



Wisconsin Elections Commission

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DATE: For the February 27, 2020 Commission Meeting

TO: Members, Wisconsin Elections Commission

FROM: Meagan Wolfe, Administrator
Wisconsin Elections Commission

SUBJECT: Delegation of Authority to Administrator

Background

At its January 9, 2018 meeting, the Elections Commission approved a Delegation of Authority document to outline the actions and decisions that the Administrator could implement without prior Commission action. The Delegation of Authority is used to maintain and improve the agency's administrative efficiencies for routine decisions and transactions, and also require the Administrator to report actions to the Commission and, in some cases, to consult with the Chair prior to taking action. This memorandum proposes modifications to the current Delegation of Authority for the Commission's consideration.

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 her in the administration of the election laws. The Delegation of Authority facilitates the agency's day-to-day management and clarifies 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 Delegation of Authority was reviewed and approved by the Commission most recently in January 2018. The Commission Chair has requested that the Commission review and approve the document after considering the following changes recommended by the Chair:

- 1) Modify the introductory language in section 1 to require that the Administrator consult with the Commission Chair prior to taking specified actions "to determine whether a special meeting is conducted before action is taken."
- 2) Institute more transparency into the Wis. Stat. § 5.06 complaint process through the following changes:

Wisconsin Elections Commissioners

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

Administrator
Meagan Wolfe

- A. Commission staff shall share filings in Section 5.06 review cases with the Commissioners as they are received and post the filings on the WEC website.
 - B. If time permits, as determined by the Administrator in consultation with the Chair, staff shall provide draft decisions to all Commissioners prior to their issuance. The Administrator and Chair shall determine whether it feasible to permit Commissioners to submit comments regarding the draft decision given statutory and administrative deadlines, and the amount of time allowed to submit comments.
 - C. If time permits, Commissioners who wish to comment on the draft decision may contact the Administrator but shall not discuss the case with other Commissioners. The Administrator shall determine whether any comments or input provided by Commissioners will be incorporated into the final decision.
 - D. If two or more Commissioners ask the Administrator to request a special meeting on a Section 5.06 complaint, the Administrator will discuss with the Commission Chair such requests and the Chair will determine whether to hold a special meeting to discuss the matter prior to release of the Commission decision.
- 3) Revise the language in section 1 regarding communication with litigation counsel to read: "To communicate with litigation counsel representing the Commission in order to advise the Commission regarding necessary decisions related to Commission litigation. This delegation is intended to require Commission input regarding significant litigation decisions such as the filing of an appeal, but is not intended to require consultation with the Chair or the Commission prior to communicating with litigation counsel regarding routine matters such as feedback pertaining to briefs and other legal filings, discovery procedures and Commission staff's participation in court proceedings."
- 4) Delete the language in section 1 allowing the Administrator, after consultation with the Chair to make a finding pursuant to Executive Order #50, Sec. IV(8) that a proposed administrative rule does not have an economic impact. Such findings would be made by the Commission during the administrative rule promulgation process.
- 5) Move the language in section 2 authorizing of non-appointment of an individual nominated by the political parties to serve as a first-choice nominee election official under Wis. Stat. § 7.30(4)(e) into section 1 requiring prior consultation with the Commission Chair.

A "redlined" version of the January 2018 Delegation of Authority detailing the changes outlined above is set out below. Should the Commission adopt the proposed changes, the "redlined" changes would be accepted, and a final version would be provided to Commission members for reference.

Delegation of Authority (January 2018) with Proposed Modifications

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 a special meeting is conducted before action is taken ~~should be held~~:
- To issue compliance review orders under the provisions of Wis. Stat. § 5.06. Prior to compliance review orders being issued, the following actions shall be taken:
 - Commission staff shall provide to Commissioners the parties' filings as they are received and post the filings on the Commission's website.
 - If time permits, as determined by the Administrator in consultation with the Chair, staff shall provide draft decisions to all Commissioners prior to their issuance. The Administrator and Chair shall determine whether it is feasible to permit Commissioners to submit comments regarding the draft decision given statutory and administrative deadlines, and the amount of time allowed to submit comments.
 - If time permits, Commissioners who wish to comment on the draft decision may contact the Administrator but shall not discuss the case with other Commissioners. The Administrator shall determine whether any comments or input provided by Commissioners will be incorporated into the final decision.
 - If two or more Commissioners ask the Administrator to request a special meeting regarding a Section 5.06 draft decision, the Administrator will discuss with the Commission Chair such requests and the Chair will determine whether to hold a special meeting prior to release of the decision.
 - 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 advise the Commission regarding necessary decisions ~~regarding~~ related to Commission litigation. This delegation is intended to require Commission input regarding significant litigation decisions such as the filing of an appeal, but is not intended to require consultation with the Chair or the Commission prior to communicating with litigation

counsel regarding routine matters such as feedback pertaining to legal briefs and other legal filings, discovery procedures and Commission staff's participation in court proceedings;

- ~~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.
- To authorize the non-appointment of an individual who is nominated by a political party to serve as a first choice nominee election official under the provisions of Wis. Stat. § 7.30(4)(e).

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.

Additional Considerations

Commission staff believes the following considerations may help provide context to past and current use of the Delegation of Authority and the proposed modifications.

Under the Commission's administrative rules, Section 5.06(1) complaints require that the parties involved submit their filings by specific deadlines. Many complaints involve time sensitive ballot access issues decided by local clerks, which can impact ballot preparation, ballot printing, distribution of ballots to absentee voters and programming of electronic voting equipment by local election officials. In such cases Commission staff encourages the parties to submit filings under shortened timeframes in order to permit a timely decision that may be appealed to court. Several complaints during the 2020 Spring Election cycle required expedited pleadings and decisions, which would have made it impossible to solicit feedback during a meeting of the full Commission. Commission decisions are based upon the legal requirements of relevant statutes, administrative rules and court decisions.

The proposed modifications to the process would allow the Administrator and Chair to determine whether Commissioners should have an opportunity to review draft decisions and provide comments prior to the issuance of the final decision. The current administrative rules permit the Chair to determine whether a Section 5.06 complaint should be considered at a Commission meeting prior to a decision being issued. Wis. Stat. 5.06(7) also permits the Commission to withdraw, modify or correct a decision within a timely period if it find such action to be appropriate.

Regarding the Administrator's communications with litigation counsel, the Department of Justice regularly consults with the Administrator and legal staff regarding litigation activities, including the development of legal arguments, drafting of pleadings and briefs, discovery requirements, witness testimony, and the administrative implications of litigation positions and potential outcomes. The proposed modification is not intended to restrict such routine communications or require prior consultation with the Chair or Commission. The proposed modification does not authorize the Administrator to communicate a position regarding significant litigation decisions, such as whether to appeal a court decision, without prior approval of the Chair and/or full Commission.

The proposed modification also requires the Administrator to consult with the Chair prior to authorizing a municipal clerk to "non-appoint" an individual nominated by a political party as a first-choice nominee to serve as an election official. It is rare that a municipal clerk invokes the non-appointment procedure under Wis. Stat. 7.30(4)(e) but it has happened in rare cases of uncooperative or unqualified nominees. The remaining proposed modification would remove the Administrator's authority to determine that a proposed administrative rule has no economic impacts pursuant to an existing Executive Order. Instead such determinations would be made by the Commission as part of the rulemaking process.

Regarding some of the existing delegation provisions, 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. This provision was more relevant under the Government Accountability Board which issued informal advisory opinions related to statutes governing campaign finance, lobbying and the code of ethics for public officials. Elections Commission staff is rarely asked to issue such informal advisory opinions. Each informal advisory opinion must be consistent with applicable formal advisory opinions issued by the Commission or applicable statutes or case law, 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, and if the Commission disagrees with an opinion issued by the Administrator, it may withdraw the opinion or request an opinion of the Attorney General.