

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. Wolfe*
Case No. EL 20-27

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) and 5.05(1e) by Meagan Wolfe, Administrator of the Commission.

By email to both parties dated December 22, 2020, DeWitt established deadlines of January 13, 2021 for Ms. Wolfe to respond to the Amended Complaint and January 27, 2021 for you to reply. On January 13, 2021, Ms. Wolfe filed a Response to the Amended Complaint of Commissioner Dean Knudson (“Response”). You filed a reply dated February 5, 2021. In part, your reply contended that Ms. Wolfe’s Response was untimely and “must be disregarded” and requested that Ms. Wolfe “be deemed to have admitted the allegations contained in the complaint.” Ms. Wolfe responded to that request for the relief via letter dated February 11, 2021.

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.

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, Ms. Wolfe's 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

The following material facts are undisputed:

- Ms. Wolfe is the appointed Administrator of the Commission. Amended Complaint ¶ 9; Response, p. 7.
- The Commission adopted a Delegation of Authority in 2018, which was then amended by the Commission on February 27, 2020. Amended Complaint ¶ 10; Response, p. 7.
- In pertinent part, the Delegation of Authority, as amended on February 27, 2020, states:

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:

* * *

To certify and sign election related documents including candidate certifications, certificates of election, and certifications of election results on behalf of the Commission[.]

Response, Ex. A, p. 1.

- On the afternoon of November 30, 2020, the Commission Chair signed a statement of determination of canvass results for the 2020 general election. Response, p. 22.
- Later on November 30, 2020, Ms. Wolfe supervised the preparation of and edited a document entitled "Certificate of Ascertainment for President, Vice President and Presidential Electors," which was then transmitted to Governor Tony Evers. Amended Complaint ¶ 31; Response, pp. 11-13, 39.
- Ms. Wolfe supervised and participated in the preparation of the Certificate of Ascertainment at the direction of the Commission Chair. Response, pp. 12, 22. Before supervising and participating in the preparation of the Certificate of Ascertainment, Ms. Wolfe consulted with the Commission Chair, who directed that a meeting of the

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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Commission would not be conducted before the certificate was prepared. Response, pp. 6, 12.

- The certificate was sent to Governor Evers prior to the expiration of the time to request a full statewide recount and to appeal the recount. Amended Complaint ¶¶ 44-45; Response, pp. 46-47.

The Amended Complaint alleges that Ms. Wolfe committed three violations of Wisconsin Statutes.

First, the Amended Complaint asserts that Ms. Wolfe, in preparing and transmitting the Certificate of Ascertainment, acted without authority and without an affirmative vote of at least two-thirds of the members of the Commission, as the Amended Complaint alleges is required by Wis. Stat. § 5.05(1e).

Second, the Amended Complaint asserts that, by preparing the Certificate of Ascertainment before expiration of the time to request a full statewide recount, Ms. Wolfe violated Wis. Stat. § 7.70(5)(a).

Third, the Amended Complaint asserts that, by preparing the Certificate of Ascertainment before expiration of the time to appeal the recount, Ms. Wolfe violated Wis. Stat. § 7.70(5)(a).

In her Response, Ms. Wolfe asserts that she acted within the scope of her delegated authority in supervising and participating in the preparation and transmittal of the Certificate of Ascertainment, which she contends did not require an affirmative vote of Commission members. Ms. Wolfe also asserts that the procedures for certifying the election of presidential electors under Wis. Stat. § 7.70(5)(b) are distinct from the procedures for certifying the results of other elections under § 7.70(5)(a), such that the Commission is not required to wait for exhaustion of all recount and appeal proceedings before acting to certify presidential election results.

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 Ms. Wolfe Acted Outside The Scope Of Her Delegated Authority.

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The claims in this action arise from Ms. Wolfe's involvement in the transmittal of the Certificate of Ascertainment to Governor Evers on November 30, 2020. The obligation to prepare this certificate falls to the Commission, according to the plain language of Wis. Stat. § 7.70(5)(b):

For presidential electors, *the commission* shall prepare a certificate showing the determination of the results of the canvas 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. [emphasis added]

It is undisputed that the Commission adopted a Delegation of Authority, which, as amended on February 27, 2020, delegates to Ms. Wolfe, as the Administrator of the Commission, the authority to "certify and sign election related documents" provided that she first "consult[s] with the Commission Chair to determine whether a special meeting is conducted before action is taken." Response, Ex. A, p. 1. No party has alleged in this case that the Commission's delegation of authority to certify and sign "election related documents" was improper.

The Commission finds that the Certificate of Ascertainment prepared and transmitted on November 30, 2020 was an "election related document" within the meaning of the Delegation of Authority. That the Certificate of Ascertainment was related to an election is plainly apparent from the face of the document. It provides a "listing of the votes cast for the election of Presidential Electors, at a General Election held in the several towns, villages, cities, wards and election districts within the State of Wisconsin."

Ms. Wolfe's Response states that she supervised and participated in the preparation and transmittal of the Certificate of Ascertainment at the direction of the Commission Chair, after first consulting with the Chair about whether a meeting of the Commission would be conducted prior to preparation of the certificate. According to the Response, the Chair directed that no meeting would be held. You did not dispute these facts in your reply or in any other statement or brief. Accordingly, the Commission finds that Ms. Wolfe consulted with the Chair as required by the Delegation of Authority.

In sum, the Commission finds that there is no probable cause to believe that Ms. Wolfe acted outside of the scope of the authority delegated to her by the Delegation of Authority when she supervised and participated in the preparation and transmittal of the Certificate of Ascertainment to Governor Evers.²

² In concluding that there is no probable cause to find that Ms. Wolfe acted beyond the scope of her delegated authority, the Commission need not reach a finding on any facts other than those recounted above. Nonetheless, the Commission notes that you did not dispute the facts set forth in Ms. Wolfe's Response indicating that "[t]he Commission has never in its history voted on the certification of an election for any office, including President" and that the Commission "has never required a vote of the Commission prior to the preparation of a § 7.70(5)(b) certificate." Response, pp. 13, 39. This established practice of the Commission undermines your argument that Wis. Stat. § 5.05(1e) required an affirmative vote of at least two-thirds of the members of the Commission before preparing the Certificate of Ascertainment.

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There Is No Probable Cause To Find That Ms. Wolfe's Preparation And Transmittal Of The Certificate Of Ascertainment Violated Wis. Stat. § 7.70(5).

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 the type of certificate set forth in § 7.70(5)(b).

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

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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.”

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.”).³

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

³ 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 the preparation of the Certificate of Ascertainment violated § 7.70(5). However, the Commission notes that the historical facts, which you have not disputed, again do not support the interpretation of § 7.70(5) underlying the allegations of the Amended Complaint. In her Response, Ms. Wolfe alleges that “the 2016 certificate of ascertainment ... was signed by Governor Walker and transmitted on December 12, 2016, which was *four days before* the deadline for filing a recount appeal expired.” Response, p. 36. 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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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.

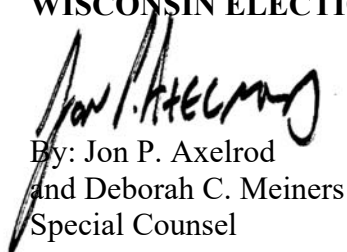
Right to Appeal – Circuit Court

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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