

WISCONSIN ELECTIONS COMMISSION

212 EAST WASHINGTON AVENUE, 3RD FLOOR
POST OFFICE BOX 7984
MADISON, WI 53707-7984
(608) 261-2028
ELECTIONS@WI.GOV
ELECTIONS.WI.GOV



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MEMORANDUM

DATE: For the January 10, 2017, Board Meeting

TO: Members, Wisconsin Elections Commission

FROM: Michael Haas
Administrator, Wisconsin Elections Commission

Prepared and Presented by:
Nathan W. Judnic
Legal Counsel

SUBJECT: Ballot Access – Candidate Dennis Krueger

This memorandum is in response to a written request of the Commission filed by Candidate Dennis Krueger, Candidate for Waupaca County Circuit Court Judge, Branch 1. Mr. Krueger's request was provided to Commission members via email on January 9, 2017. Mr. Krueger requested that the Commission staff reconsider and change its initial recommendation of denying ballot access after determining that 0 valid signatures were filed on his nomination papers, and further requests that the Commission grant him ballot access.

Discussion

Commission staff's initial recommendation of denying Mr. Krueger ballot access has not changed. All of Mr. Krueger's nomination papers failed to include the date of election in the header. In at least six instances since 2012, where a challenge had been filed against nomination papers of a candidate that failed to include the date of election, the previous state elections agency had struck all signatures contained on those pages. Given the statutory language which states that a candidate is to include the date of election in the header portion of the nomination papers, the explicit instructions to the candidate which state that a date of election is a required field and outline what date is supposed to be inserted into that section of the header, and other applicable statutes and administrative code provisions, Commission staff believes the recommendation to deny ballot status to Mr. Krueger is correct.

The Commission staff regularly reviews the header portion of nomination papers for state candidates before they are circulated to avoid the situation in which Mr. Krueger finds himself. Although voluntary, the Commission staff reviews many nomination papers and provides feedback and suggestions prior to circulation during every election cycle. Mr. Krueger did not utilize this service, and filed his nomination papers late in the day on the deadline, which left him with no options for recirculation of papers with an election date. "Each candidate for public office has the responsibility to assure that his or her nomination papers are prepared, circulated, signed, and filed in compliance with statutory and other legal requirements." Wis. Admn. Code § EL 2.05(1).

Mr. Krueger's Request for Ballot Access Approval

Mr. Krueger requested that the Commission staff review his nomination papers and determine how many signatures would have been counted initially as valid, had he properly included the date of election in the header. There is no dispute that Commission staff reviewed Mr. Krueger's nomination papers and determined that 211 signatures would have been counted if the error had not been made on the date of election. There is no dispute that no formal challenge to Mr. Krueger's nomination papers was received by the Commission by the January 6, 2017 deadline. Historically, formal challenges are rarely filed when the initial number of valid signatures is determined to be zero – which is what occurred in Mr. Krueger's case. A main component of a challenge complaint is providing clear and convincing evidence that signatures which have been accepted by the Commission staff as valid are in fact invalid for any number of potential reasons. Wis. Admn. Code § EL 2.07(4). In this instance, no signatures were initially deemed valid, decreasing the likelihood that a challenge complaint, against an individual with zero valid signatures, would be filed with the Commission.

More importantly, prior decisions of the former elections agencies have stated that the date of election the candidate is requesting to appear on the ballot must be contained in the header of the nomination paper at the time of circulation under Wis. Stat. § 8.10(2)(b). Nomination papers that fail to include the election date in the space indicated on the nomination paper header do not substantially comply with the requirements of Wis. Stat. § 8.10(2)(b). For the nomination papers to substantially comply with Wis. Stat. § 8.10(2)(b), a minimum amount of information related to the candidate and the election for which they are running must be contained in the header. The date of election has been consistently considered one of the bare minimum requirements.

Mr. Krueger argues that his nomination papers do in fact substantially comply with Wis. Stat. § 8.10(2)(b) even though the date of election box in the header is left blank. The Commission has previously deemed nomination papers substantially compliant with the requirement when a partial date or an incorrect date (election in the past, typo in the day, month or year) or even including the date of the primary date instead of the date of the election is present. That is simply not the case here.

Mr. Krueger also argues that the circulators of his nomination papers purposefully omitted the date of election to avoid misleading the electors that were signing his papers. Candidates file nomination papers to appear on the ballot for the election, not the primary – Wis. Stat. § 8.10(1)(intro.) (“Nominations for spring election”); Wis. Stat. § 8.10(1) (“Candidates for office to filled at the spring election shall be nomination by nomination papers....”); Wis. Stat. § 8.10(2)(a) (“Nomination papers for offices to be filled at the spring election may be circulated....”). Wis. Stat. § 8.10(2)(b) (“...be place on the ballot at the (spring or special) election to be held on....”). The sample nomination papers provided to candidates clearly indicate that candidates are to put the date of the election, not the primary on their nomination papers.

In addition to the clear statutory language that directs this instruction, the Commission would not require a candidate to recirculate nomination papers after the fact if a primary is required due to the number of candidates that have filed nomination papers. If no primary is required, the candidate appears on the spring election ballot. At the time of circulation, there is no way to know if a primary will be required for a particular race. The argument that leaving the date of election box blank to somehow avoid misleading voters, instead of using the election date (which all other candidates running for this office and other offices across the State did) is not convincing. Despite the statutory language, and explicit instructions to list the spring election date, even if Mr. Krueger had listed the date of the primary to avoid misleading voters (his argument), the Commission staff would not have struck signatures on those pages, despite Mr. Krueger's assertion.

Mr. Krueger attempts to analogize his situation with that of Candidate Edward Baumann. As discussed in the staff's ballot access memorandum to the Commission, Mr. Baumann was a candidate for a special election to fill a vacant Assembly District seat with the primary for that election occurring on the same date at the 2013 Spring Election. Mr. Baumann filed papers that did not contain a date of election in the header. Mr. Baumann was one of five candidates that appeared on the primary ballot. Staff initially approved 290 signatures. No formal challenges were filed against Mr. Baumann's papers by the other four candidates (or other individuals). At the meeting of the Board in which candidates were certified for the ballot for the special election, the Board certified Mr. Baumann for the ballot based on a recommendation of the staff. Staff determined that the missing election date in this instance did not affect the signer's ability to decide whether or not to nominate the candidate.

While the record is limited as to why Mr. Baumann was granted access despite a missing election date because no formal findings or orders were issued in this matter, staff believes a significant fact was that the publicity surrounding the 98th Assembly District special primary to fill a hotly contested seat minimized potential confusion that signers may have had when presented with Candidate Baumann's papers containing no date of election. Notably, the staff did not determine that Mr. Baumann's nomination papers had substantially complied with the statutory requirement, only that given the circumstances, the staff determined that voters had not been misled or confused by the missing election date on his papers, and therefore did not object to the Board granting Mr. Baumann ballot access.

Since this decision in 2013, the staff have not found a situation similar to Mr. Baumann's, and have consistently recommended striking signatures based on the precedent established in the following orders issues by the State Elections Board and the Government Accountability Board: In re Nomination Papers Filed by Brandon Jackson (EL 16-79) (struck 13 pages of signatures); In re Nomination Papers Filed by Tim Smaby (EL 16-03) (struck 3 pages of signatures); In re Nomination Papers Filed by Ann Garrity (EL 16-02) (struck 16 signatures on two pages); In re Nomination Papers Filed by DiStefano (EL 15-06) (struck 10 signatures); In re Nomination Papers Filed by Gulasky (EL 14-06) (struck 17 signatures).