's actions and decisions.

The Board and I appreciate your continuing cooperation with these rules and our mission. Please feel free to let me know if you have any questions.

In general, the following political activities are *permissible* for all department employees subject to either the state statutes or the Federal Hatch Act:

1. Making voluntary contributions for political purposes.
2. Participating as a candidate for a nonpartisan part-time office (e.g., City Alderperson, County Board, School Board, etc.), provided service in the office will not conflict or interfere with the employee's performance of state duties.
3. Expressing opinions as an individual, either privately or publicly, on political subjects and candidates.
4. Participating as a candidate for a partisan political office providing a leave of absence is taken at the time a person declares his or her intention to run, except for employees in federally funded programs, who are not permitted to run for partisan political office at all.
5. Becoming a member of a political party and participating in party affairs. The following are some of the political activities in which an employee may participate, providing the employee is *off duty and not on state property*:
 - a. Soliciting votes in support of, or in opposition to, a partisan candidate for public office or political party office.
 - b. Serving as an officer of a political party; a member of a national, state or local committee of a political party; an officer or member of a committee of a partisan political club; or being a candidate for any of these positions.
 - c. Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions or other funds for a partisan political purpose.
 - d. Taking an active part in managing the political campaign of a partisan candidate for public office or political party office.
 - e. Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate.
 - f. Organizing, selling tickets to, promoting or actively participating in a fund-raising activity of a partisan candidate, political party or political club.
 - g. Driving voters to polls on behalf of a political party or partisan candidate.
 - h. Serving as a delegate, alternate or proxy to a political convention.
 - i. Addressing a convention, caucus, rally or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office.
 - j. Initiating or circulating a partisan nominating petition.
 - k. Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature or similar material.
 - l. Organizing or reorganizing a partisan political party organization or political club.
6. Parking an automobile bearing partisan political signs and/or stickers in a state parking area while on duty at a state work station.

PROHIBITED POLITICAL ACTIVITIES

In general, the following political activities are *prohibited*:

1. Using governmental authority to interfere with or effect nomination or election for any public office or position within any political party.
2. Using governmental authority or influence to intimidate, threaten or coerce any person to vote contrary to his or her own voluntary choosing.
3. Using governmental authority to directly or indirectly intimidate, threaten or coerce any person to pay, lend or contribute anything of value, including services, to any party, organization, group or individual for political purposes.
4. Using any official authority or influence to coerce any individual or group for political action, or to confer benefits or effect reprisals to secure desired political action or inaction.
5. Offering to pay or accept benefits in return for desired political action or inaction.
6. Engaging in political activity in or on state-owned property including, but not limited to, wearing political identification while on duty, or posting signs in the work unit where it could impair the effectiveness of the department's operation.
7. Engaging in any political activity when off duty to such an extent that efficiency during working hours is impaired or the employee is tardy or absent from work.
8. Becoming a candidate for partisan public office when in work status.
9. Directly or indirectly soliciting or receiving subscriptions or contributions for any partisan political purpose while on state time or engaged in official duties or while in a building, office or room occupied for any purpose by the state.
10. While on state time or engaged in official state duties, soliciting--or in any manner being involved in soliciting--any assistance, subscription, or support for a partisan political party or purpose, from any person holding any position in the classified service while on state time or engaged in official state duties.
11. During the hours when on official duty, engaging in any form of political activity calculated to favor or improve the chances of any political party or any person seeking or attempting to hold partisan political office.