

WISCONSIN ELECTIONS COMMISSION

BRIAN PETERS,

Complainant,

v.

Case No. EL 23-47

JENNIFER GOERGEN,
CITY CLERK FOR THE CITY OF
GREENFIELD, WISCONSIN,

Respondent.

COMPLAINANT'S SWORN REPLY

Pursuant to Wis. Stat. § 5.06, Complainant Brian Peters alleges under oath as follows:

INTRODUCTION

Adult citizens in Wisconsin have a constitutional right to vote. Wis. Const. art. III. Voters choose to exercise that right through absentee voting for reasons of convenience or disability. For all voters, absentee voting offers a safe and secure way to exercise the franchise.¹ Nonetheless, the Legislature has treated certain provisions of absentee voting differently. Wis. Stat. § 6.84(2). But treating a statute as “mandatory” does not change the plain meaning of the law or permit the establishment of new barriers to voting. Nor can it reverse the Legislature’s policy decisions. Respondent City of Greenfield Clerk Jennifer Goergen’s choice to prohibit

¹ See WEC, WEC Takes Steps to Ensure Voting by Absentee Remains Secure, August 4, 2022, available at <https://elections.wi.gov/news/wec-takes-steps-ensure-voting-absentee-remains-secure-0>.

voters, and individuals like Brian Peters who assist voters with disabilities, from returning their absentee ballot to the polling place on election day does just that. Because Clerk Goergen’s decision (1) is contrary to the plain meaning of Wis. Stat. § 6.87(6); (2) is not required by the Supreme Court’s decision in *Teigen*; (3) creates unnecessary conflicts with federal law; and (4) is contrary to existing WEC guidance, the Commission should issue an appropriate order requiring Clerk Goergen to permit ballot returns at the polling location on election day.

ARGUMENT

I. Clerk Goergen’s prohibition on returning absentee ballots to polling places violates Wis. Stat. § 6.87(6).

Clerk Goergen’s policy of prohibiting voters (or their assistants) from returning absentee ballots to polling places on election day violates the plain language of Wis. Stat. § 6.87(6). The Commission must enforce Wis. Stat. § 6.87(6) as required by its plain language, the context of the statute, and its history.

a. The Clerk’s interpretation of the statute is contrary to its plain language.

“[W]e have repeatedly held that statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (cleaned up); *see also May v. Tri-Cnty. Trails Comm’n*, 220 Wis. 2d 729, 737, 583 N.W.2d 878 (Ct. App. 1998) (“[W]e are not free to rewrite the statute.”). Except in municipalities using a central count procedure, absentee ballots are processed and counted at the polling place for the voter’s ward or election district.

See Wis. Stat. § 6.88(2), (3)(a). Clerk Goergen does not dispute, nor can she, that Wis. Stat. § 6.87(6) does not specify that only the municipal clerk or their staff may return the ballot to the polling place. Indeed, the statute contains no limitation on who may return ballots to polling places. It reads in full:

The ballot shall be returned so it is delivered to the polling place no later than 8 p.m. on election day. Except in municipalities where absentee ballots are canvassed under s. 7.52, if the municipal clerk receives an absentee ballot on election day, the clerk shall secure the ballot and cause the ballot to be delivered to the polling place serving the elector's residence before 8 p.m. Any ballot not mailed or delivered as provided in this subsection may not be counted.

Wis. Stat. § 6.87(6). Plainly, a voter (or their assistant) who returns their ballot to the polling place on or before 8 p.m. on election day should be counted. The second sentence of the statute makes clear that a clerk or their staff *may* receive absentee ballots; however, it does not say that *only* clerks can fulfill this role.

Similarly, the language of Wis. Stat. § 6.87(4)(b)1 does not support the Clerk's position. This portion of the statute establishes the requirements placed on an absentee voter. The relevant language--which was at the center of *Teigen*--reads: "The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1. Again, an absentee voter (or their assistant) who returns the absentee ballot to the polling place fulfills this requirement. By delivering the ballot to the polling place, staffed by employees of the municipal clerk, the voter is returning it to the municipal clerk (and in the location where the ballot will be processed and counted).

b. The context surrounding Wis. Stat. § 6.87(6) supports the Complainant's interpretation.

The context and purpose of Wis. Stat. § 6.87(6) support Mr. Peters's position. Ultimately, it is the meaning of the statute which controls. *Kalal*, 2004 WI 58, ¶44. And context can be helpful in assessing meaning. *Id.*, ¶¶45, 49. "Context is important to meaning . . . Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes." *Id.*, ¶46. The context of chapter 6 is informative in three ways.

First, chapter 6 and surrounding statutes make clear that where the Legislature sought to specifically require that it be the municipal clerk who is to perform certain election functions, they knew how to do so. *See* Wis. Stat. §§ 6.15(4)(a) ("Clerks holding new resident ballots shall deliver them to the election inspectors in the proper ward or election district where the new residents reside ..."), 6.18 ("The municipal clerk shall verify that the name on the proof of identification conforms to the name on the application"), 6.88(1–2) ("the clerk shall enclose [an absentee ballot], unopened, in a carrier envelope which shall be securely sealed and endorsed with the name and official title of the clerk"), 7.15(1) ("the clerk shall perform the following duties ..."). Generally, "[i]t is presumed that the legislature is cognizant of what language to include or omit when it enacts laws." *In re Incorporation of Portion of Town of Sheboygan*, 2001 WI App 279, ¶9, 248 Wis. 2d 904, 637 N.W.2d 770. Here, the Legislature chose not to specify that only the clerk may return the ballot to the

polling place.² Clerk Goergen’s interpretation, however, would require inserting more language into the statute than the Legislature wrote: “The ballot shall be returned so it is delivered by the clerk to the polling place no later than 8 p.m. on election day.” Her reading violates basic principles of statutory interpretation. *United Am., LLC v. Wis. Dep’t of Transp.*, 2020 WI App 24, ¶16, 392 Wis. 2d 335, 944 N.W.2d 38, *aff’d*, 2021 WI 44, 397 Wis. 2d 42, 959 N.W.2d 317 (“We may not rewrite statutes; we must simply interpret them as they are written.”).

Second, other statutes in chapter 6 establish that it is not only the clerk who may return absentee ballots to polling places on election day. Wis. Stat. § 6.86(3)(a), which deals with hospitalized voters, clarifies that ballots may be returned directly to polling places by someone other than the municipal clerk. The statute explicitly states that the elector’s agent will return a completed ballot directly to the polling place if they return the ballot on Election Day. Wis. Stat. § 6.86(3)(c) (“if the ballot is returned on the day of the election, the agent shall make personal delivery to the polling place serving the hospitalized voter’s residence before the closing hours”).

Third, Wisconsin law establishes that, outside of municipalities which have specifically opted to use a central count proceeding, the polling place is the focus of election-day activity, including absentee ballot processing. Wis. Stat. § 6.87(6), requires that voters, their assistants, or the clerk get the ballot to the polling place before polls close. Wis. Stat. § 6.87(6); *see also* Wis. Stat. § 6.88(1–2). The polling place is also where election officials open carrier envelopes, review certifications, confirm

² Indeed, as described in Section I.c., *infra*, the Legislature specifically removed this requirement.

that the voter is a qualified elector in the ward and has not previously voted in the election, and verify that the ballot has been endorsed by the clerk, and tabulate the votes, among other procedures. Wis. Stat. § 6.88(3), WEC, *Election Day Manual* (Sep. 2020), at *91–102. The Legislature made the polling place the primary hub of absentee ballot activity, and having determined that it is a peculiarly secure location for election activity, it would be nonsensical to insist that voters take absentee ballots *away* from the polling place on election day, only to have it return shortly after.

Because of its central role in election activity, including activity around absentee ballots, the Legislature chose to make it possible for voters to return absentee ballots to polling places for good reason. Polling places are secure. *Teigen*, 2022 WI 64, ¶28 (lead/non-majority opinion) (noting the “statutorily-recognized security surrounding a polling place.”). They are open for observation. Wis. Stat. § 7.41. They are, as discussed below, required to be accessible to individuals with disabilities. Wis. Stat. § 5.25(4)(a). Polling places are usually located in a voter’s neighborhood or immediate community. And, as Clerk Goergen points out, returning ballots directly to the polling place obviates the need for many additional steps designed to ensure the secure delivery of the ballots, thereby reducing the work municipal clerks and their staff must perform on election day. (Resp., ¶17.e.) In short, returning an absentee ballot to a polling place affords the voter an opportunity to conveniently and securely get their ballot to the location where it will ultimately be counted.

c. *The legislative history of Wis. Stat. § 6.87(6) requires a finding that ballots may be returned to polling places on election day.*

Furthermore, the legislative history of Wis. Stat. § 6.87(6) is clear: voters or their assistants may return ballots to polling places on election day. Prior to March of 2016, Wis. Stat. § 6.87(6) read as follows: “Except as provided in s. 7.515 (3), the ballot shall be returned *so it is received by the municipal clerk* no later than 8 p.m. on election day.” Wis. Stat. § 6.87(6) (2013-14) (emphasis added). As part of its overhaul of Wisconsin’s elections administration in 2015, the Legislature passed, and the Governor signed, 2015 Wisconsin Act 261. Act 261, among its other provisions, removed the requirement that absentee ballots be received by the clerk, striking this language from the statute. 2015 Wis. Act. 261, §77. With this, the Legislature chose to remove the language that Clerk Goergen has implicitly re-inserted into the statute. This choice demonstrates that the Legislature did not intend to require a ballot be routed through the municipal clerk to the polling place so long as it is timely returned by someone to the polling place before 8 p.m. on election day. There is no reason to upset the Legislature’s decision to remove this requirement.

II. *The Teigen decision does not prohibit voters from returning ballots to their polling place.*

Clerk Goergen acknowledges that nothing in *Teigen v. Wisconsin Elections Commission* addresses the core question in this case—whether a voter can return their absentee ballot (either in person or, where appropriate, through ballot return assistance) to the polling place on election day and thereby comply with Wis. Stat.

§ 6.87(6). (Resp., ¶17.b.)³ *Teigen*'s holding was limited to the following: (1) two pieces of WEC guidance were invalid because voters must return their ballot in person or by mail; and (2) the use of absentee drop boxes was not authorized by Wisconsin law. *Teigen v. Wis. Elec. Comm'n*, 2022 WI 64, ¶4, 403 Wis. 2d 207, 976 N.W.2d 519. This was necessarily the case as the *Teigen* plaintiffs only challenged WEC guidance pertaining to those issues. *Id.*, ¶1. The lead/majority opinion explicitly declined to address various related issues, including whether a voter may have assistance in mailing their absentee ballot, whether the documents constituted unpromulgated rules, and how the decision might affect voters with disabilities who rely on ballot return assistance. *Id.*, ¶¶4–5, 84–86.

The city's, and its attorney's, insistence that language from *Teigen* nonetheless prohibits polling place ballot return is misplaced. The *Teigen* court did not consider the issue of whether voters (or their assistants) could return ballots to polling places. And because polling place ballot return was not at issue in *Teigen*, even if the Court *had* commented on it, such comments would have been dicta. *Wis. Justice Initiative v. Wis. Elec. Comm'n*, 2023 WI 38, 407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring) (“by necessity, judicial opinions touch on matters beyond the issues in a case ... The law calls this ‘dicta.’”). The Supreme Court did not have the opportunity

³ Clerk Goergen indicates that the August 5, 2022 memo on which she relied did not “directly apply[]” *Teigen*. (Resp., ¶17.b.) The memo itself, however, makes clear it relies on and seeks to interpret the *Teigen* ruling: “Based upon the language of the *Teigen* decision and a strict reading of the statute, an elector may not generally return their absentee ballot to their polling location on election day unless they are a hospitalized voter.” (Resp., Ex. B, p. 1.)

to consider these other issues around Wis. Stat. § 6.87(6), including many of the issues raised in the complaint and response.

Nothing limited the *Teigen* plaintiffs, or the courts, from addressing the various WEC guidance documents indicating that polling place ballot return is permitted. *See* Section IV, *infra*; Wis. Stat. § 227.40(1). Absent such a challenge, and therefore absent any binding ruling from a court that, “[t]he ballot shall be returned so it is delivered to the polling place no later than 8 p.m. on election day” necessarily means that the clerk, and not the voter or their agent, there is no reason to alter the actual requirements of the statute. WEC should enforce the plain language of that statute, which would permit a voter to return their ballot to the polling place on election day.

III. Clerk Goergen’s improper reading of Wis. Stat. § 6.87(6) would create preemption issues and should therefore be rejected.

Any reading of Wis. Stat. § 6.87(6) that prohibits polling place ballot return and, therefore, requires ballots to be dropped off only at the office at the municipal clerk at some time before 8 p.m. conflicts with federal law. This is another reason to avoid this cramped reading. Statutory interpretation in Wisconsin begins with “a presumption against preemption.” *Aurora Med. Grp. v. Dep’t of Workforce Dev., Equal Rts. Div.*, 2000 WI 70, ¶13, 236 Wis. 2d 1, 612 N.W.2d 646; *see also Time Warner Cable v. Doyle*, 66 F.3d 867, 884 (7th Cir. 1995) (discussing, in the context of *Pullman* abstention, the importance of interpreting state statutes in a way that avoids unnecessary constitutional issues). The question is not whether federal law requires

polling place ballot return, or whether it must be granted as an accommodation.⁴ Rather, a proper reading of Wis. Stat. § 6.87(6)—one that avoids any preemption issues—permits any voter to return their ballot to the polling place on election day.

The most obvious conflict, and the one demonstrated by the Peters’ experience in August 2022, is that such policies effectively shorten election day for voters who rely on absentee ballot return assistance. Wisconsin law is consistent: voting ends at 8:00 p.m. for both in-person and absentee voting.⁵ Wis. Stat. §§ 6.78(1m) (“The polls at every election shall be open from 7 a.m. until 8 p.m.”), 6.86(3)(c) (hospitalized elector’s absentee ballot to be returned no later than 8:00 p.m. on election day), 6.87(6). Currently, for voters in the City of Greenfield that rely on ballot return assistance, this is no longer the case. Instead, their election day ends at 7:00 p.m. or whenever the clerk decides to stop accepting ballots. This means that certain voters with disabilities, like Mrs. Peters and the plaintiffs in *Carey*, will have effectively lost time to vote, whereas voters without such disabilities may vote in person at a polling place until 8:00 p.m. This interpretation conflicts with the ADA’s guarantee that voters with disabilities have equal access to all aspects of voting. 42 U.S.C. §§ 12131–12134; 28 C.F.R. §§ 35.101–35.190.

⁴ There is no dispute that Clerk Goergen and her staff worked successfully with the Peters to ensure that Mr. Peters would be able to return Mrs. Peters’s absentee ballot. This is not an accommodation, however. It is Mrs. Peters’s right under the Voting Rights Act.

⁵ The major exception to this rule—voters in line at 8 p.m. are permitted to vote—only emphasizes the central point of the Complaint. *See* Wis. Stat. §§ 6.78(4), While Wisconsin does not permit late-arriving absentee ballots, it does permit voters to exercise their right to vote until the very last minute on election day.

Artificially limiting polling place ballot return creates other barriers for voters with disabilities on election day. In addition to their security, polling places have certain accessibility requirements that may support voters with disabilities (or their assistants) in voting, including the ability to drop off a ballot through curbside voting. Wis. Stat. § 5.25(4)(a) (“Each polling place shall be accessible to all individuals with disabilities”). Absentee voters in this position may want to enjoy the convenience and flexibility of a neighborhood polling place just as other voters who are able to vote in-person on election day. Depriving voters who rely on ballot return assistance of these aspects of voting would run afoul of the ADA, and such an interpretation must be avoided.

IV. WEC has consistently advised voters that they may return their absentee ballot to the polling place on election day.

WEC guidance has consistently adopted the plain-text reading of Wis. Stat. § 6.87(6) and advised voters and clerks that absentee ballots may be returned directly to the polling place on election day. Clerk Goergen provides no reason why WEC would now deviate from that opinion. As described in Section I, *supra*, the Legislature amended Wis. Stat. § 6.87(6) in 2015, making clear that a voter could return their ballot to the polling place. WEC’s guidance has reflected this decision, and the plain meaning of the law, ever since.

In WEC’s September 11, 2020 video, “How to Turn in Completed Absentee Ballot,” the Commission advised that one way to return an absentee ballot was to “follow the directions that came with your ballot to find out whether you should take

it to your polling place or an absentee counting location on election day.”⁶ WEC was even more direct two years later when it advised that: “Most voters may return absentee ballots to their municipal clerk's office or their normal polling place.”⁷ “Most” did not exclude voters in municipalities in which clerks did not permit polling place ballot return but, instead, excluded municipalities using central count. WEC provided similar guidance on August 5, 2022:

On Election Day, most voters may deliver their absentee ballots directly to their normal polling place, but it must arrive before polls close at 8 p.m. Check with your municipal clerk regarding this option. Voters in cities, villages or towns that count absentee ballots at a central location must return ballots to their clerk’s office or the central count location.⁸

WEC issued its 2022 guidance *after* the Supreme Court issued its *Teigen* decision and incorporated the Court’s instructions just a few weeks before its September 7, 2022, post-*Carey* memorandum. Clerk Goergen nonetheless argues that the September 7 memorandum accords with her position, because it references “assistance with mailing or delivering [a voter’s] ballot to the municipal clerk.” (Resp., ¶7.c.) Clerk Goergen does not, however, address the other WEC guidance. A voter (or their assistant) who returns an absentee ballot to a polling place does return the ballot to the municipal clerk, who supervises the election officials staffing the polling places. Wis. Stat. § 7.15(e). Clerk Goergen’s description of her process makes this clear. In jurisdictions not using central count, *all* absentee ballots are returned to election

⁶ WEC, *How to Turn In Completed Absentee Ballot? Wisconsin Elections*, September 11, 2020, available at <https://www.youtube.com/watch?v=MgMfkFbR6UM> (at 00:25).

⁷ WEC, *Polls in Wisconsin Close at 8 p.m.*, August 15, 2022, available at <http://web.archive.org/web/20220815041202/https://elections.wi.gov/node/212>

⁸ WEC, *Last-Minute Reminders Before August 9 Partisan Primary*, August 5, 2022, available at <https://elections.wi.gov/news/last-minute-reminders-august-9-partisan-primary>.

officials at the polling place. (Resp., ¶7.d.) Clerk Goergen's interpretation unnecessarily requires the ballot to first stop with another member of the clerk's staff. This is not required by WEC's guidance nor by the text of the statute.

CONCLUSION

For the reasons stated herein and in the Sworn Complaint, the Complainant, Brian Peters, respectfully requests that the Wisconsin Elections Commission do the following pursuant to Wis. Stat. § 5.06:

- A. Issue an order requiring Clerk Goergen and any other election official in the City of Greenfield to accept lawful absentee ballots at the absentee voter's appropriate polling place on Election Day until the statutory deadline of 8 P.M. under Wis. Stat. §6.87(6), whether the ballot is brought by an absentee voter themselves, by a designated ballot return assistant, or by any other lawful means.
- B. Issue an order requiring Clerk Goergen to update and correct any policies or procedures for the City of Greenfield to reflect that an absentee voter or their designated ballot return assistant may deliver their ballots to the appropriate polling place on Election Day before 8 P.M. under Wis. Stat. §6.87(6).
- C. Take any other action that has the effect of restraining Clerk Goergen from acting contrary to law as described in this Complaint.

Dated this 3rd day of October, 2023.

By: 

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Attorney for Brian Peters

I, Brian Peters, being first duly sworn, state that I personally read the above reply, and that the information contained within is true based on my personal knowledge and, as to those stated on information and belief, I believe then to be true.



Brian Peters

Subscribed and sworn to before me
this 3 day of October, 2023



Notary Public, State of Wisconsin

My commission expires: 11/24/2026

