



Wisconsin Elections Commission

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Sent via email to: klbinv@tds.net; tara.mcmenamin@cityofracine.org; Scott.Letteney@cityofracine.org; Ian.Pomplin@cityofracine.org

Re: Kenneth Brown v. Tara McMenamin et al. (EL 23–50)

Dear Mr. Brown, Clerk McMenamin, Attorney Pomplin, and Attorney Letteney:

This letter is in response to the verified complaint submitted by Kenneth Brown to the Wisconsin Elections Commission (“Commission”), which was filed in reply to actions taken by Clerk McMenamin of the City of Racine (“Respondent”) concerning alleged violations of Wis. Stat. § 7.41 (1) and (2). The complaint concerns the distance from which election observers are permitted to observe election activities.

The Commission has reviewed the complaint, response, and reply. The Commission provides the following analysis and decision. In short, the Commission finds that the Complainant did not show probable cause to believe that a violation of law or abuse of discretion occurred.

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 issue raised in this complaint.

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.”

Wisconsin Elections Commissioners

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

Administrator
Meagan Wolfe

Complaint Allegations and Response

On September 29, 2023, the Complainant filed a sworn complaint with the Commission under Wis. Stat. § 5.06 alleging that the Respondents violated Wis. Stats. §§ 7.41 (1) and (2) by placing or approving the placement of the boundary for election observers more than 3 feet away from the voting activities.

The Complainant alleges that the boundaries for the election observers' area at Central Count in the City of Racine for the 2020 General Election and the Primary and General Elections in 2022 were not compliant with Wis. Stat. § 7.41 (2). He alleges that the boundaries prevented poll observers from readily viewing election certificates resulting in few absentee certificates being observed. The complainant alleges that when the issue was explained to Respondent McMenamain, she stated that "the boundaries would not be changed because she interprets the law to mean the observers' boundaries can be anywhere within a 3 to 8 foot distance."

The response argued that the complainant failed to allege that the City Clerk violated any election statute and that the complaint is untimely and contains factually impossible allegations. The response stated that the observation areas were clearly marked and consistently complied with statutory obligations. The Respondent stated that "these areas are located no closer than three feet and no further than eight feet from the polling tables," that "the observation areas are often located in the center of the room to allow observers to view all tables where public aspects of voting occur," and that "that the boundaries of the observation area are set such that elections staff may perform their duties without being impeded by observers."

The response also argues that the focus of observation is "primarily *auditory*, not visual," and notes that statutes require absentee ballot canvassers to read information from absentee certificate envelopes out loud for observers to hear. The response alleges that observers could request to more closely inspect a specific envelope by notifying an election inspector. The response argues that the complaint was filed too long after the elections at issue to be considered timely by the Commission. Finally, the response argues that Racine did not use board of absentee ballot canvassers in 2020, and that the dates provided in the complaint do not correspond to the elections activities that are alleged to have occurred.

Discussion

Under Wis. Stat. § 7.41(1), any member of the public can observe the voting process. Wis. Stat. § 7.41(1) states:

Any member of the public may be present at any polling place, in the office of any municipal clerk whose office is located in a public building on any day that absentee ballots may be cast in that office, or at an alternate site under s. 6.855 on any day that absentee ballots may be cast at that site for the purpose of observation of an election and the absentee voting process, except a candidate whose name appears on the ballot at the polling place or on an absentee ballot to be cast at the clerk's office or alternate site at that election. The chief inspector or municipal clerk may reasonably limit the number of persons representing the same organization who are permitted to observe under this subsection at the same time. Each person permitted to observe under this subsection shall print his or her name in and sign and date a log maintained by the chief inspector or municipal clerk for that polling place, office, or alternate site.

Wis. Stat. § 7.41(2) states:

The chief inspector or municipal clerk may restrict the location of any individual exercising the right under sub. (1) to certain areas within a polling place, the clerk's office, or alternate site under s. 6.855. The chief inspector or municipal clerk shall clearly designate observation areas for election observers under sub. (1). 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. The observation areas shall be so positioned to permit any election observer to readily observe all public aspects of the voting process.

Further, Wis. Stat. § 7.52(1)(a) extends the same ability to observe to boards of absentee ballot canvassers. The municipal clerk is permitted to restrict the location of election observers within certain areas of an observable location so that they may observe the election process without interfering with the duties of election officials and voters.

According to the statute, the observation areas cannot be closer than 3 feet or further than 8 feet from the registration, check in, and absentee ballot processing tables. Respondent McMenamini asserts, and the Complainant does not refute, that the observation area was between 3 and 8 feet away from the observable activities. The Complainant appears to argue that § 7.41(2) requires Respondent McMenamini to instead always choose a distance of 3 feet. That interpretation is not consistent with the plain language of the statute, which unambiguously states that the observable area should be “not less than 3 feet from nor more than 8 feet from” the observable areas. If the boundaries were placed closer than 3 feet to the election tables, or further than 8 feet away, that would be in direct violation of Wis. Stat. § 7.41(2). The plain language of § 7.41(2) demonstrates clear legislative intent that 3 to 8 feet is a distance range that is adaptable based on the needs of each polling place. The Commission does not find that the Respondents violated Wis. Stat. § 7.41 by establishing observation areas between 3 and 8 feet from the observable areas.

The Commission does not agree with the Respondents that the complaint was untimely. Were a clerk to establish an observation area further than 8 feet from an observable area, the Commission would be within its powers under Wis. Stat. § 5.06(6) to order a clerk to conform his or her conduct to the law. Observation areas are required during each election. For this allegation, the Commission does not find that the complaint would prejudice the rights of the respondents.

Finally, the Commission has not attempted to untangle the dates alleged in the complaint and contested in the response or whether the activities alleged occurred at a polling place or a board of absentee ballot canvassers location. The Commission found that the allegations rested on an incorrect interpretation of the statute, and thus that the complaint should be dismissed no matter what dates or locations were intended to be alleged by the complainant.

Commission Decision

Based on the above review and analysis, the Commission finds that the Complainant has not shown probable cause to believe that a violation of law or abuse of discretion occurred in relation to Wis. Stats. §§ 7.41(1) and (2). The Commission orders the Respondent to continue placing the boundaries within the 3 to 8 feet range consistent with Wis. Stat. § 7.41(2).

Right to Appeal – Circuit Court

This letter constitutes the Commission’s resolution of this complaint. 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 have questions about this letter or the Commission’s decision, please feel free to contact the Commission at 608-266-8005 or elections@wi.gov.

Sincerely,

WISCONSIN ELECTIONS COMMISSION