



Wisconsin Elections Commission

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DATE: For the February 27, 2020 Commission Meeting

TO: Members, Wisconsin Elections Commission

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Wisconsin Elections Commission

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SUBJECT: Legal Standards for Nomination Paper Review

This memorandum outlines issues which are occasionally raised during the review of nomination papers by staff of the Wisconsin Elections Commission (WEC) and local filing officers, including during the review of nomination papers for the 2020 Spring Election cycle. Several statutes outline procedural requirements related to the circulation and filing of nomination papers and the issue is whether filing officers should strictly enforce those statutes as mandatory or directory. Based upon the analysis below, Commission staff is requesting that the Commission confirm that procedural requirements related to filing nomination papers are mandatory. Commission staff also recommends that the Commission direct its staff and local filing officers to not apply the “will of the electors” language in Wis. Stat. 5.01(1) to their review of nomination papers.

There are two types of errors which may lead filing officers to determine that signatures or entire pages of nomination papers are invalid. The first type are errors present in the information on the page, related to a candidate, circulator or signer. Errors may also occur if nomination papers are circulated and filed contrary to procedural requirements, such as the time and place of filing or the manner of circulating. This memorandum addresses the latter category in which the completeness or accuracy of the information on the nomination paper is not in dispute.

The Commission recently issued several administrative decisions related to nomination papers which did not strictly comply with procedural requirements. In those cases, the candidates made two separate but related arguments for accepting signatures as valid despite procedural defects. First, candidates cited Wis. Stat. 5.01(1) which states as follows:

5.01 Scope. (1) CONSTRUCTION OF CHS. 5 TO 12. Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply

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with some of their provisions.

Second, candidates noted that Wis. Admin. Code EL § 2.05(5) states:

Where any required item of information on a nomination paper is incomplete, the filing officer shall accept the information as complete if there has been substantial compliance with the law.”

Candidates cited these provisions to argue that procedural requirements for filing nomination papers should be construed as directory rather than mandatory. In other words, when such a statute uses the term “shall” it can be interpreted as “may.”

The most extensive analysis and legal review related to these issues for 2020 Spring Election candidates occurred in the cases related to Bryan Kennedy and Jim Sullivan, two candidates for Milwaukee County Executive. In those cases, the WEC issued decisions strictly enforcing the provision in Wis. Stat. § 8.04 stating that if a circulator collects signatures for two candidates for the office in the same election, the earlier paper is valid, and the later paper is invalid. The WEC made this determination while recognizing that the candidates had taken steps to attempt to ensure that its circulators did not collect signatures for more than one candidate, such as obtaining assurances from the vendor that hired the circulators that they would collect signatures for only one candidate.

The WEC’s decisions were upheld by the Milwaukee County Circuit Court and the Wisconsin Court of Appeals subsequently denied the candidates’ request to appeal, finding that they had not demonstrated a likelihood of success on the merits concerning their interpretation of the applicable statutes and court decisions. This memorandum draws on some of the legal arguments and court findings in the Kennedy and Sullivan matters, although Commission staff is requesting guidance that extends beyond Wis. Stat. § 8.04 and applies to the review of nomination papers more generally.

Will of the Electors

Several court decisions have interpreted the meaning of Wis. Stat. § 5.01(1)’s mandate that election laws “shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.” As far back as 1933, the Wisconsin Supreme Court held that this language, found in the predecessor statute to § 5.01, “applies only after the holding of the election and the will of the electors has been manifested.” *State ex rel. Oaks v. Brown*, 211 Wis. 571, 249 N.W.2d 50 (1933). In 1978 the Supreme Court declined to apply § 5.01(1) to the requirement that a circuit court judge candidate file nomination papers with the State Elections Board when the candidate had instead filed the papers with the county clerk. *State ex. rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 263 N.W.2d 152 (1978).

This principle was reaffirmed in 1999 by the Court of Appeals which held that § 5.01(1) is inapplicable to the instant case, as there was no election from which the will of the electors had manifested.” *City of Chippewa Falls v. Town of Hallie*, 231 Wis. 2d 85, 92, 604 N.W.2d 300 (Ct. App. 1999). The Chippewa Falls case involved a provision existing in Wis. Stat. § 8.40 at

the time which required that the circulator of an annexation petition reside in the territory to be annexed. The Commission's decisions related to Mr. Kennedy and Mr. Sullivan stated:

In short, Wisconsin courts have determined that assessing the will of the electors is relevant to the determination of whether an election statute is directory or mandatory only in the context of conducting an election or when the will of the electors can be observed at an election or through examining ballots cast. The courts have not extended that analysis to the processes for circulating and reviewing nomination papers.

In reviewing the Commission's decision, the Milwaukee County Circuit Court cited several other court decisions which had construed election laws to be directory rather than mandatory based upon the "will of the electors" language in Wis. Stat. § 5.01(1). The Court noted that all of those cases related to absentee ballot procedures and whether to count votes on absentee ballots with the one exception of *Matter of Recall of Redner*, 153 Wis. 2d 383, 450 N.W.2d 808 (Ct. App. 1989). While the Redner decision included a citation to Wis. Stat. § 5.01(1), the Milwaukee County Circuit Court determined that the reference constituted dicta in the decision. In other words the Court of Appeals in *Redner* did not rely on Wis. Stat. § 5.01(1) for its decision.

It is worth noting that *Redner* involves a recall petition rather than nomination papers. In addition, the petition requirements which the Court found to be directory involved the completeness of information on the petition as well as whether the recall petition could exceed one page in length. With regard to whether the information on the petition was complete and in proper form, the Court determined that only substantial compliance was required to protect against fraud and to ensure that the signers knew the contents of the petition.

Upon review of the cases involving Mr. Kennedy and Mr. Sullivan, the Court of Appeals relied on both the plain language of Wis. Stat. 8.04 and the line of cases cited in the Commission's order, including the *Oaks v. Brown* and *City of Chippewa Falls v. Town of Hallie* decisions. *James Sullivan et al. v. Wisconsin Elections Commission et al.*, 2020AP164-LV at 3. The Court of Appeals held the candidates had not shown a likelihood of success in reversing the Circuit Court's decision which upheld the Commission's decision. *Id.*

Based upon the relevant court decisions including the Sullivan/Kennedy decision, Commission staff believes the correct interpretation of the "will of the electors" language in Wis. Stat. § 5.01(1) is that it does not apply to the validity of signatures on nomination papers and should not be a consideration in the review of nomination papers by WEC staff or local filing officers.

Substantial Compliance

As noted above, Wis. Admin. Code EL § 2.05(5) directs filing officers to accept incomplete information on nomination papers as complete if there has been substantial compliance with the law. Notably, however, this rule applies only to "any required item of information" on the page. Required information on nomination papers and other election petition includes information related to the candidate, recall target or referendum question; information required in the circulator's certification, and information pertaining to signers of the page. The Commission and

its predecessor agencies have consistently applied the substantial compliance standard when evaluating the completeness of information on the page.

The substantial compliance standard does not apply to procedural requirements. In its oral decision in the Sullivan/Kennedy case, the Milwaukee County Circuit Court pointed out that the issue in dispute related to acts taken by the circulators, not infirmities of the nomination paper itself. Circulators had collected signatures for more than one candidate for the same office in the same election and pursuant to Wis. Stat. § 8.04 the earlier paper is valid and the later paper is invalid.

The Court also noted that Wis. Admin. Code EL § 2.05(1) states that “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.” While it may be a harsh penalty to disqualify a candidate for flaws in these processes, the Court found that the intent of the candidates or steps taken to prevent mistakes were not relevant in determining whether the required procedures were followed and nomination papers were accepted as valid.

Application of Legal Standards

Due to the volume of nomination papers reviewed by WEC staff and other filing officers in a short period of time, certainty in applying the rules is important. This is especially true because filing officers have a responsibility to determine the facial sufficiency of papers filed and often do not have the time or resources to conduct in-depth investigations. Information on a page can be analyzed to determine if it is complete and substantially complies with the law, but filing officers cannot take into account a candidate or circulator’s circumstances or intent when nomination papers are filed after a deadline or with an incorrect office, or with other procedural defects.

Commission staff believes it would be beneficial to both filing officers and candidates to have clear and updated guidance as to the applicability of Wis. Stat. § 5.01(1) and Wis. Admin. Code EL § 2.05(5) to the review of nomination papers and other election petitions as outlined below. Such guidance would promote consistency among filing officers, give notice to candidates regarding the applicable standards, reduce the number of challenges filed and more efficiently resolve challenges.

Recommended Motion:

The Commission adopt the following principles for its review of nomination papers and election petitions and for review by local filing officers:

1. The “will of the electors” language in Wis. Stat. § 5.01(1) does not apply to the review of nomination papers and election petitions. Commission staff will not consider the “will of the electors” in evaluating nomination papers and election petitions and the Commission will not take it into account when ruling on challenges or appeals of decisions issued by local filing officers related to nomination papers and other election petitions.

2. The “substantial compliance” language in Wis. Admin. Code EL § 2.05(5) applies only to evaluating the completeness of information on nomination papers or other election petitions. Examples include the required information related to candidates, circulators and signers of the petition.
3. The “substantial compliance” language in Wis. Admin. Code EL § 2.05(5) does not apply to procedural requirements for circulating and filing nomination papers and other election petitions. Procedural requirements involve acts that are done to the documents and include the time and place of filing.
4. The plain language of Wis. Stat. § 8.04 requires that when a circulator collects signatures for more than one candidate for the same office in the same election, the earlier paper is deemed valid and the later paper is deemed invalid. In such cases, the Commission and local filing officers will not consider whether there has been substantial compliance with this provision because the requirement does not relate to the completeness of information on the page. (Filing officers are likely to detect this circulator error as well as signatures of the same individual on nomination papers for more than one candidate for the same office only upon review of a challenge because the facial review does not require a comparison of nomination papers between candidates).

The Commission further directs staff to incorporate these principles into its review of nomination papers and other election petitions and to communicate the same to local filing officers.