

Memorandum

Date: January 23, 2018

To: Wisconsin Elections Commission members

From: Dean Knudson

I want to provide my fellow members with my thoughts and my proposal regarding the administrator position on the agenda for the meeting today.

Our top priority should be to insure continuity and stability with the agency so that the Commission can effectively administer and enforce Wisconsin election laws.

Wisconsin Statute 15.61 empowers the Commission members to:

- a) nominate an administrator to a four year term ending on July 1 of the odd numbered year
- b) appoint an interim administrator to serve until confirmation of administrator
- c) remove the administrator

The Senate yesterday voted to reject the nomination of Michael Haas as administrator. The Commission members clearly have the power to remove the administrator; however some members have held the position that only the Commission may remove the administrator. This position is unlikely to be upheld in court and I fear litigation would become a distraction leading to unnecessary disruption and uncertainty. I have provided members with a memo written by Deputy Director Jessica Karls-Ruplinger of Wisconsin Legislative Council stating "Although the statutes do not expressly address what happens if the Senate rejects confirmation of the administrators, it appears likely that a court would find that such action removes the administrators and results in vacancies in the administrator positions."

When a vacancy occurs in the administrator position, state law requires the Commission to appoint a new administrator, and submit the appointment for confirmation, within 45 days after the date of the vacancy. It is my belief that courts will be likely to deem the administrator position vacant as of today. The 45 day period would end on Friday, March 16<sup>th</sup>. **If the commission has not appointed a new administrator within 45 days, state law requires the legislature to name an interim administrator.**

I believe the administrator position is vacant today. I further believe that the mission of the Wisconsin Elections Commission will be seriously compromised by an effort to prove that the Commission could ignore the Senate vote and retain Michael Haas as Administrator. For example, in our annual Delegation Memo the Commission delegated authority to the Administrator to certify candidates, to implement determinations regarding sufficiency of nomination papers and qualifications of candidates, and to sign contracts. In each of these areas the Commission risks creating instability and uncertainty by attempting to retain Haas. No other staff is empowered to fulfill these functions. Candidates could challenge Commission decisions and actions taken by Haas during the period of litigation that would follow such action.

By attempting to retain Haas the Commission itself would immediately create the uncertainty and instability in our elections that Commission members and staff work so hard to avoid.

I propose a two-part process for consideration by the Commission. First, we should appoint a new interim administrator from within existing Commission staff. Second, we should conduct a nationwide search to recruit our new administrator. The interim administrator would serve on a temporary basis while the Commission evaluates candidates for the position and would be eligible to compete for the position. I propose the following motion for consideration at the meeting today.

Motion:

1. Appoint Deputy Administrator Meagan Wolfe to serve as Interim Administrator until the completion of a search process to be conducted over not more than 6 months. Wolfe shall immediately assume all the duties and authority of the Administrator and Chief Election Official pursuant to Wis. Stats 5.05 (3d) and (3g).
2. Direct the chairman to advertise the administrator position for 60 days, followed by a Commission meeting to narrow the field to three applicants. Schedule a Commission meeting to interview applicants not more than 90 days from today.
3. Direct the chairman to inform the Senate that Wolfe has been named Interim Administrator pending a nationwide search for the next Administrator. Her name will be submitted for confirmation as required by law, however the Commission's intention will be to replace her with the individual chosen during the search process. Ms. Wolfe will be eligible to compete for the administrator position along with other applicants.

Attachments:

Legislative Council Memo to Speaker Vos regarding Senate rejection of Administrator

2018 Delegation Memo regarding delegation of powers to the Administrator

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ADMINISTRATOR MICHAEL HAAS

## MEMORANDUM

**DATE:** For the January 9, 2018 Commission Meeting  
**TO:** Members, Wisconsin Elections Commission  
**FROM:** Michael Haas, Interim Administrator  
**SUBJECT:** Delegation of Authority to Administrator

At its October 14, 2016 meeting, the Elections Commission approved a Delegation of Authority document to clarify actions and decisions that the Administrator could implement without prior Commission action. The Delegation of Authority was intended to maintain and improve the agency's administrative efficiencies for routine decisions and transactions, and also required the Administrator to report actions to the Commission after the fact and, in some cases, to consult with the Chair prior to taking action. This memorandum recommends that the Commission continue to delegate the same authority regarding various agency responsibilities.

By statute, the Wisconsin Elections Commission has general authority over the state's election laws. In various provisions of the election laws, the Commission is given a series of specific powers in addition to its general authority. Pursuant to Wis. Stat. § 5.05(3g), the Administrator of the Commission serves as the State's chief election officer, and pursuant to Wis. Stat. § 5.05(3d), the Administrator shall perform such duties as the Commission assigns to him or her in the administration of the election laws. Both the State Elections Board and the Government Accountability Board delegated certain authority to their administrative heads in order to facilitate the agency's day-to-day management and to clarify the scope of staff's authority to act without prior specific approval of the oversight body. Given the nature of the Commission's oversight of the agency and its meeting schedule, the Delegation of Authority aims to permit the Administrator to effectively manage the daily responsibilities of the agency while maintaining the Commission's role in making policy determinations, setting agency priorities, and directing significant staff initiatives.

The Commission previously indicated that it wished to review the Delegation of Authority on an annual basis. The recommended Delegation of Authority below is identical to that approved by the Commission in October 2016, except for the last bullet point under Section 2, which was not previously included simply due to an oversight.

### **Recommendation**

Consistent with the Delegation of Authority previously adopted by the Wisconsin Elections Commission, I recommend the Commission delegate the authority described below to the

Administrator, pursuant to the Administrator's role as agency head and chief state election official. In exercising all delegated authority, the Administrator should be required to report, at the Commission meeting immediately following the delegated action, the specifics of the action taken, the basis for taking the action, and the outcome of that action.

1. The following authority should be delegated to the Administrator subject to the requirement that before it is exercised, the Administrator consult with the Commission Chair to determine whether Commission members should be polled or a special meeting conducted before action is taken:
  - To issue compliance review orders under the provisions of Wis. Stat. § 5.06;
  - To certify and sign election related documents including candidate certifications, certificates of election, and certifications of election results on behalf of the Commission;
  - To accept, review, and exercise discretion to approve applications for voting system modifications characterized as engineering change orders (ECOs) for systems previously approved for use in Wisconsin;
  - To implement the Commission's determinations regarding sufficiency of nomination papers or qualifications of candidates;
  - To communicate with litigation counsel representing the Commission in order to make timely necessary decisions regarding Commission litigation;
  - To make a finding pursuant to Executive Order #50, Sec. IV(8), that a proposed administrative rule does not have an economic impact.
  - To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), subject to the further provisions of this paragraph. The Administrator is required to request approval from the Commission for contracts involving a sum exceeding \$100,000, or for purchases from a statewide contract over \$100,000. The Administrator is required to request approval from the Commission prior to posting a Request for Proposal or Request for Bid. In addition, the Administrator may enter into a sole source contract only after obtaining approval from Commission Chair and providing five days' prior notice to the Commission regardless of the dollar amount.
2. The following authority should be delegated to the Administrator without the requirement for prior consultation with the Commission Chair before action is taken:
  - To exempt municipalities from polling place accessibility requirements pursuant to the provisions of Wis. Stat. § 5.25(4)(a);
  - To exempt municipalities from the requirements for the use of voting machines or electronic voting systems pursuant to the provisions of Wis. Stat. § 5.40(5m);

- To authorize the non-appointment of an individual who is nominated to serve as an election official under the provisions of Wis. Stat. § 7.30(4)(e);
- To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), for contracts involving a sum not exceeding \$100,000, or for purchases from a statewide contract involving sums not exceeding \$100,000.
- To issue written informal advisory opinions pursuant to Wis. Stat. §5.05(6a) related to recurring issues or issues of first impression for which no formal advisory opinion has been issued.

In making the above recommendations, I would note the following. Applications for exemption from accessibility requirements are rare and generally involve last minute construction issues. Permitting a municipality to use paper ballots instead of electronic voting equipment is a fairly routine decision that is predicated on unique circumstances such as the cost of programming electronic voting equipment when there is only one race on the ballot. Post-election certifications are generally administrative in nature, time sensitive and necessary to ensure an orderly transition of leadership following an election. These election-related certifications cannot be completed while a recount or litigation challenging a recount is pending. Wis. Stat. § 7.70 (5)(a). Regarding contract authority, agency purchases are governed by state procurement requirements, and very few contracts involve an amount exceeding \$100,000.

Finally, Wis. Stat. §5.05(6a) specifically permits the Commission to authorize the Administrator to issue informal written advisory opinions subject to any limitations the Commission deems appropriate. Every informal advisory opinion shall be consistent with applicable formal advisory opinions issued by the Commission or applicable statutes or case law. Requests for such informal advisory opinions are rare and the Administrator is required to review any such opinions issued at the next meeting of the Commission. The Commission may choose to issue a formal advisory opinion adopting or modifying the informal advisory opinion. If the Commission disagrees with an opinion issued by the Administrator, it may withdraw the opinion or request an opinion of the Attorney General.

A proposed motion is set out below.

**Recommended Motion:**

Pursuant to the Commission Administrator's role as agency head and the State's chief election official, the Wisconsin Elections Commission delegates the authority described below to its Administrator. In exercising all delegated authority, the Administrator is required to report, at the Commission meeting immediately following the delegated action, the specifics of the action taken, the basis for taking the action, and the outcome of that action.

1. The following authority is delegated to the Administrator subject to the requirement that before it is exercised, the Administrator consult with the Commission Chair to determine

whether Commission members should be polled or a special meeting conducted before action is taken:

- To issue compliance review orders under the provisions of Wis. Stat. § 5.06;
  - To certify and sign election related documents including candidate certifications, certificates of election, and certifications of election results on behalf of the Commission;
  - To accept, review, and exercise discretion to approve applications for voting system modifications characterized as engineering change orders (ECOs) for systems previously approved for use in Wisconsin;
  - To implement the Commission's determinations regarding sufficiency of nomination papers or qualifications of candidates;
  - To communicate with litigation counsel representing the Commission in order to make timely necessary decisions regarding Commission litigation;
  - To make a finding pursuant to Executive Order #50, Sec. IV(8), that a proposed administrative rule does not have an economic impact.
  - To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), subject to the further provisions of this paragraph. The Administrator is required to request approval from the Commission for contracts involving a sum exceeding \$100,000, or for purchases from a statewide contract over \$100,000. The Administrator is required to request approval from the Commission prior to posting a Request for Proposal or Request for Bid. In addition, the Administrator may enter into a sole source contract only after obtaining approval from Commission Chair and providing five days' prior notice to the Commission regardless of the dollar amount.
2. The following authority is delegated to the Administrator without the requirement for prior consultation with the Commission Chair before action is taken:
- To exempt municipalities from polling place accessibility requirements pursuant to the provisions of Wis. Stat. § 5.25(4)(a);
  - To exempt municipalities from the requirements for the use of voting machines or electronic voting systems pursuant to the provisions of Wis. Stat. § 5.40(5m);
  - To authorize the non-appointment of an individual who is nominated to serve as an election official under the provisions of Wis. Stat. § 7.30(4)(e);
  - To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), for contracts involving a sum not

exceeding \$100,000, or for purchases from a statewide contract involving sums not exceeding \$100,000.

- To issue written informal advisory opinions pursuant to Wis. Stat. §5.05(6a) related to recurring issues or issues of first impression for which no formal advisory opinion has been issued.



## WISCONSIN LEGISLATIVE COUNCIL

*Terry C. Anderson, Director*

*Jessica Karls-Ruplinger, Deputy Director*

TO: SPEAKER ROBIN VOS

FROM: Jessica Karls-Ruplinger, Deputy Director

RE: Senate Action on the Appointments of the Elections Commission Administrator  
and Ethics Commission Administrator

DATE: January 18, 2018

This memorandum responds to your question about whether the interim administrators of the Elections Commission and the Ethics Commission are removed from their positions if the Senate votes “no” on confirmation of the administrators. Although the statutes do not expressly address what happens if the Senate rejects confirmation of the administrators, it appears likely that a court would find that such action removes the administrators and results in vacancies in the administrator positions.

### BACKGROUND

The Elections Commission and the Ethics Commission are each under the direction and supervision of an administrator who serves for a four-year term expiring on July 1 of the odd-numbered year. The administrator of the Elections Commission is “appointed by a majority of the members of the [Elections Commission], **with the advice and consent of the [S]enate.**” Similarly, the administrator of the Ethics Commission is “appointed by a majority of the members of the [Ethics Commission], **with the advice and consent of the [S]enate.**” “Until the [S]enate has confirmed an appointment ..., [each] commission shall be under the direction and supervision of an interim administrator selected by a majority of the members of the commission.” [ss. 15.61 (1) (b) 1. and 15.62 (1) (b) 1., Stats. (emphasis added).]

### DISCUSSION

The statutes do not expressly address whether an interim administrator of the Elections Commission or the Ethics Commission is removed if the Senate votes “no” on confirmation of the administrator. If a court were asked to determine whether an interim administrator is removed if the Senate rejects his or her confirmation, it would likely apply rules of statutory

construction to “ascertain the intent of the legislature.” Rules of statutory construction include harmonizing the parts of the statute, considering the legislative history of the statute, and giving effect to each word, clause, and sentence.<sup>1</sup> [*In re Estate of Walker*, 75 Wis. 2d 93 (1977).]

The statute requires the “advice and consent” of the Senate for the appointment of an administrator for the Elections Commission and the Ethics Commission, but allows an interim administrator to direct the commission until the Senate confirms the appointment of an administrator. To give meaningful effect to Senate “advice and consent,” a court is likely to find that the Legislature intended to allow an interim administrator to serve temporarily until the Senate acts on confirmation rather than to allow an interim administrator to continue to serve indefinitely as administrator after Senate rejection of that administrator’s confirmation. If the Legislature intended to allow an administrator to continue to serve in the position regardless of the Senate rejection, it would be unnecessary to include Senate confirmation as an element of the appointment process.

Further, a court may look to another statute relating to interim appointments for guidance. Under s. 17.20 (2), Stats., if an interim appointment nominated by the Governor is later rejected by the Senate, the effect of the Senate rejection is a vacancy in the position. Specifically, the statute provides:

Vacancies occurring in the office of any officer normally nominated by the governor, and with the advice and consent of the senate appointed, may be filled by a provisional appointment by the governor for the residue of the unexpired term, if any, subject to confirmation by the senate. Any such appointment shall be in full force until acted upon by the senate, and when confirmed by the senate shall continue for the residue of the unexpired term, if any, or until a successor is chosen and qualifies. ... **Any appointment made under this paragraph which is withdrawn or rejected by the senate shall lapse. When a provisional appointment lapses, a vacancy occurs.** ... [Emphasis added.]<sup>2</sup>

This statute gives effect to a principle that Senate rejection of the confirmation of a Governor’s appointee terminates the lawful status of the appointee. Similarly, if a court is asked to determine the effect of Senate rejection on the status of the administrators of the Elections Commission and the Ethics Commission, it would likely apply this same principle by

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<sup>1</sup> Generally, all words and phrases in the statutes must be construed according to common and approved usage. [s. 990.01 (1), Stats.]

<sup>2</sup> In the absence of this specific language about Senate rejection, the Wisconsin Supreme Court recognized that Senate rejection of the confirmation of an interim appointee terminates the lawful status of the appointee. [*State ex rel. Reynolds v. Smith*, 22 Wis. 2d 516 (1964) and *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275 (1964), which were decided before s. 17.20 (2), Stats., included specific language about Senate rejection. The statute instead stated: “Any such appointment subject to confirmation by the [S]enate shall be in full force until acted upon by the [S]enate, and when confirmed by the [S]enate shall continue for the residue of the unexpired term.”]

concluding that rejection results in a vacancy, in order to give meaningful effect to the role of Senate confirmation.

In contrast, it could be argued that removal of the administrator of the Elections Commission requires action by the Elections Commission, and that removal of the administrator of the Ethics Commission requires action by the Ethics Commission, because the statutes: (1) allow each commission to be under the direction and supervision of an interim administrator “[u]ntil the [S]enate has confirmed an appointment” of an administrator; and (2) provide that removal of an administrator is by “affirmative vote of a majority of all members of the commission” and does not specifically allow the Senate to remove an administrator. [ss. 15.61 (1) (b) and 15.62 (1) (b), Stats.] However, this reading makes the requirement for “advice and consent” of the Senate superfluous and is likely not consistent with legislative intent.

First, the statutes provide that the Elections Commission and the Ethics Commission are each under the direction and supervision of an interim administrator “[u]ntil the [S]enate has confirmed an appointment” of an administrator. [ss. 15.61 (1) (b) 1. and 15.62 (1) (b) 1., Stats.] Arguably, if the Senate rejects the confirmation of an administrator, it has not “confirmed an appointment” and thus the interim administrator whose confirmation was rejected may continue to serve as the interim administrator. However, this reading of the statutes ignores the presumed temporary nature of an “interim” administrator. It appears more likely that the ability of a commission to appoint an interim administrator is similar to the ability of the Governor to make an interim appointment, as described above, in that it exists to ensure that an administrator can be in place prior to Senate action on confirmation.

Second, the statutes provide that the administrator of the Elections Commission may be removed by the affirmative vote of a majority of all members of the Elections Commission. Similarly, the administrator of the Ethics Commission may be removed by the affirmative vote of a majority of all members of the Ethics Commission. [ss. 15.61 (1) (b) 2. and 15.62 (1) (b) 2., Stats.] However, the ability of each commission to remove an administrator appears to be compatible with a vacancy resulting from Senate rejection of the confirmation of an administrator. This is consistent with interim appointments nominated by the Governor; for such appointments, the Governor can remove the appointee or a vacancy could result from Senate rejection of the confirmation of the appointee. [ss. 17.07 (3), (4), and (5) and 17.20 (2) (a), Stats.]

## CONCLUSION

It appears likely that a court would find that a Senate “no” vote on confirmation of the interim administrators of the Elections Commission and the Ethics Commission results in the removal of the administrators and vacancies<sup>3</sup> in the administrator positions because such a

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<sup>3</sup> If a vacancy in the administrator position for the Elections Commission or the Ethics Commission occurs, the commission must appoint a new administrator, and submit the appointment for Senate confirmation, within 45 days after the date of the vacancy. If the commission does not appoint a new administrator within 45 days, the Joint Committee on Legislative Organization must appoint an interim administrator to serve until a new

reading of the statutes is likely consistent with legislative intent and gives effect to the requirement for Senate confirmation.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

JKR:jal

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administrator is confirmed by the Senate but for a term of no longer than one year. [ss. 15.61 (1) (b) 1. and 15.62 (1) (b) 1., Stats.]