



Wisconsin Elections Commission

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November 19, 2022

Peter Bernegger
1806 Brynwood Trace
New London, WI 54961

Meagan Wolfe & Robert Kehoe
201 West Washington Avenue
Madison, WI 53703

Sent via email: pmbmap123@gmail.com; meagan.wolfe@wisconsin.gov; robert.kehoe@wisconsin.gov

Re: Complaint Filed with Wisconsin Elections Commission
Peter Bernegger v. Meagan Wolfe et al. (EL 22-85)

Dear Mr. Bernegger,

This communication is to inform you that the verified complaint you submitted against Administrator Wolfe and Deputy Administrator Kehoe is being returned without consideration or action by the Wisconsin Elections Commission (“Commission”).

It is the position of the Commission that a complaint against the Commission, a specific Commissioner, and/or a member of the agency’s staff mandates recusal of the Commission from any consideration of the complaint. This position reflects the ethical requirements necessary to avoid the conflicts associated with an adjudicative body deciding a matter brought against itself, similar to the provisions of law and ethics precluding a judge from presiding over a case filed against herself, or someone with personal or professional ties to her.

This is consistent with the ruling by the Wisconsin Supreme Court in *Teigen et al. v. Wisconsin Elections Commission et al.*, 403 Wis.2d 607, 633, which stated that “...it would be nonsensical to have WEC adjudicate a claim against itself...” The Court’s three justice majority went on to analyze the Wis. Stat. § 5.06 complaint process specifically at issue in that case in more detail (*Id.* at 641-643):

First, Wis. Stat. § 5.06(1) applies only to complaints against “election official[s].” “Election officials” are specific “individuals” (not “person[s]”) who are “charged with any duties relating to the conduct of an election.” Wis. Stat. § 5.02(4e). The Wisconsin voters brought this lawsuit against WEC, not any individual, alleging WEC's memos do not comport with the law. “In chs. 5 to 10 and 12 [of the Wisconsin statutes],” the word “commission” is used to refer to WEC. Wis. Stat. § 5.025. *Section 5.06 does not require voters to complain to the “commission” when they believe WEC has violated the law—only when they believe an “election official” has. Intuitively, this distinction makes sense: “No man is allowed to be a judge in his own cause; because his interest will certainly bias his judgment, and, not improbably, corrupt his integrity.”* The Federalist No. 10, at 107 (James Madison) (John C. Hamilton ed., 1882); see also The Code of Justinian 3.5.1 (Valens, et al. 378) (“[N]o one shall act as judge in his own case, or

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Administrator
Meagan Wolfe

interpret the law for himself, as it would be very unjust to give anyone the right to render a decision in an affair which is his own.”). DRW's reliance on cases involving claims against election officials—not WEC—is misplaced. See *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 487 N.W.2d 639 (Ct. App. 1992). (Emphasis added.)

Second, the remedies WEC can impose under Wis. Stat. § 5.06(6) would be senseless if they were applied by WEC against itself. Is WEC supposed to “order” itself to “conform” its (not “his or her”) “conduct to the law”? § 5.06(1). Can WEC order itself “restrain[ed]” or “require[]” itself to “correct any action or decision” it has taken that is “inconsistent with the law”? *Id.* The plain language of § 5.06(6) does not contemplate giving an election official a chance to reconsider the official's position; it contemplates WEC issuing binding directives to such officials. (Emphasis added.)

The *Teigen* Court drew a distinction between the Commission and “Election officials,” in the context of Wis. Stat. Chapter 5 administrative complaints. The Commission and its staff are “Election officials” under Wis. Stat. § 5.02(4e), to the extent they are “charged with duties relating to the conduct of an election.” However, the Commission cannot be “Election officials” when a Wis. Stat. § 5.06 complaint is filed with the Commission, asking it to decide and enforce a complaint against itself. This same principle applies to the Commission’s staff, as they have a statutory responsibility to carry out the directives of their governing body.

The decision in *Teigen* highlights that an unresolvable conflict exists as to legal standing, due process, and ethics when Wis. Stat. Chapter 5 administrative complaints are filed against the Commission and its staff. The Commission has determined that similar conflicts exist in the context of Wis. Stats. §§ 5.05 and 5.061 complaints. Thus, any complaint under Wis. Stat. Chapter 5 naming the Commission and/or its staff must be returned without consideration, dismissal, or prejudice.

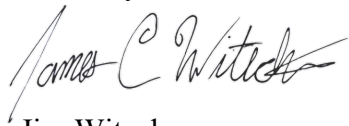
As for next steps available to you, Wisconsin Statutes provide the following:

Wisconsin Statute § 5.05(2m)(c)11: If the commission finds that there is probable cause to believe that a violation under subd. 2. has occurred or is occurring, the commission may, in lieu of civil prosecution of any matter by the commission, *refer the matter to the district attorney for the county in which the alleged violator resides*, or if the alleged violator is a nonresident, to the district attorney for the county where the matter arises, or if par. (i) applies, to the attorney general or a special prosecutor. For purposes of this subdivision, a person other than a natural person resides within a county if the person's principal place of operation is located within that county.

Wisconsin Statute § 5.06(8): Any election official or complainant who is aggrieved by an order issued under sub. (6) *may appeal the decision of the commission to circuit court for the county where the official conducts business or the complainant resides* no later than 30 days after issuance of the order. Pendency of an appeal does not stay the effect of an order unless the court so orders. (*Emphasis Added*)

By this letter, the Commission formally gives you leave to submit this complaint to the respective district attorney for the jurisdiction in which the respondent resides for alleged criminal violations under Wis. Stat. § 5.05. Additionally, you may appeal this decision directly to the circuit court in accordance with Wis. Stat. § 5.06(8) for alleged administrative violations, or for violations of Wis. Stat. § 5.061 (“HAVA Complaints”). You may have other legal rights, including but not limited to, Wis. Stat. Chapter 227 appeal/hearing rights, the filing of a civil complaint in the courts, or similar remedies. Please feel free to contact me if you have additional questions regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Witecha". The signature is fluid and cursive, with a large initial "J" and "W".

Jim Witecha
Staff Attorney

WISCONSIN ELECTIONS COMMISSION

cc: Commission Members