



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 1, 2022

Van Wanggaard
2310 Thor Avenue
Racine, WI 53405

Cory Mason
Mayor
730 Washington Ave.
Racine, WI 53403

Tara McMenamin (formerly Coolidge)
City Clerk
730 Washington Ave.
Racine, WI 53403

Sent via email to: clerks@cityofracine.org; mayor@cityofracine.org;
scott.letteney@cityofracine.org;

Re: In the Matter of: Van Wanggaard v. Tara Coolidge et al. (Case No.: EL 22-30)

Dear Senator Wanggaard, Mayor Mason, and Ms. McMenamin:

This letter is in response to the verified complaint submitted by Van Wanggaard (“Complainant”) to the Wisconsin Elections Commission (“Commission”), which was filed in reply to actions taken by Clerk McMenamin of the City of Racine (“Respondent”) concerning the alleged use of the city’s website to provide false information and violate Wis. Stat. § 6.87. Mayor Cory Mason was also named as a respondent, but the Commission has consistently interpreted the definition of “Election Official” found in Wis. Stat. § 5.02(4e) as not applicable to city mayors, for the purposes of an administrative Wis. Stat. § 5.06 complaint, unless that mayor directly assumed “duties relating to the conduct of an election.” (See analysis below where the Commission holds that Mayor Mason assumed no such duties and is thus not incorporated as a respondent herein).

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 City of Racine’s 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 Respondent’s website postings, although there may have been a brief window of time where a violation of law did occur (*i.e.* the point at which the Wisconsin Supreme Court’s *Teigen* decision was published and Racine’s website had yet to be updated). Probable cause was not established at the time of filing, and the posting at issue was subsequently corrected once probable cause was established.

Commissioners

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

Administrator
Meagan Wolfe

Complaint Allegations and Response

On April 4, 2022, Senator Wanggaard filed a sworn complaint with the Commission pursuant to Wis. Stat. § 5.06 alleging that Clerk McMenammin violated Wis. Stat. § 6.87 in light of the Waukesha County Circuit Court's order in *Richard Teigen v. Wisconsin Elections Commission* (Case No. 21-CV-0958).

Complainant alleged that the Respondent maintains a website on behalf of the City of Racine, VoteRacine.org, and that an "FAQ" section of the website falsely indicated the following:

- a. "Can I deliver someone else's ballot?"
- b. (Answer) "Yes, a ballot can be returned by someone who is not the voter."

Complainant contends that this represented false information in violation of Wis. Stat. § 6.87(4)(b)1, under which there are only two ways to return an absentee ballot: 1) Through the mail; 2) Delivered in person to the municipal clerk.

On January 13, 2022, the *Teigen* court ruled that an elector must personally mail or deliver his or her own absentee ballot, except where the law explicitly authorizes an agent to act on an elector's behalf. The decision was stayed by the Wisconsin Court of Appeals on January 24, 2022. On February 11, 2022, the Wisconsin Supreme Court declined a motion to extend the stay of the circuit court ruling beyond February 15, 2022. Complainant further contends that the circuit court ruling was thus in effect for the April 5, 2022, election.

As such, the Respondent was, or should have been, aware of the ruling. Complainant further alleges that Racine officials were then in violation of the law when they continued to publish false information on the city's website and accepted ballots from individuals who were not the electors named on the ballot.

The Respondent, through the Racine City Attorney's Office, responded that the allegations were based on unsettled law, in a court decision not then applicable to the Respondent. Contrarily, Respondent's actions are consistent with a fair interpretation of Wisconsin Statutes, especially when considering federal law. Further, Complainant does not make any specific allegations about absentee ballots received, even accepting Complainant's reading of the relevant statute.

Respondent acknowledged that there was a court case, which was pending at the time of complaint filing, addressing the meaning of a sentence in Wis. Stat. § 6.87(4)(b)1.: " The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots."

Respondent argued several additional points in response to the complaint. First, Mayor Mason is not a proper respondent and does not meet the Wis. Stat. § 5.02(4e) definition of an "election official." Next, Respondent did not provide false information on its website. Racine, and its election officials, were not a party to the *Teigen* case, and the court did not issue an order to Racine at that time. Respondent then went on to provide lengthy analysis of the law at issue in the case, which need not be addressed here, as the Wisconsin Supreme Court issued its decision after the filings in the instant matter were submitted. Finally, the Respondent again noted that no evidence had been provided to support a contention that ballots were illegally accepted.

In the final reply, Complainant first noted that the verified response of Racine was submitted a day late, on April 26, 2022, not April 25, 2022, which was the response deadline provided by the Commission's legal counsel (Note: In an April 6, 2022, email, Respondent requested an April 26, 2022, response deadline, because Commission legal counsel had failed to account for the fact that Good Friday fell within the dates of calculation; *See* Wis. Stat. § 801.15(1)(a) which includes "legal holidays and a full day on Good Friday").

Complainant also argued that Mayor Mason meets the definition of an "election official" under Wis. Stat. § 5.02(4e), because he engaged in various activities related to the conduct of an election (e.g. signed an agreement with CTCL for election administration assistance, led an effort to obtain and utilize a mobile voting precinct).

Next, the Complainant submitted additional analysis supporting his contention that Respondent provided false information in contravention of the *Teigen* court's order. Complainant specifically contends that Respondent's analysis of Wis. Stat. § 6.87(4)(b)1. is irrelevant in light of the *Teigen* court activity, and the Wisconsin Supreme Court's order being applied statewide, while the Respondent relied on rescinded Commission guidance to maintain the status quo. Thus, to argue that Complainant provided no evidence of illegally accepted ballots, is a nothing more than a conclusory statement, and specific allegations were made, including statements of the Respondent to the media.

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 Senator Wanggaard.

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 violations of Wis. Stat. § 6.87(4)(b)1.

It is important to first establish a timeline of events for the record so that necessary clarity exists as to the complaint filings and associated legal activity:

- January 13, 2022: The *Teigen* decision is issued in the Waukesha County Circuit Court.
- January 20, 2022: The official order granting summary judgement for the plaintiffs is signed by Judge Michael Bohren.
- January 24, 2022: The decision was stayed pending appeal by the Wisconsin Court of Appeals.
- February 11, 2022: The Wisconsin Supreme Court declined a motion to extend the stay of the circuit court ruling beyond February 15, 2022.
- February 16, 2022: The Commission published a statement to clerks and withdrew the applicable guidance.

- April 4, 2022: Complainant files sworn complaint with the Commission.
- April 13, 2022: Oral arguments in *Teigen* are heard by the Wisconsin Supreme Court.
- April 26, 2022: Response submitted to the Commission by the Respondent.
- May 12, 2022: Complainant's final reply received by the Commission.
- July 8, 2022: The Wisconsin Supreme Court's opinion is filed.

The timeline above provides critical context in deciding this complaint. On April 26, 2022, the Respondent argued that Complainant's allegations were based on unsettled law, in a court decision not then applicable to the Respondent. Even though the Wisconsin Supreme Court allowed the stay of the Waukesha County Circuit Court's order to expire on February 15, 2022, the order may not have been applicable to non-party municipalities, outside of the jurisdiction of that circuit court.

The Commission proceeds at this juncture without deciding whether or not Judge Bohren's decision was then binding. Valid jurisdictional questions have been raised. They need not be addressed here, though, and the Commission assumes without a formal decision that the trial court's decision was non-binding based on those jurisdictional questions. The Commission may have also had an obligation under the order detailed below to apply the trial court's statutory interpretation to the instant matter, but that question is now moot. The Commission typically holds administrative complaints in abeyance when they raise similar questions to those pending before a court, particularly when an appeal is pending before the high court. Upon independent review shortly after the Wisconsin Supreme Court's *Teigen* opinion filing in July, Commission staff discovered that the applicable website posting had been timely removed and has remained unpublished since.

The circuit court's order specifically stated the following:

- For the reasons set forth by the Court on the record at the January 13, 2022 hearing, the Court hereby declares that WEC's interpretation of state statutes in the Memos is inconsistent with state law, to the extent they conflict with the following: (1) an elector must personally mail or deliver his or her own absentee ballot, except where the law explicitly authorizes an agent to act on an elector's behalf, (2) the only lawful methods for casting an absentee ballot pursuant to Wis. Stat. § 6.87(4)(b)1. are for the elector to place the envelope containing the ballot in the mail or for the elector to deliver the ballot in person to the municipal clerk, (3) the use of drop boxes, as described in the Memos, is not permitted under Wisconsin law unless the drop box is staffed by the clerk and located at the office of the clerk or a properly designated alternate site under Wis. Stat. § 6.855.
- The Court further declares that WEC's Memos are administrative rules under Chapter 227 of the Wisconsin statutes and are invalid not only for the reasons described above, but also because they should have been, but were not, promulgated as rules.
- Defendant Wisconsin Elections Commission is hereby permanently enjoined as follows:
 - The Wisconsin Elections Commission shall not issue any further interpretations, to municipal clerks or anyone else, that conflicts with Wis. Stat. §§ 6.87 and 6.855, as described above.
 - No later than January 27, 2022, the Wisconsin Elections Commission shall withdraw the Memos and issue a statement to clerks notifying them that WEC's interpretation of Wis. Stat. §§ 6.87 and 6.855 in the Memos has been declared invalid by this Court, as described above.

The *Teigen* plaintiff was granted precise injunctive and declaratory relief. Specifically, the Commission was ordered to cease issuing any interpretation of the relevant statutes contrary to

the court's decision and remove the memoranda at issue in the case. The Commission argued in *Teigen* that its memos and opinions had never been represented to any party as anything more than non-binding guidance, without a force of law. The circuit court disagreed and declared that they represented an unpromulgated administrative rule.

That said, those two positions provide important context to the decision in the instant matter. It means that the Commission never represented to the Respondent that she was obligated to follow the Commission's interpretation of law, and that the guidance was removed immediately after the circuit court determined that it represented an unpromulgated rule. Thus, the Respondent has always been free to seek the opinion of city attorneys on how to apply Wis. Stat. § 6.87(4)(b)1.

Similarly, the Commission's role in interpreting Wis. Stat. Chapters 5-10 and 12, absent an administrative rule, is to provide recommended guidance or interpretation for municipalities to consider. The Commission consistently recommends seeking guidance from local counsel before acting on any non-binding guidance or interpretation. When the circuit court ordered the withdrawal of the guidance at issue in *Teigen*, whether or not it was an unpromulgated rule, the Respondent was left with nothing more than the counsel of its city attorneys.

Many city attorneys were left in this same position after February 15, 2022, and before the July 8, 2022, decision of the Wisconsin Supreme Court. Municipal legal assessments varied, but some cities such as Racine determined that they were outside the jurisdiction of another county's circuit court and/or were not a party to the litigation, while others opted to exercise caution with regard to ballot return policies and/or explicitly adhere to the determination of the *Teigen* trial court. Some city attorneys implemented an assortment of compliance practices (e.g. scripts for clerks and election officials, requesting an attestation from voters that they are returning their own ballot, an assessment of lawful situations under which a ballot may be returned by a party other than the voter, etc.). It is unknown, based on the record here, whether Racine implemented any such practices.

There is also a valid question as to whether the Respondent's website posting was indeed fully false, or even partially false, given that the *Teigen* courts did not address or prohibit specific examples where there is an allowance of third-party ballot delivery (e.g. disabled voters requiring assistance), but that need not be addressed here. Again, the retroactive applicability of the *Teigen* order to Racine is moot.

The statutes and principles at issue in those municipal determinations are outside of the Commission's statutory purview. That said, to the extent they must be applied here, the Commission agrees that it was within the legal authority of the Respondent and her attorneys to make independent decisions, and their choice to do so does not inherently conflict with the law. Under most circumstances, a circuit court decision lacks precedential value, and accordingly has little application to parties outside of that litigation and/or some other form of jurisdiction of that court. Therefore, Respondent lawfully conferred with counsel to determine whether the circuit court's order should be implemented prior to a published, precedential opinion of an appeals court.

It is possible, at some point after July 8, 2022, the VoteRacine.org website still contained information contradicting the courts' determinations, or lacked sufficient specificity. That is of no consequence here, because at the time of complaint filing and throughout the applicable briefing, no probable cause existed to believe that the Respondent had violated relevant election

laws. For a time, the website continued to include information that possibly contradicted the trial court's determination in *Teigen*, but all briefing occurred prior to the issuance of the Wisconsin Supreme Court's opinion, and administrative complaints are typically held in abeyance pending resolution in the courts.

Further mitigating any remaining concern is the fact that the Commission confirmed in both September and November that the information at issue had been removed from VoteRacine.org, thus evidencing Respondent's compliance with the Wisconsin Supreme Court's affirmation of the circuit court's decision. As such, probable cause does not exist to believe that a violation of Wis. Stat. § 6.87(4)(b)1. occurred as a result of the VoteRacine.org posting and actions of Racine election officials. It is, however, recommended that election officials ensure compliance with the July 8, 2022, decision of the Wisconsin Supreme Court, if such compliance measures have not been fully implemented already. No post-July 8th allegations exist within the facts or filings of this complaint.

Ancillary Arguments of the Complainant

The Commission will also briefly address the other non-relevant issues raised in the complaint. Complainant correctly notes that Wis. Stat. § 5.02(4e) provides that "Election official" means an individual who is charged with *any* duties relating to the conduct of an election." (*emphasis added*). Complainant reads this statute with a focus on "any duties," but such a reading fails to consider several other important points. Wisconsin Statute § 5.02(4e) also contains elements pertaining to being "charged" with those duties, and the duties relating to the "conduct of an election."

Mayors have no statutory "charge" to carry out duties relating to the conduct of an election. Indeed, that would be wholly inappropriate, as Mayors are often ballot candidates or may have competing interests. The "charge" element does not automatically rule out a mayor or similar individual from meeting the definition of an "election official," though. The statutory definition must be read in conjunction with the "duties" and "conduct" elements.

The Commission concedes that there may be circumstances under which it would deviate from its traditional treatment of a mayor as a non-election official. For instance, a mayor who is not a ballot candidate in a specific election may fill in as an election inspector when there is a shortage of personnel, provided there are no other legal or ethical conflicts not being considered here. That hypothetical person would thus meet the definition of an "election official." They would have a statutory charge and would be performing duties relating to the conduct of an election.

The fact-set in this complaint does not indicate that Mayor Mason assumed the role of an election official. As such, he cannot be named as a party to a Wis. Stat. § 5.06 complaint. The examples cited by the Complainant as the basis for including Mayor Mason do not meet the elements discussed above. Signing an agreement with CTCL for election administration assistance, and advocating for the purchase/use of a mobile voting precinct were "charges" and "duties" falling under the mayor's Wis. Stat. § 62.09(8)(a) authority as Racine's chief executive officer, and to "take care that city ordinances and state laws are observed and enforced and that all *city officers and employees discharge their duties.* (*emphasis added*)

It is to be expected that a chief municipal executive will perform perfunctory duties related to, and politically advocate for, commodities and services that "city officers and employees will use in the

discharge of their duties,” duties which include the clerk’s charge to carry out any duties relating to the conduct of an election. While the mayor signed a contract for election services, advocated for a mobile voting precinct, and likely performed other executive functions adjacent to elections, the record is devoid of evidence which supports Mayor Mason being determined to meet the statutory qualifications of an election official.

Finally, the Complainant raised allegations that Respondent accepted ballots from individuals who were not the electors named on the ballot. There was factual debate in the filings as to whether the Complainant supported that allegation in its evidentiary submissions. This evidentiary question is of no consequence based on the analysis above. The record in the instant matter does not contain evidence of any subsequent violations that may have occurred after July 8, 2022. For that reason, the Commission finds that probable cause does not exist to believe a violation of law exists with regard to the alleged acceptance of ballots from parties other than the elector who voted the ballot.

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 Respondent’s alleged use of the city’s website to provide false information and violate Wis. Stat. § 6.87.

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

A handwritten signature in black ink that reads "Meagan R.M. Wolfe". The signature is written in a cursive style with a large, looped initial "M".

Meagan Wolfe
Administrator

cc: Commission Members