



Wisconsin Elections Commission

201 West Washington Avenue | Second Floor | P.O. Box 7984 | Madison, WI 53707-7984
(608) 266-8005 | elections@wi.gov | elections.wi.gov

December 20, 2023

Eugene Wojciechowski
11923 West Lincoln Avenue
West Allis, WI 53227

Dawn M. Martin
1975 S. 70th Street
West Allis, WI 53219

Rebecca Grill, City Clerk
7525 West Greenfield Avenue
West Allis, WI 53214

Sent via email to: clerk@westalliswi.gov; kdecker@westalliswi.gov;
dmartin928@sbcglobal.net; dlencz@lawforward.org

Re: In the Matters of: **Eugene Wojciechowski v. Rebecca Grill** (Case No.: EL 22-58)
Dawn M. Martin v. Rebecca Grill (Case No.: EL 23-38)

Dear Mr. Wojciechowski, Ms. Martin, and Clerk Grill:

This letter is in response to the verified complaints submitted by Eugene Wojciechowski and Dawn M. Martin to the Wisconsin Elections Commission (“Commission”), which were filed in reply to actions taken by Clerk Grill of the City of West Allis (“Respondent”) concerning alleged violations of Wis. Stats. §§ 6.02, 6.87, and 6.88. Both complaints center upon the legal question of whether a voter is required, or can be asked, to produce proof of photo identification upon the in person return of a completed absentee ballot. Both complainants raise a secondary question of whether the Respondent is permitted to place an additional mark upon the envelope of a completed absentee ballot to indicate that no photo identification was provided during the return of the ballot in case the ballots need to be separated later.

Together, the complaints raise allegations about the Respondent’s in-person absentee ballot return policies during the elections held on August 9, 2022, February 21, 2023, and April 4, 2023. Though both Complainants bring similar allegations against the same Respondent, they are brought amidst ongoing, relevant legal guidance from three different courts of law, as well as changes in the Respondent’s own policy regarding photo identification and the return of completed absentee ballots. Given the similarities between the facts and applicable law, the Commission has reviewed both complaints together and accordingly issues this closing letter to resolve both complaints.

The Commission has reviewed both complaints, the Respondent’s responses, and both Complainants’ replies. The Commission provides the following analysis and decision. In short, the Commission finds that both Complainant Wojciechowski and Complainant Martin did show probable cause to believe that a violation of law or abuse of discretion occurred with relation to Respondent’s procedural actions.

Commissioners

Don Millis, chair | Marge Bostelmann | Ann S. Jacobs | Carrie Riepl | Robert Spindell | Mark L. Thomsen

Administrator
Meagan Wolfe

Commission Authority and Role in Resolving Complaints Filed Under Wis. Stat. § 5.06

Under Wis. Stat. §§ 5.05(1)(e) and 5.06(6), the Commission is provided with the inherent, general, and specific authority to consider the submissions of the parties to a complaint and to issue findings. In instances where no material facts appear to be in dispute, the Commission may summarily issue a decision and provide that decision to the affected parties. This letter serves as the Commission's final decision regarding the issues raised in the complaints of Eugene Wojciechowski and Dawn M. Martin.

The Commission's role in resolving verified complaints filed under Wis. Stat. § 5.06, which challenge the decisions or actions of local election officials, is to determine whether a local official acted contrary to applicable election laws or abused their discretion in administering applicable election laws.

Complaints "...shall 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). Probable cause is defined in Wis. Admin. Code § EL 20.02(4) 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."

Complaint Allegations; Response; Reply – Wojciechowski v. Grill

On August 9, 2022, Complainant Wojciechowski filed a sworn complaint with the Commission pursuant to Wis. Stat. § 5.06, alleging that Respondent violated Wis. Stat. § 6.87(4)(b)3. by requiring the production of proof of identification when a voter returns a completed absentee ballot in person to the municipal clerk's office.

Complainant Wojciechowski alleges that he requested and received by mail an absentee ballot to vote in the August 9, 2022, election, and that he provided a copy of his photo identification. On August 1, 2022, he alleges that he attempted to return his absentee ballot to the office of the municipal clerk at City Hall in West Allis. He alleges that a clerk's office staff member informed him that the Respondent required a voter to show photo identification in order to return their completed absentee ballot. Complainant Wojciechowski did not specify whether he showed his photo identification anyway, or whether the staff member refused to accept his ballot.

On August 18, 2022, the Respondent submitted her response. She began by alleging that her office had changed its policy since Complainant Wojciechowski filed his complaint. She alleges that the office policy is now to ask voters if they are willing to show identification, rather than require it. She alleges that if the voter declines to show identification, the clerk's office will still accept the ballot, but will mark that ballot as "No ID Verified," or similar language, to ensure that she can separate absentee ballots later, if necessary.

Despite these allegations describing the new policy, the Respondent does not deny that she required Complainant Wojciechowski to show his photo identification on August 1, 2022, in order to accept the in-person return of his completed absentee ballot. In addition to these allegations, the Respondent also provided various interpretations of relevant statutory provisions and welcomed the complaint as an opportunity to resolve these legal issues.

Complainant Wojciechowski filed a sworn reply to the Respondent's response. He sets forth several additional legal arguments, most of which attempt to refute Respondent's interpretation of the law.

Both Complainant Wojciechowski's and the Respondent's legal arguments will be fully addressed in the Commission's discussion and legal analysis.

Complaint Allegations – Martin v. Grill

On April 14, 2023, Complainant Martin filed a sworn complaint with the Commission pursuant to Wis. Stat. § 5.06, alleging that Respondent violated Wis. Stat. § 6.87(4)(b)3. by requiring the production of proof of identification at the point of in-person absentee ballot return.

Complainant Martin alleges that in the spring of 2020, she became a permanent absentee voter by virtue of her age, physical illness, or infirmity. She alleges that after submitting her application but before the April 7, 2020, election, she appeared in person to the office of the Respondent to provide her photo identification.

Complainant Martin alleges that she received by mail an absentee ballot for the February 21, 2023, primary election. Prior to that election, she alleges that she attempted to return her absentee ballot to the Respondent's office. She alleges that one of Respondent's staff workers informed her that the Respondent and the city attorney required a voter to show photo identification to return a completed absentee ballot. Complainant Martin alleges that the staff member told her that she would not accept her ballot unless Complainant Martin showed her photo identification. Complainant Martin alleges that she informed the staff member that she believed this requirement to be unlawful, but that she showed her photo identification and her ballot was accepted.

Complainant Martin alleges that she received by mail an absentee ballot for the April 4, 2023, primary election. She alleges that on March 20, 2023, she attempted to return her completed absentee ballot to the Respondent's office in City Hall. She alleges an employee at the service counter in Respondent's office asked if Complainant Martin would provide photo identification. She alleges that she told the employee she was not required to provide photo identification to turn in her ballot. She alleges that the employee accepted her ballot.

Complainant Martin also alleges that she asked if the employee would do anything to the ballot if she did not provide photo identification. She alleges she was told that the employee would put a checkmark on the envelope. She alleges that when she objected, the employee told her this was the staff's normal procedure. She alleges that she showed her photo identification to avoid having her ballot unlawfully marked.

On May 2, 2023, the Respondent submitted her response. She does not refute Complainant Martin's allegations, but does provide her legal analysis of why she believes her actions were lawful. The Respondent also provided a flowchart which allegedly depicts her office's policy for accepting absentee ballots from disabled voters. Finally, the Respondent asked the Commission to determine if there is a duty, pursuant to *Teigen*, to verify the identity of voters as they deliver their completed absentee ballots, and whether election results could be jeopardized if a clerk's office fails to confirm that voters have delivered their own absentee ballots.

Complainant Martin filed a sworn reply to Respondent's response. She does not appear to provide additional allegations or evidence, but does set forth a number of additional legal arguments, most of which attempt to refute Respondent's interpretation of the law.

Both Complainant Martin’s and the Respondent’s legal arguments will be fully addressed in the Commission’s discussion and legal analysis.

Discussion

Claims of Violations of § 6.87(4)(b)3.

As an initial matter, the Respondent concedes that there is no explicit statutory language that requires electors to provide proof of identification upon returning an absentee ballot in person to a voter’s municipal clerk. Instead, she argues that the way the relevant statutes have been interpreted by binding precedent imposes an implicit duty with which she must comply.

While voting is a right for all qualified electors in Wisconsin, it is subject to regulation, particularly with respect to absentee voting. Wis. Stat. § 6.84(1). Absentee voting is a “privilege exercised wholly outside the traditional safeguards of the polling place,” and “must be carefully regulated to prevent the potential for fraud or abuse” Wis. Stat. § 6.84(1). One of the ways in which absentee voting is regulated is by requiring absentee voters to submit or show proof of photo identification so that the municipal clerk can confirm their identity as an elector.

Subject to several enumerated exceptions, when an elector requests an absentee ballot, § 6.86(1)(ac) requires the elector to “transmit a copy of his or her proof of identification in the manner provided in s. 6.87(1).” Although this particular sentence does not specifically mention when an elector must present his or her proof of identification, the parties do not appear to dispute that § 6.86(1)(ac) requires certain electors to provide proof of photo identification when requesting an absentee ballot from the municipal clerk.

However, there are enumerated, statutory exceptions to the general requirement of § 6.86(1)(ac) that voters must provide proof of photo identification when requesting absentee ballots. One exception is for absentee voters who have previously provided their photo identification as part of an absentee ballot request, and who have not changed their name or address since they last provided their identification. Wis. Stat. § 6.87(4)(b)3. Another exception is for absentee voters who are indefinitely confined—in lieu of identification, they may provide a statement signed by their witness verifying their name and address are correct. Wis. Stat. § 6.87(4)(b)2.

The Complainants argue that once an absentee elector has provided their photo identification and received an absentee ballot previously, election officials may not require him or her to provide that photo identification again, at any point, unless the elector has changed his or her name or address. Wis. Stat. § 6.87(4)(b)3. The Respondent argues that § 6.87(4)(b)3. is only relevant when electors request absentee ballots, and accordingly, it does not prohibit her from requesting proof of photo identification when an elector is *returning* a completed absentee ballot.

The relevant statutory provisions that govern absentee voting are organized to provide step-by-step instructions for the entire process, from requesting the ballot to returning it. Section 6.86 is titled “Methods for Obtaining an Absentee Ballot.” Section 6.87 is titled “Absentee Voting Procedure.” These two sections are organized along a temporal divide of when the elector submits his or her request for an absentee ballot. Put another way, § 6.86 governs the procedures for how an elector may request an absentee ballot, and § 6.87 outlines the steps the municipal clerk should take after receiving a request for an absentee ballot, as well as how the voter should complete and return the absentee ballot to the municipal clerk.

The very first step of § 6.87 provides the procedures by which a municipal clerk issues an absentee ballot after it has been properly requested by the voter pursuant to § 6.86. Section 6.87(1) specifies that unless an enumerated exception applies, the elector should have enclosed a copy of proof of photo identification with their absentee ballot request. The municipal clerk is then instructed to verify that the name on the proof of photo identification conforms to the application before issuing the ballot. Wis. Stat. § 6.87(1). If the voter was properly exempt from providing their proof of photo identification with their ballot request, § 6.87(4)(b)3. confirms that the elector “is not required to provide proof of identification.”

The Commission interprets § 6.87(4)(b)3. to mean that if a voter has already provided their proof of photo identification with their absentee ballot request, or if they are exempt from doing so, they are not required to provide proof of identification when they return their completed absentee ballot in person to the municipal clerk.

When the Legislature intended to impose a proof of photo identification requirement on electors, it did so with specificity. Electors must provide proof of identification when registering to vote. Wis. Stat. §§ 6.15(2)(bm), (3). Electors must also provide proof of identification when voting in person at the polls on election day. Wis. Stat. § 6.79(2)(a). Electors must provide proof of identification when voting via in-person absentee voting, and certain electors must provide proof of identification when requesting an absentee ballot by mail. Wis. Stat. § 6.86(1)(ac). Accordingly, had the Legislature intended to require proof of photo identification when a voter returns a completed absentee ballot in person to the municipal clerk, the legislature would have included that requirement clearly within § 6.87.

Despite the lack of explicit statutory authority, the Respondent argues that binding Wisconsin Supreme Court precedent imposes an affirmative duty upon her to verify the identity of voters who are returning completed absentee ballots in person. In July 2022, before any of the elections central to these complaints, the Court held that an absentee ballot “must be returned by mail or the voter must personally deliver it to the municipal clerk at the clerk’s office or a designated alternate site.” *Teigen v. Wis. Elections Comm’n*, 2022 WI 64, P4, 403 Wis. 2d 607, 976 N.W.2d 519.¹ Specifically, the Court held that Wisconsin law does not permit anyone other than the voter to return their completed absentee ballot. *Id.* at P73.

Importantly, *Teigen* does *not* hold that a voter must present photo identification to return a completed absentee ballot. The photo identification requirement is the Respondent’s interpretation of her obligations under *Teigen* as an election official, and it is that legal interpretation that sits at the center of both complaints. The Respondent determined that asking a voter to present their photo identification was the “least intrusive” method of confirming that the voter him or herself was the individual returning the completed absentee ballot.

The Commission finds that the Respondent’s interpretation of *Teigen* is contrary to law. *Teigen* concluded that “an absentee ballot delivered in person under Wis. Stat. § 6.87(4)(b)1. must be delivered personally by the voter.” *Teigen v. Wis. Elections Comm’n*, 2022 WI 64, P83. It does not say that the voter must produce a copy of their photo identification. Accordingly, *Teigen* does not place a direct obligation upon the Respondent to confirm via photo identification that the elector returning the completed absentee ballot is not an impermissible agent or third party.

¹ *Teigen* interpreted Wis. Stat. 6.87(4)(b)1., which states, in relevant part, “[t]he envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.”

Furthermore, the Respondent's interpretation of *Teigen* is contrary to law to the extent that it prevents voters with disabilities from lawfully relying upon third parties to return their ballots. A month after *Teigen*, the District Court for the Western District of Wisconsin held that the federal Voting Rights Act preempted Wisconsin state law with respect to the ability of voters with disabilities to rely upon third parties to request, complete, and return their voted absentee ballots. *Carey v. Wis. Elections Comm'n*, 2022 U.S. Dist. LEXIS 156973, P4 (W.D. Wisconsin 2022). Under *Carey*, the Commission is enjoined from enforcing the portion of § 6.87(4)(b)1. that prohibits the plaintiffs from receiving assistance in returning their absentee ballots. *Id.* at P29–P30. The Respondent's policy of requiring a voter to produce identification when returning an absentee ballot is contrary to the federal protections guaranteed by *Carey*.

Furthermore, the Respondent's policy could also unlawfully prevent hospitalized voters from relying on the assistance of an agent to return their completed absentee ballot. Wis. Stat. § 6.86(1)(a)4. Any registered elector who is hospitalized may apply for and obtain an official ballot by agent. Wis. Stat. § 6.86(3)(a)1. That agent is also permitted to return the hospitalized voter's ballot to the municipal clerk or to the voter's polling place on election day. Wis. Stat. § 6.86(3)(c).

As in all cases, any person who commits voter fraud or violates any statutory voting requirement may be subject to legal remedies in a criminal or civil proceeding. Wis. Stat. § 5.05(2m)(c)2.a.; § 12.13. Accordingly, a voter who intentionally attempts to return a voted ballot they are not permitted to return may face legal consequences.

Claims of Violations of § 6.02(1)

The Complainants have also argued that the Respondent's procedures impose additional voter qualification requirements on electors in violation of § 6.02(1). The Complaints appear to argue that the Respondent does not consider them to be qualified electors if they do not provide proof of photo identification when returning their completed absentee ballots in person. The Respondent argues that a voter who does not show proof of photo identification when returning their absentee ballot is still an eligible voter. Accordingly, the parties appear to agree that the Complainants are still eligible electors under § 6.02(1), even if they choose not to present proof of photo identification in order to return their completed absentee ballot.

However, the Commission believes that the Complainants have also articulated claims that the Respondent imposed additional voter regulations not authorized by law beyond their specific § 6.02(1) voter qualification claim. Accordingly, the Commission will also address whether the Respondent exceeded her statutorily delegated authority as a municipal clerk in imposing this photo identification requirement on absentee voters.

Wisconsin law allocates election administration authority between the Commission and the state's 1,850 municipal clerks and 72 county clerks, who are each "a partner in the process of carrying out open, fair and transparent elections." *State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, P13, 396 Wis. 2d 391, 957 N.W.2d 208 (quoting Commission guidance). The Commission issues clerk communications, training materials, and other resources for local clerks. In return, local clerks "are tasked with implementing any changes in policy or law in their community, including administering absentee ballot voting." *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 959 (W.D. Wis. 2020).

County and municipal clerks have specific statutory authority pursuant to §§ 7.10(1) and 7.15(1) to supervise elections and registration in their jurisdictions. They are tasked with equipping their polling places, purchasing election equipment, preparing ballots, training election officials, reporting suspected election fraud, reviewing nomination papers, and facilitating election administration on election day, among other duties. Wis. Stat. §§ 7.10(1) and 7.15(1). If a clerk's decision (or failure to act) with respect to conduct of elections is contrary to law, or the clerk has abused his or her discretion, any elector of that clerk's jurisdiction may bring a complaint against the clerk to the Commission, which is what the Complainants have done. Wis. Stat. § 5.06.

The Wisconsin Supreme Court has consistently held that only the Legislature may regulate the right to vote in Wisconsin. *State ex rel. Cothren v. Lean*, 9 Wis. 279, 283–84 (1859); *see also League of Women Voters of Wis. Educ. Network v. Walker*, 2014 WI 97, ¶¶19–21, 357 Wis.2d 360, 851 N.W.2d 302. The Legislature, in turn, has delegated the administration of Chapters 5 through 10 and 12 of the state statutes to the Commission. Wis. Stat. § 5.05(1).

Accordingly, the statutory authority to interpret Wisconsin election law rests with the Commission, not individual clerks. County and municipal clerks “are not to interpret Wisconsin’s election laws and make declarations based on those interpretations.” *Jefferson v. Dane Cty.*, 2020 WI 90, P24, 394 Wis. 2d 602, 951 N.W.2d 556. Duties of county and municipal clerks are enumerated in §§ 7.10 and 7.15, and “nowhere in these duties did the legislature include disseminating information based on the clerk’s interpretation of absentee voting laws.” *Id.* Instead, the Commission is responsible for guidance in the statewide administration and enforcement of Wisconsin’s election laws, not county and municipal clerks. *Id.*

Accordingly, the Commission concludes that the Respondent exceeded the statutory authority delegated to her pursuant to § 7.15 by imposing additional regulations on voting not provided by law. Section 7.15(1) confirms that municipal clerks have “charge and supervision of elections and registration” in their jurisdiction, and that they are to perform their enumerated duties “and any others which may be necessary to properly conduct elections or registration.” However, imposing additional regulations on voting not provided by law does not constitute properly conducting elections, and therefore cannot be a lawful exercise of § 7.15(1) responsibility.

Claims of Violations of § 6.88

Finally, Complainant Martin argues that the Respondent’s policy of placing a mark upon the returned, voted absentee ballot to indicate that the elector declined to show her proof of photo identification when returning the ballot violates the procedures outlined in § 6.88. That section describes the procedures the municipal clerk is to take upon the receipt of a completed absentee ballot. Complainant Martin argues that this policy imposes additional voting procedures that are not permitted by statute.

The Respondent concedes that § 6.88 does not specifically authorize her to mark absentee ballots in this manner, but also argues that her authority to properly conduct elections authorizes her to carry out this policy because the law is unclear with respect to her obligations to verify that the voter herself is returning her own completed absentee ballot. Respondent claims that her policy of marking “No ID Verified,” or similar, on the absentee certificate envelope is to ensure that she can later separate out those absentee ballots collected without proof of photo identification, if necessary.

A municipal clerk is not limited in marking only what is required by § 6.88. In fact, other statutes compel municipal clerks to make specific notations on absentee certificate envelopes in certain circumstances. For example, if a municipal clerk receives an absentee ballot from an elector who presents a citation or notice in lieu of a driver's license under § 6.87(4)(b)4., statute specifically directs her to "enter a notation on the certificate envelope 'Ballot under s. 6.965 stats.'" Wis. Stat. § 6.965. This then directs the election inspectors to make a similar notation on the back of voter's ballot on election day. Wis. Stat. § 6.965. Several other statutes provide for specific notations that election inspectors shall make to the backs of certain ballots at the polls on election day when processing ballots. Wis. Stat. §§ 6.95, 6.96, 6.965, 6.97.

Nothing in the state statutes requires municipal clerks to affix any mark or notation upon an absentee certificate envelope if a voter declines to provide proof of photo identification when returning an absentee ballot. In light of the Commission's decision regarding the practice of asking for photo identification upon the return of an in-person absentee ballot return to the municipal clerk, the Commission finds that this particular notation is not supported by a statutory process or requirement, and is therefore an abuse of discretion regarding the administration of an election.

Commission's Findings

Complainants seek various forms of relief from the Commission, including the issuance of an order requiring West Allis officials to stop requiring additional production of POI, issuance of an order requiring West Allis to update any policies or procedures to the contrary, and any action that has the effect of restraining Respondent from acting contrary to the law.

Pursuant to the analysis above, the Commission hereby issues this order restraining the Respondent from taking any action inconsistent with the analysis of the law in this decision. Wis. Stat. § 5.06(6). The Respondent is not permitted to require or ask voters to produce proof of voter identification upon the in-person return of completed absentee ballots. The Respondent is also not permitted to place any mark or notation on the absentee certificate ballot indicating that the voter did not produce proof of photo identification upon the in-person return of completed absentee ballots. Finally, to the extent necessary, the Respondent is instructed to rescind any memoranda, guidance, or policies that contradict these findings, and may not develop any future guidance or policy that contradicts these findings.

The Commission understands that this decision may not provide an answer to what specific actions, if any, municipal clerks should take to be fully compliant with the *Teigen* decision. This decision solely decides that requiring an individual to present proof of photo identification upon the in-person return of a voted absentee ballot is contrary to law. The Commission may at some future time decide to issue further guidance on municipal clerk duties under *Teigen*, but that is beyond the scope of this § 5.06 complaint.


Right to Appeal – Circuit Court

This letter constitutes the Commission's resolution of these complaints. Wis. Stat. § 5.06(2). Pursuant to Wis. Stat. § 5.06(8), any aggrieved party may appeal this decision to circuit court no later than 30 days after the issuance of this decision.

If any of the parties should have questions about this letter or the Commission's decision, please feel free to contact me.

Sincerely,

WISCONSIN ELECTIONS COMMISSION

A handwritten signature in black ink that reads "Megan H.M. Wolfe". The signature is written in a cursive style with a large, prominent initial "M".

Meagan Wolfe
Administrator

cc: Commission Members