

STATE OF WISCONSIN
BEFORE THE ELECTION COMMISSION

Robert Pellegrini

Complainant,

v.

Darlene Igl

Defendant

REPLY IN SUPPORT OF COMPLAINT

The Complainant submits this reply pursuant to Wis. Admin. Code § EL 20.04(3) to show that there are no disputed issues of material fact and to request that the matter be immediately presented to the Commission for decision as a matter of law.

In her response, Defendant admits that she “permitted electors in the Village to submit absentee ballots via outdoor drop boxes” and that “ballots were cast at [these] locations.” Response ¶¶ 15, 23. Her response otherwise involves legal arguments that drop boxes are or should be permitted under Wisconsin law. Given that there are no factual disputes between the parties,¹ the Commission can and should promptly resolve the legal issues raised in the complaint.

And none of Defendant’s legal responses overcome the straightforward text of Wis. Stat. § 6.87(4)(b)(1), so the Commission should find that unstaffed drop boxes are not allowed under state law and direct Defendant to adjust her conduct in future elections accordingly.

¹ Defendant briefly asserts that the complaint “fails to identify where any allegedly illegal activity occurred and/or to identify witnesses.” Response ¶ 4. That is not true; the complaint described where drop boxes were located, Complaint ¶ 15, and is signed and sworn by complainant. But it does not matter anyway, given that Defendant admits she allowed drop boxes.

Defendant leads with suggesting that courts have already concluded drop boxes are lawful in Wisconsin, but that is simply not true. Defendant cites Justice Hagedorn’s concurrence in *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568, but, putting aside that a concurrence is not the law, Justice Hagedorn did not even address the issue raised in this complaint. Instead, Justice Hagedorn only commented about “voters who returned ballots to city election inspectors”—not unstaffed drop boxes—and even then noted that “[a] comprehensive analysis is not possible or appropriate in light of the abbreviated nature of this review,” 2020 WI 91, ¶¶ 36, 54 (Hagedorn, J., concurring). Moreover, the Wisconsin Supreme Court recently denied, for procedural reasons, a petition for original action that *did* raise the issue here, while noting that “[t]he issues raised in this original action petition may warrant our attention” in a different procedural posture. *Order Denying Petition, Fabick v. Wisconsin Elections Commission*, No. 2021AP428 (June 25, 2021).²

Likewise, the Seventh Circuit in *Trump v. Wisconsin Elections Commission*, 983 F.3d 919 (7th Cir. 2020), did *not* hold, as Defendant asserts, that “[t]he Legislature authorized WEC to issue this guidance [on drop boxes].” *E.g.*, Response ¶ 4. Rather, the Seventh Circuit rejected the claims raised in that case for procedural reasons, 983 F.3d at 925–26, and based on its interpretation of the Electors Clause, *id.* at 926–27, while emphasizing that “the errors that the President alleges occurred in the Commission’s exercise of its authority are in the main matters of state law ... [that] belong, then, in the state courts,” *id.* at 927.

When Defendant does address the text of the Wisconsin Statutes, the arguments she offers are all flawed or irrelevant. Defendant emphasizes that “a municipal clerk’s authorized representatives are permitted to receive absentee ballots.” *E.g.*, Response ¶ 10. That is undisputed,

² Available online at http://www.thewheelerreport.com/wheeler_docs/files/062521wscfabick_01.pdf

but beside the point. Defendant does not explain how an inanimate object like a drop box can qualify as an “authorized representative” of the municipal clerk, or how dropping a ballot into an unstaffed drop box is delivery “in person” to the clerk or an authorized representative.

The Defendant’s position appears to be that an “authorized representative” could be any person, group, or entity, or even an inanimate object. That interpretation does not pass the reasonableness test. *State ex rel. Kalal v. Cir. Ct. for Dane Cty*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (statutory language must be interpreted “reasonably, to avoid absurd or unreasonable results”). Because Wis. Stat. § 12.13 prohibits anyone other than the “election official in charge” from receiving a ballot, the more reasonable interpretation is that any “authorized representative” must be an election official under the statutes, i.e., a person appointed under the provisions of Wis. Stat. § 7.30(2)(a).

Similarly, Defendant’s argument that Complainant’s interpretation would require postal workers to become “authorized representatives” under Wis. Stat. § 7.30, Response ¶ 14, is also a red herring. That is not Complainant’s position, nor does it logically follow from Complainant’s position. There are two alternative ways to return an absentee ballot: by mail, or by delivery “in person” to the municipal clerk (which includes, through the definition in Wis. Stat. § 5.02(10), the clerk’s “authorized representatives”). Thus, the question of who can be an “authorized representative” is only relevant to the second alternative—in-person delivery—and not to mailing.

Defendant briefly asserts that Wis. Stat. § 6.87(4)(b)(1) does not “require that in-person delivery be made only by the elector” because the phrase “by the elector” comes after the verb “mailed” but is not repeated after the phrase “delivered in person.” Response, ¶ 11. Splitting and isolating portions of the text like this is inconsistent with interpreting statutory language “in the context in which it is used.” *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271

Wis. 2d 633, 681 N.W.2d 110. The full text, in context, reads, “The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk.” Given that the phrase “delivered in person” *immediately follows* the phrase “by the elector,” the only reasonable interpretation is that the voter, and only the voter, must either mail or deliver their ballot in person. In any event, this argument, even if it were correct, still would not allow drop boxes, because “in person” delivery also requires the presence of a municipal clerk (or an election official appointed under Wis. Stat. § 7.30(2)(a) as an authorized representative).

Defendant then offers policy arguments for why drop boxes *should* be permitted. She argues, for example, that drop boxes are similar to putting a ballot into the mail. Response ¶ 11, pp. 8–9. Any similarities between these two methods of returning ballots are irrelevant to interpreting the text of the statute. Putting a ballot in a drop box obviously is not “mail[ing]” the ballot, or “deliver[ing] [it] in person,” the only two options allowed under state law. But even if these policy arguments mattered—and they do not—the Legislature reasonably concluded that there are meaningful differences, from an election integrity perspective, between mailing ballots and dropping them into unstaffed drop boxes, and therefore authorized one and not the other. For example, mailed ballots contain additional evidence that they came directly from the voter (the return address, for example), and the United States Postal Service has a long history of reliably protecting and delivering the items entrusted to it. To be sure, there are plenty of examples of Postal Service failures, but the reality that everything has faults (some things more than others) was a reasonable basis for the Legislature to limit the methods for casting an absentee ballot to the two it selected.

Moreover, that limited selection is entirely consistent with a policy concern that the Legislature *did* specifically enact, namely that “the privilege of voting by absentee ballot must be

carefully regulated to prevent the potential for fraud and abuse” and that “matters relating to the absentee ballot process ... shall be construed as mandatory.” Wis. Stat. § 6.84(1), (2). The Legislature selected two, and only two, methods of casting an absentee ballot and intended those two methods to be mandatory.

Finally, Defendant cites a few cases from other jurisdictions concluding that drop boxes are permissible under other states’ laws, but none of these cases are relevant to the interpretation of Wisconsin law. Defendant first cites two cases interpreting Ohio law, Response ¶ 4, but the Ohio legislature explicitly authorized drop boxes for the 2020 election cycle, *Ohio Democratic Party v. LaRose*, 2020-Ohio-4778, ¶ 2, 159 N.E.3d 1241, and the parties *agreed* that drop boxes were permissible under Ohio law, *id.* ¶ 29; the sole question was whether Ohio law “limits the personal delivery of absentee ballots to a single location,” *id.* ¶ 22. Even putting those points aside, Ohio’s statute differs from Wisconsin’s in significant ways.³

The Pennsylvania case Defendant cites, *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), rested its decision “largely” on the “liberal[] constru[ction]” Pennsylvania courts apply to Pennsylvania’s election code and on Pennsylvania’s freewheeling, legislative-intent-focused method of statutory interpretation, *id.* at 356, 360–61, and it also invoked a Pennsylvania statute allowing county elections boards to freely “designate” “other place[s]” to cast ballots, *id.* at 357 (quoting 25 Pa. Stat. § 3151). Wisconsin, by contrast, has no comparable provision, Wisconsin’s absentee voting procedures are “construed as mandatory,” Wis. Stat. § 6.84(2), and are therefore “strictly enforced,” *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 597, 263 N.W.2d 152 (1978), and Wisconsin courts, unlike Pennsylvania courts, employ a textualist approach to statutory interpretation, *Kalal*, 2004 WI 58.

³ For example, as far as Complainant has been able to determine, Ohio has no statute analogous to Wis. Stat. § 6.84(1) and (2).

The last two cases Defendant cites are especially inapt, as neither considered the legality of drop boxes; the courts simply noted as background that Georgia and Arizona offered them. *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020); *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 832 (D. Ariz.). Even if these cases could be characterized as endorsing the legality of drop boxes in those states (and they cannot), those states’ laws also differ in relevant ways. To give just one example, Arizona allows election officials to establish additional voting locations as they “deem[] necessary or appropriate.” Ariz. Rev. Stat. § 16-246(c).

None of the other states Defendant references contain statutes quite like Wisconsin’s. They do not contain directives that “voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place” such that it “must be carefully regulated to prevent the potential for fraud or abuse,” and that absentee ballot procedures “shall be construed as mandatory.” Wis. Stat. § 6.84. Nor do those states appear to have case law similar to Wisconsin’s that where an election statute is mandatory, its exercise requires strict compliance, *Ahlgrimm*, 82 Wis. 2d at 597, or statutes like Wis. Stat. § 6.855, which provides that the office of the municipal clerk is the default location “to which voted absentee ballots shall be returned by electors for any election” and that any other location must be designated in the manner set forth therein.

To conclude, this complaint does not concern whether the Legislature *should* authorize drop boxes by statute; it concerns Defendant’s incorrect position that the Legislature *has* done so. It has not and the Defendant should be ordered to cease and desist from the unlawful practice.

Respectfully submitted this 23rd day of July, 2021.

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The Complainant, Robert Pellegrini being first duly sworn, states that he has personally read the above complaint, and that based on information and belief and advice from his counsel the complainant believes that the information contained herein is true.

[Signature]

Subscribed and sworn to before me
this 22nd day of July, 2021.

[Signature]

Notary Public, State of Wisconsin

My Commission expires is permanent

CERTIFICATE OF SERVICE

I hereby certify that I electronically served the foregoing on counsel for the Defendant, who has agreed in writing to accept electronic service of all filings in this matter.

A handwritten signature in black ink, appearing to read "Luke Berg", is written above a horizontal line.

Luke N. Berg