

**State of Wisconsin
Before the Elections Commission**

Eugene Wojciechowski,

Complainant,

against

EL 22-58

Rebecca Grill,
as City Clerk for the
City of West Allis, Wisconsin,

Respondent.

ANSWER

Pursuant to Wis. Stat. § 5.06 and Wis. Adm. Code Ch. EL 20, Respondent, Rebecca Grill, hereby answers the above-captioned complaint.

Preface

As an initial matter, the city clerk's office policy regarding the return of absentee ballots has been adjusted since the date on which Mr. Wojciechowski returned his absentee ballot.

The office policy is now to ask voters if they are willing to show identification rather than require it. If the voter chooses not to show identification, the clerk's office will still accept that absentee ballot without identification but mark that ballot as "No ID Verified," or similar language, to indicate that the clerk's office did not verify that the voter returned their own ballot. This change ensures that the clerk can separate absentee ballots, if necessary, on a later date and those who provided identification will have their ballots counted.

Regardless, Mr. Wojciechowski's complaint is an opportunity to resolve this issue, which is important and could have significant consequences statewide. Therefore, this response will focus on the factual allegations in the original complaint.

Introduction

Although there appears to be no explicit statutory language requiring voters to provide proof of identification upon returning an absentee ballot in person to the city clerk, the way two statutes have been interpreted in binding precedent imposes what appears to be an implicit duty.

One unequivocal holding by the Wisconsin Supreme Court is that a voter must return their own absentee ballot to comply state law: “[w]e conclude an absentee ballot delivered in person under Wis. Stat. § 6.87(4)(b)1. must be delivered by the voter.” Teigen v. Wisconsin Elections Comm’n, 2022 WI 64, ¶ 83, 976 N.W.2d 519, 546. The court found this to be a mandatory part of the absentee voting process. In addition, any ballot cast in violation of this mandatory process may not be counted:

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.

Wis. Stat. § 6.84(2). Accordingly, pursuant to these two statutes and the analysis in Teigen, any ballot delivered to the city clerk by a person other than the voter may not be counted or included in the certified result of an election.¹

This appears to be a strict liability matter and not one in which the clerk must knowingly count an improperly returned ballot or display reckless disregard as to whether the absentee ballot is properly delivered. Instead, the law imposes a duty upon the clerk to not count an absentee ballot that has been delivered in person by someone other than the named voter. In an effort to ensure every absentee ballot is authorized by law to be counted, the clerk’s office sought to verify that the voter was delivering their own absentee ballot through the least intrusive means: requiring proof of identification.

Count 1 – Violation of Wis. Stat. § 6.87(4)(b)3.

The law in question reads as follows:

¹ This answer assumes federal law regarding accommodations for disabled voters is not applicable.

If the absentee elector has received an absentee ballot from the municipal clerk by mail for a previous election, has provided proof of identification with that ballot, and has not changed his or her name or address since providing that proof of identification, the elector is not required to provide proof of identification.

Wis. Stat. § 6.87(4)(b)3. Read out of context, that provision appears to prohibit the clerk's office from requiring proof of identification for certain repeat absentee voters at any time. However, read in context, that provision does not apply at the time of delivering a completed absentee ballot. Instead, it applies to the moment in which an absent elector normally must provide proof of identification: upon applying for a new absentee ballot. That context is made clear by other statutes within the absentee voting regulatory scheme.

First, Wis. Stat. § 6.86(1)(ac) says "[e]xcept as authorized in *ss. 6.87(4)(b)2. to 5.* ..., the elector shall transmit a copy of his or her proof of identification in the manner provided in s. 6.87(1)...." (emphasis added). This provision creates a method for voters to request an absentee ballot by facsimile or email. It is not related to the return of a completed ballot.

Second, a voter must submit proof of identification "with his or her application" to receive an absentee ballot, not upon returning a completed absentee ballot. Wis. Stat. § 6.87(1). The clerk is then specifically charged with "verify[ing] that the name on the proof of identification conforms to the name on the application," not the envelope that contains a completed absentee ballot. Id.

Finally, there is a direct reference to the statutory language in question that states no proof of identification is required at the time of applying for an absentee ballot if "the absent elector is exempted from providing proof of identification under sub. (4)(b)2. or 3." Id.

In the context of the absentee voting regulatory scheme, the language within Wis. Stat. § 6.87(4)(b)3. is not a general exception that applies to absent electors at the time they return their absentee ballots. Instead, it is a narrow exception to the proof of identification requirements when obtaining a new absentee ballot under Wis. Stat. § 6.87(1). It only exempts certain repeat absent electors from having to provide proof of identification at the time that voter is obtaining a new absentee ballot.

Therefore, the city clerk's policy of requiring proof of identification upon in-person delivery of that absentee ballot did not violate Wis. Stat. § 6.87(4)(b)3. because that provision does not apply to the delivery of completed absentee ballots. That law only applies to the issuance of absentee ballots to a voter after the voter's identification was already confirmed at a prior election and remained unchanged.

Count II – Violation of Wis. Stat. § 6.02

Within this count, the complainant appears to argue that Wis. Stat. § 6.02 – which creates a definition of an eligible elector – prohibits the clerk from verifying that a person delivering an absentee ballot is the named voter because doing so changes the definition of an eligible elector.

As the complaint states, eligible electors are subject to reasonable regulations enacted by the state. (Complaint, ¶¶ 23-25.) Furthermore, unlike in-person voting, “voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place [and it] must be carefully regulated to prevent the potential for fraud or abuse....” Wis. Stat. § 6.84(1).

Within those regulations, the law says any absentee ballots delivered in person must be handed to the city clerk by the named voter. Wis. Stat. § 6.87(4)(b)1.; Teigen, 2022 WI 64, ¶ 83. The only reasonable way to verify that this law is followed is by requiring proof of identification. If a person refused to produce proof of identification, that person remained an eligible elector. However, eligible electors are subject to regulations, and verification of identity is one of those regulations that the city clerk must enforce in order to count an absentee ballot.

Therefore, the city clerk's policy of requiring proof of identification upon in-person delivery of that absentee ballot did not violate Wis. Stat. § 6.02 because those voters remain eligible electors subject to existing regulations.

Conclusion

Even though the city clerk did not violate the statutes cited in the complaint, the Wisconsin Election Commission (“WEC”) should determine if there is a duty to verify the identity of voters as they deliver their ballots in person in light of the Teigen holding. Also pertinent is whether failing to verify

voters are returning their own ballots would jeopardize the election results in any way. The city clerk is hopeful that the WEC provides clear direction in advance of the upcoming election cycle in the fall.

Date: August 18, 2022



Kail Decker
City Attorney
State Bar No. 1063074

City of West Allis
7525 W. Greenfield Ave
West Allis, WI 53214
kdecker@westalliswi.gov
414.302.8450

Attorney for Rebecca Grill

I, Rebecca Grill, being first duly sworn on oath state that I personally read the above answer, and that the above statements are true based on my personal knowledge and, as to those stated on information and belief, I believe them to be true.



(respondent's signature)

STATE OF WISCONSIN)
) ss.
County of MILWAUKEE),

Sworn to before me this 18th day of August, 2022.



(Signature of person authorized to administer oaths)

My commission is permanent
Notary Public

