



Wisconsin Elections Commission

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July 5, 2023

Jody Audetat
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Adrian Amelse
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Sent via email to: countyclerk@vernoncounty.org; nikki@abtswaynelaw.com;
jody.audetat@vernoncounty.org; aamelse@gmail.com

Re: In the Matter of: Adrian Amelse v. Vernon County Clerk, et al. (Case No.: EL 22-41)

Dear Mr. Amelse, Clerk Audetat, and Respondents:

This letter is in response to the verified complaint submitted by Adrian Amelse (“Complainant”) to the Wisconsin Elections Commission (“Commission”), which was filed in reply to actions taken by Clerk Audetat of Vernon County and the members of the Vernon County Canvass Board (“Respondents”) concerning alleged violations of Wis. Stats. §§ 5.01 and 6.97, relating to the tie break and ballot draw down following the Spring of 2022 Election.

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.”

The Commission has reviewed the complaint, the Respondents’ response, and Complainant’s 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 with relation to Respondents’ procedural actions.

Complaint Allegations and Response

On May 12, 2022, Complainant filed a sworn complaint with the Commission pursuant to Wis. Stat. § 5.06, alleging that Respondents violated Wis. Stats. §§ 5.01(3), (4), and 6.97(4) after performing a tie break and ballot drawdown during canvass processes for the Spring of 2022 Election.

Complainant asserts that the ballots of four Richland County residents were inadvertently counted in the race for the Vernon County Board of Supervisors, District 14. He further alleges that the county’s canvass board identified and removed the improper ballots, which resulted in

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Administrator
Meagan Wolfe

the removal of three ballots in favor of Ole Yttri and one ballot in favor of the Complainant, thus creating a 139 vote to 139 vote tie. The complaint further details that the Vernon County Board of Canvass then added back the four illegal/incorrect ballots, thus resulting in the Complainant trailing by two votes again, and those votes were used again for drawing lots in the tiebreaker. Complainant believes this put him at a significant statistical disadvantage, since he was no longer tied in a tiebreaker and needed three out of four votes to tie again, and four out of four votes to win. Finally, the Complainant notes that neither he or his wife ever agreed to use those improper ballots in the drawdown or to break a tie.

In the joint response to the complaint, the Respondents note what they believe to be multiple facts in dispute. Four illegal ballots were never removed and then added back into the vote tally. The Village of Viola notified the county that there was an error to remedy involving the need to remove four ballots from the Village's ballot bag. It had 35 ballots, when there should have been 31. Respondents never officially removed the four votes/ballots during canvassing which would have resulted in a tie. Thus, there was never a tie to be broken. The Respondent board never weighed, as a factor in deciding how to proceed with a tie-break, the possible election outcome. Rather, the board was faced with the question of how to reconcile the 35 ballots in the Viola bag with the 31 voters reflected in the pollbook.

Respondents stipulated to the fact that neither Complainant nor his wife wished Respondents to use "illegal ballots." Respondents did, however, dispute the implication that neither Complainant nor his wife indicated consent to a drawdown. Complainant's wife expressed her consent on his behalf while he was out of the county and unavailable. After careful explanation to Ms. Amelse, she affirmed that her husband would prefer to remove four ballots randomly to arrive at the necessary 31 ballots to comport with the pollbook's 31 entries.

Therefore, there was never a reversion from a 139 vote tie to a 142-140 tally for the purpose of drawing lots. Complainant incorrectly premises his concern on a misunderstanding that the Respondents removed four specific ballots, resulting in a tie, and then put them back as a way to resolve that tie. There were 35 ballots in the bag when there should have been 31, and the reconciliation process required a random four ballot drawdown.

The local canvass board did report the error, and they felt they could identify the improper ballots, but they never remedied the error before certifying and sending to the Respondent board of canvass. The Respondent board understood it was tasked with remedying the discrepancy of a ballot bag with 35 ballots when there were to be 31 ballots. It understood that the four ballots could be arguably identified, based on the municipal board's information. However, after conversations with Commission staff and independent research, it was ultimately determined that there was concern with the municipal board pulling the ballots from the machine, and having recorded all voters' numbers on their respective ballots such that each ballot could be—and perhaps was in this case—linked to each respective pollbook entry. This practice of course completely nullifies any anonymity for the Village of Viola's voters.

In Wisconsin, the right to a secret ballot is preserved in the State Constitution. It followed that to rely on the knowledge obtained through the Village's practice, which would have been necessarily done if the Respondent board had opted to remove the four ballots the Village indicated to be the four ineligible, was to potentially infringe further upon the constitutionally protected right to secret ballots.

After consulting again with Commission staff, the Respondents believed that a drawdown would be the best way to remedy the discrepancy. The Respondent board also believed that exercising either option may be permissible. Before making its decision as to which of the two options to exercise, the board attempted to consult with the two impacted candidates and factored into their decision the input it obtained. The Respondents believed both candidates supported these decisions. Four ballots were withdrawn; two by Ms. Polhamus (for Mr. Amelse) and two by Mr. Yttri himself, after Ms. Amelse could not be reached to conduct the drawdown on behalf of her husband. Overall, the race yielded 140 votes for Mr. Yttri and 138 for Mr. Amelse. At no time was there a tie. The official minutes were submitted with the response to support this recitation of the facts.

The Respondents further assert that they followed Wis. Stat. § 5.01(3) when they ensured there were 31 ballots counted as reflected in the pollbook using a random drawdown, that Wis. Stat. § 5.01(4) is irrelevant because there was never a tie to be broken, and that Wis. Stat. § 6.97(4) does not apply in the instant matter and only requires a board of canvassers to count a ballot when timely notified that an individual voter is indeed qualified after they initially failed to provide necessary proof of identification and residency.

In his final reply, the Complainant rebuts several of the arguments submitted by the Respondents. Complainant believes the certified minutes do indeed reflect that a ballot removal occurred, resulting in a 139-139 tie, that his proxies, Lori Polhamus and Donna Amelse advocated for a deck of cards to be used in the breaking of that tie and otherwise represented his interests, that Ms. Polhamus opposed a drawdown to prevent the disenfranchisement of lawful voters, and that the sworn statements provided by Ms. Polhamus and Ms. Amelse contradict some of the elements of the certified minutes.

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 complaint of Adrian Amelse.

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.

Commission Findings

Alleged Tie Break, Reversal, and Improper Drawing of Lots.

The Commission begins by noting that the certified minutes do indicate that conversations were held between Commission staff and the Respondents, and that the procedures for a tie break were discussed. This is likely the reason for Complainant's incorrect assertion that there was a tie and a tie break occurred. However, no evidence was provided in the record to support a claim that this portion of the minutes represented anything more than theoretical discussions about what to do after an initial investigation and count determined that the improperly forwarded ballots would result in a tie.

The sworn statements of Ms. Polhamus and Ms. Amelse indicate that the four improper ballots had been segregated and preparations were underway for a tie break, but the record also supports the contention that this was never the final determination of the canvassers, and it is clear from the record that the Respondent board officially opted for a drawdown process before certifying the county's canvass and sending the information to state officials for final certification of the results. It is of no consequence whether Ms. Polhamus and Ms. Amelse consented to any of this because it is a board of canvasser decision to make by law, regardless of whether they sought input from a candidate or their proxy on their desired path forward. The record also shows that Ms. Polhamus participated in the drawdown, thus indicating some form of consent and an opportunity to ensure public/candidate trust was maintained.

It is impossible for the Commission to find probable cause that a violation of law or abuse of discretion occurred with relation to Wis. Stat. § 5.01(4) in the context alleged by the Complainant when no such tie breaking process ever occurred, and the drawdown process chose by the Respondents did not subsequently result in a tie, thus no tie break occurred. As to whether the lack of a tie break itself supports a finding of probable cause that a violation of law or abuse of discretion occurred, that question will be more thoroughly addressed below.

Legality of Drawdowns and Alleged Wis. Stat. Chapter 5 Violations.

The certified minutes, supported by the verified response, further indicate that the Commission's then Deputy Agency Administrator, Richard Rydecki, was contacted a second time, after Respondents' initial discussion and calculation of the potential tie that would exist if the improper ballots were removed. Respondents and Commission staff then discussed the concern over voter anonymity and the possibility of improperly violating ballot confidentiality rights/requirements. The record also shows that Deputy Administrator Rydecki correctly noted the decision on a tie break or drawdown was within the lawful authority and discretion vested in the Respondent board, and a choice would rest with them. The minutes indicate that Candidate Yttri and Ms. Amelse preferred a drawdown process, which seems to conflict with the final reply. It is of no consequence, though, because the board was sole body authorized to make this decision, subject to potential challenge—a right the Complainant exercised here.

There is often no perfect solution to bring an election error into legal compliance when that error has already created a non-compliant situation. Removing the specifically identifiable ballots that belonged in the totals of another county and retallying the vote totals would appear, on its face, to have been the most equitable solution with regard to the effort to accurately reflect voter intent. That said, it could have subjected the Respondents, and Village of Viola officials, to additional noncompliance claims, sworn Commission complaints, and even lawsuits relating to an equally concerning outcome—the reidentification of voters and a violation of the legal right to a confidential ballot.

There is also no guarantee that any of the incorrectly included ballots could be properly identified and removed without an error that would invalidate the ballot of a proper resident-voter of Vernon County, or perhaps even more than one lawful voter. Put more succinctly, the Vernon County Board of Canvassers faced two imperfect solutions through no fault of its own. The underlying responsibility rests solely with municipal parties not named in this complaint. Either of the Respondents' choices were within the discretionary authority of a canvass board (*See* Wis. Stats. §§ 7.54 and 7.60). The Respondents opted to perform a drawdown, and it is not

the Commission's place to opine on whether one option or the other would have been better. Rather, the Commission must determine whether the discretionary authority exercised on that day, and the choice made, complies with the statutes that Wis. Stat. § 5.05(1) authorizes the Commission to administer.

The Commission finds that probable cause was not established by Complainant to believe that a violation of Wis. Stats. §§ 5.01(3), (4), and 6.97(4), or an abuse of discretion, occurred when the Respondents performed a ballot drawdown, tallied the final vote totals, and certified the canvass. Wisconsin Statute § 7.08(3) states that the Commission shall prepare and publish separate from the election laws an election manual written so as to be easily understood by the general public explaining the duties of the election officials, together with notes and references to the statutes as the commission considers advisable. The Commission met this obligation through the creation of the Election Day Manual for Wisconsin Elections Officials ("Manual").

Page 108 of the Manual contemplates the legality of a drawdown and describes the processes that should be followed before drawing down the surplus of ballots. The Commission has also published the "Suggested Procedures for County Boards of Canvassers." Page 4 of that document indicates that a drawdown can be used where the number of ballots does not align with the number of voters. It also indicates that drawdown is an option of "last resort," should not be used until all other options for explaining the discrepancy have been exhausted, and it then directs the reader to the Manual for an explanation of procedures. Based on the record before the Commission, the Respondents appear to have followed all of these guidelines.

While it is true that the Respondents had an "explanation for the discrepancy," they were also placed in a situation of "last resort," where the removal of the ballots or the performance of a drawdown were equally viable options within the confines of the law, with each having positive and negative implications. The choice made was not an abuse of discretion or violation of Wis. Stats. §§ 5.01(3) or (4). It does leave one important question, though.

Wisconsin Statutes contemplate the drawdown processes in the local board of canvass setting (*See* Wis. Stat. § 7.51(2)(e)) and in the context of the canvassing of absentee ballots by a "municipal board of absentee ballot canvassers designated under s. 7.53(2m)" (*See* Wis. Stat. § 7.52(4)(e)). These statutes represent the underlying authority for the use of a drawdown process in general, as well as the procedural clarifications placed in the Manual by the Commission. That said, there is no direct contemplation of the county board of canvass in any of these references.

The Commission must address whether it would have been required for the Respondent to follow the process outlined in Wis. Stat. § 7.60(3) which states: "If, on examination, any of the returns received are so informal or defective that the board cannot intelligently canvass them, they shall dispatch a messenger to deliver the returns back to the municipal board of canvassers with written specifications of the informalities or defects and command them to immediately complete the returns or remedy the defects in the manner required and deliver them to the messenger."

The Commission finds that the Respondents should have delivered the returns back to the Village of Viola with an order to fix the defect and would recommend doing so if similar issues occur in the future. That said, time is often of the essence in the canvassing and certification of an election. The Respondents' sworn response also provides the following for the administrative record:

On April 11, 2022, the Vernon County Board of Canvass (the “Board”) convened. The Board received from District 14 (the Village of Viola) a ballot bag that contained a total of 35 ballots. There were only 31 voters reflected on the pollbook. The Village of Viola’s Municipal Board of Canvass (“Municipal Board”) reported to the Board that the ballots were retrieved from the electronic machine and as a result of the Municipal Board’s practice of recording voter numbers on the ballots, the Municipal Board believed it could identify the four ballots that were not reflected in the pollbook. The Municipal Board did not remedy the error but did alert the Board to the matter. (*See* Page 3)

There is a clearly established record of the Village of Viola’s canvassers choosing to identify and request assistance from the Respondents in the correction of this error. There is also a question of whether the returns received were “so informal or defective that the [county] board [could not] intelligently canvass them.” While those considerations may support the decisions made by the Respondents, the Commission recommends full compliance with Wis. Stat. § 7.60(3) should this type issue occur again, including a return of election materials to the local canvassers. The Commission need not render a formal decision on whether a Wis. Stat. § 7.60(3) violation or abuse of discretion occurred, because the Complainant did not raise such an allegation. This analysis was, however, important to an understanding of the processes that occurred, and should be considered an informal recommendation.

Commission Decision

Based upon the above review and analysis, the Commission does not find probable cause to believe that a violation of law or abuse of discretion occurred pertaining to Respondents’ use of a ballot drawdown process.

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 should have questions about this letter or the Commission’s decision, please feel free to contact me.

Sincerely,

WISCONSIN ELECTIONS COMMISSION



Meagan Wolfe
Administrator

cc: Commission Members