

STATE OF WISCONSIN
BEFORE THE ELECTIONS COMMISSION

Kenneth Brown
610 Main Street
Racine, WI 53403,

Complainant,

Complaint: EL23-50

v.

Tara McMenamin
Office of the City Clerk
730 Washington Ave.
Racine, WI 53403,

Respondent.

RESPONSE OF RESPONDENT TARA MCMENAMIN

Respondent Tara McMenamin, in her capacity as City Clerk of the City of Racine, by and through her attorneys Scott Letteney and Ian Pomplin, hereby submits the following response to the Complaint filed by Kenneth Brown with the Wisconsin Elections Commission.

INTRODUCTION

Between 2020 and 2022, and all other years, the City of Racine has operated elections within the scope of the law, including the establishment of appropriately distanced observation areas. The City of Racine has operated these observation areas consistently by indicating on the ground with removable, high visibility tape where observers may stand. These areas are located no closer than three feet and no further than eight feet from the polling tables at which electors announce their name and address to be issued a voter number and from the tables at which an individual may register to vote. These observation areas are often located in the center of the room to allow observers to view all tables where public aspects of voting occur. *Aff.* of McMenamin,

Ex. 1. (This photograph was taken after the closing of polls on April 4, 2023, and illustrates the location of the observer area at the City of Racine central count location. The observation area has been set up in an identical manner for every election at which the City of Racine has opted to use a central count.) The boundaries of the observation area are set such that elections staff may perform their election duties without being impeded by observers.

For all elections prior to August 9, 2022, the City of Racine canvassed absentee ballots at the polling locations pursuant to Wisconsin Statutes section 6.88. Beginning with the election that occurred on August 9, 2022, the City of Racine opted into Wisconsin Statutes section 7.52, which permitted the City to establish a central count location for the canvassing of absentee ballots. Racine, Wis., Municipal Code §§ 2-321, 2-322. Accordingly, all elections in 2020, 2021, and both the 2022 Spring Primary and the 2022 Spring General Election did not use a central count system. The 2022 Partisan Primary, 2022 General Election, and all elections in 2023; however, utilized a central count system.

The City of Racine did not allow any voting activity on Monday, April 4, 2022—the day before the 2022 Spring Election. This was done in accordance with Wisconsin Statutes section 6.86(1)(b).

ARGUMENT

The complaint fails to allege that the City Clerk has violated any election statute and thus fails as a matter of law. The City of Racine has numerous polling locations spread throughout the City. Though the complainant alludes to the central count location established under Wisconsin Statutes section 7.52, he does not specify which location is alleged to be in error. Further, the complaint is untimely and contains factually impossible allegations.

I. The City Clerk properly restricted observation areas within the meaning of Wis. Stat. § 7.41

City of Racine Clerk Tara McMenamin lawfully followed all requirements of Wisconsin Statutes section 7.41 to restrict observation to certain areas within a polling place, clerk's office, or alternate site under section 6.855. There are three statutory requirements:

1. The chief inspector or municipal clerk shall clearly designate observation areas for election observers under sub. (1).
2. The observation areas shall be not less than 3 feet from nor more than 8 feet from the table at which electors announce their name and address to be issued a voter number at the polling place, office, or alternate site and not less than 3 feet from nor more than 8 feet from the table at which a person may register to vote at the polling place, office, or alternate site.
3. The observation areas shall be so positioned to permit any election observer to readily observe all public aspects of the voting process.

Wis. Stat. § 7.41(2).

The complaint does not allege that any of these requirements were violated. The chief inspector and/or municipal clerk clearly designated observation areas through signage and high-visibility tape. The chief inspector and/or municipal clerk located these areas no less than three feet nor more than eight feet from polling tables. The complaint admits as much. "Poll Observer's Area's boundaries were more than 3 feet away from Poll Worker's workstation." *Compl.* p. 2. "The Observer's area is located more than 3 feet from the location where Absentee Ballots were processed." *Id.* The observation areas were centrally located and provided observers with the ability to readily observe the election process, both visually and audibly. This was done in accordance with Wisconsin Statutes section 7.41 and the "Election Administration Manual for Wisconsin Municipal Clerks" *Wisconsin Elections Commission*, September 2023 p. 183 ("Observers are allowed at a central counting location under Wis. Stat. § 5.86. Counting Area: There must be an observer area between three and eight feet of the table at which the counting is taking place.") The complaint, which alleges that observers were not allowed closer than three

feet, is wholly without merit. The City Clerk for the City of Racine followed the law exactly, and the complaint itself admits as much.

Further, the focus of observation, as such applies to the central count procedure adhered to by the City of Racine under Wisconsin Statutes section 7.52, is primarily *auditory*, not visual. Section 7.52 incorporates both the right of observation and the statutory distance requirements prescribed by Wisconsin Statute section 7.41. To illustrate, section 7.52 clearly states that “[t]he board of absentee ballot canvassers shall first open the carrier envelope only, and, in such a manner that *a member of the public, if he or she desired, could hear*, announce the name of the absent elector or the identification serial number of the absent elector if the elector has a confidential listing under s. 6.47 (2).” Wis. Stat. § 7.52(3)(a) (emphasis added). Plainly, this statute emphasizes auditory observation, but also allows for visual observation from the requisite distance. It is just as plain that there is no room within the law for members of the public to hover mere inches behind absentee ballot canvassers, despite what the complainant has implied.

To the extent that the activities at central count constitute an “open meeting,” the observation locations are legally permissible under that framework as well. Former Attorney General J.B. Van Hollen opined in an Attorney General Opinion that processing absentee ballots at a central count location constituted an “open meeting” within the meaning of Wisconsin Statutes section 19.82(1). OAG 5-14. Within that opinion, it was made clear that “canvassing boards must provide the public a reasonable opportunity to meaningfully observe their meetings, they may impose reasonable limits on public access to the extent necessary to protect the effective and orderly conduct of the canvass.” The central count restrictions imposed by the City’s Clerk—designated observation areas no closer than three feet and no further than eight feet—comply with both open meetings laws and Wisconsin Statute section 7.41.

In furtherance of the principles behind both Wisconsin Statutes section 7.41 and the open meetings laws, as well as OAG 5-14, reasonable discretion was used to allow observers the opportunity to more closely inspect any ballot envelope upon request. Observers need only identify the *specific* envelope or document and alert the chief election inspector and/or the municipal clerk. This is in accordance with the Attorney General opinion that “canvassers must exercise reasonable discretion to determine the manner of public access to election documents and materials that is consistent with the orderly conduct of the canvass.” OAG 5-14. Thus, all requirements regarding the handling of election materials were followed, as the chief election inspector and/or municipal clerk allowed for visual inspection upon request.

II. The Complaint is untimely

The complaint alleges that violations occurred on “Election Day 2020, Primary Day 2022, and Election Day 2022.” *Compl.* p. 1. Presumably, the complaint is referring to the November 3, 2020, Fall General Election, the August 9, 2022, Fall Primary Election, and the November 8, 2022, Fall General Election, though other elections occurred within 2020 and 2022. It is possible that “Primary Day 2022 and Election Day 2022” refer to the spring elections in 2022. Regardless, all complaints about these elections are untimely.

All complaints alleging election administration issues must be filed promptly. Wis. Stat. § 5.06. While the statute is silent as to what “promptly” means, this complaint is certainly outside the realm of any sense of that word. The complaint here appears to have been filed on September 29, 2023, and such was transmitted to the Respondent on October 2, 2023. This indicates that the complaint was filed one thousand fifty-four days after the November 3, 2020, Fall General Election, four hundred and ten days after the August 9, 2022, Fall Primary Election, and three hundred nineteen days after the November 8, 2022, Fall General Election. A common definition

of promptly is “in a prompt manner: without delay: very quickly or immediately” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/promptly>. (Accessed Oct. 4, 2023.) The complainant here delayed many hundreds of days after the allegations are said to have occurred, which is clearly not prompt within the meaning of the statute.

III. The Complaint alleges actions in locations that did not exist and actions on a day for which an election was not held.

It appears that this complaint is alleging that the City of Racine operated its central count area in violation of witness observation laws. *Compl.* p. 1 (“Which in turn, violated ALL Poll Workers at Cenral [sic] Count in the city of Racine Civil Rights.”) However, the City of Racine began using central count canvassing under Wisconsin Statutes section 7.52 only during the 2022 Fall Primary Election, which was held on August 9, 2022. This means that the complaint regarding the 2020 election necessarily fails because it argues a factual impossibility, as no central count location was operated in 2020 (or prior to August 9, 2022).

Further, the complaint alleges that violations occurred on Monday, April 4, 2022¹. Specifically, it states that “[a] request made to Tara McMenamin was made by John Harry Landwehr on 04/03/2022 by e~mail and then again on Election Day 04/04/2022.” No election activity occurred on April 4, 2022. The scheduled election was to occur on April 5, 2022, but the City of Racine did not operate the central count location for that election. Further, in-person absentee voting may not occur on the Monday prior to a Tuesday election. Wis. Stat. § 6.86(1)(b). Thus, this allegation is factually impossible.

¹ It is possible that the complainant is referring to the April 4, 2023, election, for which central count canvassing was used. However, the complaint references the year 2022 eight separate times, indicating that the complaint does in fact refer to April 4, 2022, a day in which no voting activity occurred.

Dated this 12th day of October, 2023.

Respectfully submitted,

Electronically signed by Ian R. Pomplin
Ian R. Pomplin, Assistant City Attorney
State Bar No. 1105355
ian.pomplin@cityofracine.org
Scott R. Letteney, City Attorney
State Bar No. 1000559
scott.letteney@cityofracine.org
Attorneys for Tara McMenamin

Racine City Attorney's Office
800 Center Street
Suite 122
Racine, Wisconsin 53403
Telephone: (262) 636-9115
Facsimile: (262) 636-9570

VERIFICATION

I, Tara McMenamin, being first duly sworn upon oath, state that I personally read the above verified Response, and that the above Response is true and correct based upon my personal knowledge.

Dated this 12th day of October, 2023.

Tara McMenamin
City Clerk, City of Racine

STATE OF WISCONSIN)
)ss.
COUNTY OF RACINE)

Subscribed and sworn to before me this 12th day of October, 2023, by

Signature
Notary Public, State of Wisconsin

My commission expires: 9-23-2025



STATE OF WISCONSIN
BEFORE THE ELECTIONS COMMISSION

Kenneth Brown
610 Main Street
Racine, WI 53403,

Complainant,

v.

Tara McMenamin
Office of the City Clerk
730 Washington Ave.
Racine, WI 53403,

Respondent.

**AFFIDAVIT OF TARA MCMENAMIN IN SUPPORT OF
RESPONSE OF RESPONDENT**

STATE OF WISCONSIN)
)SS
COUNTY OF RACINE)

Tara McMenamin, first being duly sworn on oath, deposes and states as follows:

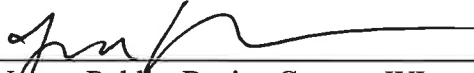
1. That at all times pertinent hereto, she was an adult resident of the State of Wisconsin, and that she is employed by the City of Racine as City Clerk.
2. This affidavit is given in support of Respondent's Response in the above-entitled action.
3. Appended hereto as Exhibit 1, is a true and accurate copy of a photograph taken on April 4, 2023, that is illustrative of the typical observer area in the City of Racine's central canvassing location.

Dated at Racine, Wisconsin, this 12th day of October, 2023.



Tara McMenemy

Subscribed and sworn to before me
this 12 day of October, 2023.



Notary Public, Racine County, WI

My commission expires/is 9-23-2025

