

April 30, 2021

**VIA EMAIL: dean.knudson@wisconsin.gov
AND FIRST CLASS MAIL**

Mr. Dean Knudson
1753 Laurel Avenue
Hudson, WI 54016

RE: In the Matter of *Knudson v. Evers*
Case No. EL 20-28

Dear Mr. Knudson:

As you know, the law firm of DeWitt LLP (“DeWitt”) is retained as special counsel for the Wisconsin Elections Commission (“Commission”) with respect to the above-referenced matter. This letter is in response to the Amended Complaint you submitted to the Commission on December 9, 2020, alleging violations of Wis. Stat. § 7.70(5) by Tony Evers, Governor of the State of Wisconsin.

By email to both parties dated December 22, 2020, DeWitt established deadlines of January 13, 2021 for Respondent to respond to the Amended Complaint and January 27, 2021 for you to reply. On January 13, 2021, Respondent filed a Verified Response to Amended Complaint Filed December 9, 2020 (“Response”). You filed a reply dated February 5, 2021. In part, your reply contended that the Response was untimely and “must be disregarded” and requested that Respondent “be deemed to have admitted the allegations contained in the complaint.” Respondent replied to that request for the relief via letter dated February 11, 2021, in which Respondent in turn asserted that your reply was untimely and should be stricken.

By email to both parties dated February 24, 2021, DeWitt stated its determination that all aforementioned submissions would be accepted as timely filed and would be considered “the briefs of the parties.” DeWitt also invited either party to submit additional briefs or statements if desired. You submitted no additional briefs or statements. Respondent submitted a “Point of Order” on March 3, 2021, requesting that Commissioner Robert Spindell, Jr. be recused from participating in the Commission’s deliberations on the above-referenced Amended Complaint.

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.”

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The Commission¹ has reviewed your Amended Complaint, the Response, your reply, and all supporting documentation. The Commission provides the following analysis and decision. In short, the Commission finds that you did not show probable cause to believe that a violation of law or abuse of discretion occurred with regard to the claims asserted in the Amended Complaint.

Amended Complaint Allegations and Response

It is undisputed that, on November 30, 2020, Respondent signed and transmitted a document entitled “Certificate of Ascertainment for President, Vice President and Presidential Electors.” It is also undisputed that Respondent did so prior to the expiration of the time to request a full statewide recount and to appeal the recount.

The Amended Complaint alleges that Respondent violated Wis. Stat. § 7.70(5) in signing and transmitting the “Certificate of Ascertainment” before expiration of the time to request a full statewide recount and before expiration of the time to appeal the recount.

In his Response, Respondent asserts that (1) the Amended Complaint is not properly before the Commission because it asserts alleged violations that arise in connection with a recount and is therefore prohibited by Wis. Stat. § 5.06(10); (2) Respondent is not an election official and is therefore not subject to a complaint under Wis. Stat. § 5.06; and (3) the Certificate of Ascertainment was properly signed and transmitted in accordance with applicable law.

Commission Authority and Role in Resolving Complaints Filed Under Wis. Stat. § 5.06

The Commission’s role in resolving complaints filed under Wis. Stat. § 5.06 that challenge the decisions or actions of election officials is to determine whether an official acted contrary to applicable election laws or abused their discretion in administering applicable election laws. Under Wis. Stat. § 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 by your Amended Complaint.

Commission Findings

There Is No Probable Cause To Find That The Certificate of Ascertainment Was Improper.

The Amended Complaint asserts that the Certificate of Ascertainment was issued prematurely before exhaustion of the time for full statewide recount and recount appeal. You asserted the same claim in a separate matter, Case No. EL 20-27, brought against Meagan Wolfe, Administrator of

¹ By email dated February 23, 2021, you stated your decision to recuse yourself as a Commissioner from involvement in the Commission’s discussion, decision, or action concerning the above-referenced matter. Accordingly, you did not review a draft of or vote on this decision.

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the Commission. Since such allegations in the two cases arise from the same set of facts and present the same issue of law, the Commission will first address this contention in its decision.

Wis. Stat. § 7.70(5) has two subsections, subsection (a) and subsection (b), stating as follows:

(a) The commission shall record in its office each certified statement and determination made by the commission chairperson or the chairperson's designee. Immediately after the expiration of the time allowed to file a petition for recount, the commission shall make and transmit to each person declared elected a certificate of election under the seal of the commission, except that the commission need not wait until expiration of the time allowed to file a petition for recount if there is no aggrieved party, as defined in s. 9.01 (1) (a) 5. It shall also prepare similar certificates, attested by the commission administrator, addressed to the U.S. house of representatives, stating the names of those persons elected as representatives to the congress from this state. In the case of U.S. senators, the commission shall prepare a certificate of election for the governor's signature, and the governor shall sign and affix the great seal of the state and transmit the certificate to the president of the U.S. senate. The certificate shall be countersigned by the secretary of state. If a person elected was elected to fill a vacancy, the certificate shall so indicate. When a valid petition for recount is filed, the commission chairperson or the chairperson's designee may not certify a nomination, and the governor or commission may not issue a certificate of election until the recount has been completed and the time allowed for filing an appeal has passed, or if appealed until the appeal is decided.

(b) For presidential electors, the commission shall prepare a certificate showing the determination of the results of the canvass and the names of the persons elected, and the governor shall sign, affix the great seal of the state, and transmit the certificate by registered mail to the U.S. administrator of general services. The governor shall also prepare 6 duplicate originals of such certificate and deliver them to one of the presidential electors on or before the first Monday after the 2nd Wednesday in December.

In interpreting the above statute, the Commission “begins with the language of the statute.” *Town of Rib Mountain v. Marathon Cty.*, 2019 WI 50, ¶ 9, 386 Wis. 2d 632, 926 N.W.2d 731 (citation omitted). The Commission gives the statutory language “its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.* The Commission also interprets the statutory language “in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.*

The Commission finds that the language of Wis. Stat. § 7.70(5) is clear and unambiguous. According to the plain language of § 7.70(5)(b), that specific subsection applies “[f]or presidential electors.” The documents entitled “Certificate of Ascertainment” that is at issue in this case – which states on its face that it reports “the votes cast for the election of Presidential Electors” – is therefore the type of certificate set forth in § 7.70(5)(b).

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The requirements for a certificate prepared pursuant to § 7.70(5)(b) are clear. A certificate under that subsection must “show[] the determination of the results of the canvass and the names of the persons elected.” The governor must “sign, affix the great seal of the state, and transmit the certificate by registered mail to the U.S. administrator of general services.” Finally, in the only language establishing a timing requirement in § 7.70(5)(b), “[t]he governor shall prepare 6 duplicate originals of the certificate and deliver them to one of the presidential electors on or before the first Monday after the 2nd Wednesday in December.” These are all mandatory requirements, denoted by the word “shall” in the statute, and do not leave room for the exercise of discretion.

Unlike subsection (b) of Wis. Stat. § 7.70(5), subsection (a) of that statute contains language establishing a different timing requirement. Specifically, § 7.70(5)(a) states that, “[w]hen a valid petition for recount is filed, ... the governor or commission may not issue a certificate of election until the recount has been completed and the time allowed for filing an appeal has passed, or if appealed until the appeal is decided.” The Amended Complaint contends that Ms. Wolfe’s preparation and transmittal of the Certificate of Ascertainment violated this statutory language because the document was transmitted before expiration of the time for a full statewide recount and recount appeal. However, there is nothing in the plain language of § 7.70(5) applying this language to an election “[f]or presidential electors.” It is not appropriate for the Commission to add to § 7.70(5) language that does not exist there. *Dawson v. Town of Jackson*, 2011 WI 77, ¶ 42, 336 Wis. 2d 318, 801 N.W.2d 316 (“We decline to read into the statute words the legislature did not see fit to write.”).

Moreover, it is clear from a plain language analysis that the two subsections of § 7.70(5) are distinct. Subsection (a) specifically names the certificate to which it refers as a “certificate of election.” The language on which Amended Complaint relies states that “the governor or commission may not issue a *certificate of election*” until recounts and related appeals are completed. [emphasis added]. Subsection (b) does not specifically name the certificate to which it refers, and the absence of the phrase “certificate of election” from subsection (b) is significant. That the legislature chose to distinguish between the “certificate of election” addressed in subsection (a) and the “certificate showing the determination of the results of the canvass and the names of the persons elected” addressed in subsection (b) means that these certificates are separate documents. *Armes v. Kenosha Cty.*, 81 Wis. 2d 309, 318, 260 N.W.2d 515, 519 (1977) (“Where the legislature uses two different phrases ... in two paragraphs in the same section, it is presumed to have intended the two phrases to have different meanings.”).²

² The Commission need not look beyond the plain language of Wis. Stat. § 7.70(5) to conclude that the subsections of that statute are distinct and that there is, therefore, no probable cause to find that Respondent’s signing and transmittal of the Certificate of Ascertainment violated § 7.70(5). However, the Commission notes that the historical facts also do not support the interpretation of § 7.70(5) underlying the allegations of the Amended Complaint. The Response alleges that, in 2016, “Governor Walker signed and transmitted a certificate of ascertainment on December 12, 2016, the *very same day* that the WEC Chairperson conducted the state canvass and certified the results,” and “without waiting for the statutory window for an appeal of the recount result to close.” Response, p. 17 (emphasis original). You did not dispute these facts. This past practice undermines your argument that Wis. Stat. § 7.70(5) prohibited the preparation and transmittal of the Certificate of Ascertainment before the expiration of the time to appeal a recount.

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For the above reasons, the Commission finds that there is no probable cause to believe that Respondent's signing and transmittal of the Certificate of Ascertainment violated the applicable provisions of Wis. Stat. § 7.70(5) set forth in § 7.70(5)(b).

The Commission Need Not Determine The Remaining Issues Raised In Respondent' Response.

Respondent raised two other defenses in his Response. Specifically, Respondent asserts that the Amended Complaint is not properly before the Commission because it asserts alleged violations that arise in connection with a recount and is therefore prohibited by Wis. Stat. § 5.06(10). He also argues that he is not an election official and is therefore not subject to a complaint under Wis. Stat. § 5.06.

In light of its conclusion that there is no probable cause to find that the signing and transmittal of the Certificate of Ascertainment violated Wis. Stat. § 7.70(5), the Commission need not address these other defenses.

Commission Decision

Based upon the above review and analysis, the Commission finds that the Amended Complaint does not raise probable cause to believe that a violation of law or abuse of discretion has occurred. All claims are hereby dismissed.

Request for Recusal of Commissioner Spindell

In a Point of Order dated March 3, 2021, counsel for Respondent requested the recusal of Commissioner Spindell from participation in the deliberations on the Amended Complaint. By email the same date, DeWitt requested a response from Commissioner Spindell by March 8, 2011. Commissioner Spindell subsequently requested a copy of the documents filed by the parties in the matter and an extension of his time to respond to the Point of Order, both of which were provided by DeWitt. By email dated March 11, 2021, Commissioner Spindell stated his decision that he would not agree to recuse himself.

In light of the disagreement, the Commission shall reach a decision as to whether to disqualify Commissioner Spindell from participating in this matter, which is the procedure contemplated by Wis. Stat. § 227.46(6):

The functions of persons presiding at a hearing or participating in proposed or final decisions shall be performed in an impartial manner. A hearing examiner or agency official may at any time disqualify himself or herself. In class 2 and 3 proceedings, on the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a hearing examiner or official, the agency or hearing examiner shall determine the matter as part of the record and decision in the case.

This letter sets forth the decision of the Commission not to require Commissioner Spindell to disqualify himself from participating in this matter.

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Counsel's Point of Order contending that Commissioner Spindell cannot participate in the Commission's deliberations stems from his alleged attendance at and participation in a meeting of Republican Party designees who purported to cast Electoral College votes even though they were not Presidential Electors. Counsel contends that such conduct shows that Commissioner Spindell has prejudged the question of whether the electors for the State of Wisconsin were properly ascertained and that his own personal interests preclude him from being neutral.

For guidance, the Commission looks to recusal standards that would apply to judges in the State of Wisconsin. "The relevant recusal standard in the Wisconsin Statutes is a subjective one." *State v. Pinno*, 2014 WI 74, ¶ 93, 356 Wis. 2d 106, 850 N.W.2d 207. A judge shall disqualify himself or herself "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." Wis. Stat. § 757.19(2)(g).³ "This statute 'is clearly drafted so as to place the determination of partiality solely upon the judge.'" *Pinno*, 2014 WI 74, ¶ 93 (quoted source omitted). "A reviewing court decides objectively whether the judge actually made the subjective determination." *Id.*

"In addition to the requirement that a judge must reach a subjective determination that he is not biased under Wis. Stat. § 757.19(2)(g), the Due Process Clause requires an objective inquiry." *Id.* ¶ 94. However, the Due Process Clause "demarks only the outer boundaries of judicial disqualifications," "[m]ost matters relating to judicial disqualification [do] not rise to a constitutional level," and, therefore, "most disputes over disqualification will be resolved without resort to the Constitution." *Id.* (cited sources omitted).

Here, the Commission finds that Commissioner Spindell made a subjective determination. Commissioner Spindell responded to the Point of Order by requesting case documents and seeking an extension of his time to consider the request before ultimately stating his determination not to recuse himself. The Commission does not find cause to override Commissioner Spindell's determination. The members of the Commission are appointed by politicians and political parties. Participation by Commission members in partisan political activities should not be unexpected and, in the Commission's determination, is not sufficient justification to award the extraordinary relief sought by the Point of Order. Furthermore, if Commissioner Spindell's participation in the meeting of Republican Party designees is a disqualifying event because it shows that he prejudged the issue of ascertainment of electors, then the Chair of the Commission – who directed the preparation and transmittal of the Certificate of Ascertainment to Respondent – would likely be similarly disqualified.

³ This standard is very different from the standard that would apply to a judge who is an actual party in a matter before him or her. In such a circumstance, the standard is objective, not subjective. See Wis. Stat. § 757.19(2)(b) ("Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when ... "a judge is a party....").

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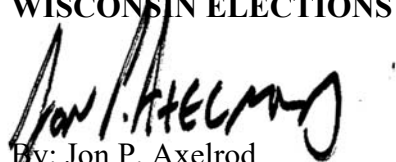
Right to Appeal – Circuit Court

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



By: Jon P. Axelrod
and Deborah C. Meiners
Special Counsel

JPA:sd

cc (via email): Commission Members

Attorney Nathan Judnic, Wisconsin Elections Commission
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