



Wisconsin Elections Commission

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March 10, 2022

John Petersen
2387 Turnberry Dr.
Beloit, WI 53511

Lisa Tollefson
Rock County Clerk
51 S Main St.
Janesville, WI 53545

Sent via email: jpp1931@gmail.com, Lisa.Tollefson@co.rock.wi.us

Re: In the Matter of: John Petersen v. Lisa Tollefson (Case No.: EL 22-05)

Dear Mr. Petersen and Clerk Tollefson:

This letter is in response to the verified complaint submitted by John Petersen (Complainant) to the Wisconsin Elections Commission (Commission), which was filed in reply to actions taken by election officials during the Spring of 2022 nomination paper review period. The complaint alleges that the Rock County Clerk, Lisa Tollefson (Respondent), erred by approving ballot access for Robert Potter after challenges to Mr. Potter's nomination papers.

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."

The Commission has reviewed the complaint, the response, the reply, and all supporting documentation. The Commission provides the following analysis and decision. In short, the Commission has determined that the Complainant has not shown probable cause to believe that a violation of law or abuse of discretion occurred with relation to Wis. Stats. §§ 8.07, 8.10, and 8.15, or Wis. Admin. Code §§ EL 2.05 and 2.07.

Summary of Complaint Allegations, Response, and Reply

The Complaint centers on two allegations. First, the Complainant alleges that the Respondent failed to strike three pages from Mr. Potter's nomination papers in response to a challenge. Specifically, the Complainant alleges that the Respondent allowed Mr. Potter to alter—after the nomination papers had been filed and without signing a correcting affidavit—the circulator dates on pages 1, 3, and 4 of Mr. Potter's nomination papers due to those circulator dates being earlier than some of the dates of the nominating signatures contained on those pages. The Complainant also supplied the Commission with video footage covering the time of this event. Due to this

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alleged failure to permissibly alter information contained on nomination papers, and due to the alleged illegibility of that correction, the complaint argues that these pages must be struck and that the Commission order the Respondent to do so.

Second, the complaint alleges that the Respondent failed to strike three names from Mr. Potter's nomination papers in response to a challenge that the three individuals did not reside at the addresses provided with their signatures. Specifically, the Complainant alleges that evidence from a property manager was shown to the Respondent that Josh Fillmore, Sara Munz, and Betty Hawk did not reside at the addresses they provided on Mr. Potter's Nomination Papers, that the evidence provided during the challenge met the burden of clear and convincing evidence, and that the Respondent's reasons for rejecting the challenge were insufficient. The Complainant provided to the Commission the evidence presented to the Respondent during the challenge as well as additional evidence that was not provided to the Respondent during the challenge. Further, the Complainant alleges that Mr. Potter's response failed to refute the challenge to these three individuals. The Complainant argues that the Commission should order the Respondent to strike these three names. The evidence provided will be examined below under Commission Findings.

In the Response concerning the first allegation, the Respondent states that the Rock County Clerk's office does not consider nomination papers to have been filed until the candidate and office agree upon the number of pages submitted and estimate a number of signatures present, and then sign a form, called a *Nomination Paper Chain of Custody* form, documenting that agreement. The Respondent admits that Mr. Potter handed her his nomination papers prior to Mr. Potter changing the certification dates on pages 1, 3, and 4. The Respondent alleges that she performed a review of the nomination papers and that, after asking Mr. Potter if he watched each signatory sign his nomination papers, she pointed out that the circulator date on pages 1, 3, and 4 did not align with the dates of the signatures on those pages. The Respondent admits that Mr. Potter then changed those dates on his nomination papers. The Respondent alleges that at the time Mr. Potter corrected those dates, he had possession of the nomination papers and that they had not been filed, Mr. Potter had not received or signed a Chain of Custody form, and the papers had not been stamped as received. The Respondent further alleges that she was able to read the dates and that the dates were valid.

Concerning the second allegation, the Respondent argues that her determination to reject the challenge to Josh Fillmore, Sara Munz, and Betty Hawk based on the evidence presented during the challenge was a reasonable exercise of her discretion. The Respondent stated that the email presented during challenge had been altered and did not have an affidavit to show authenticity, that not all occupants of an apartment may be on the lease, and that the candidate stated that he asked each signatory if the signatory lived in the apartment. The respondent alleges that she did not have time to conduct an investigation into the evidence presented.

In the Reply, regarding the first allegation, the Complainant reaffirms that he is disputing all signatures on pages 1, 3, and 4 due to the alleged failure of Mr. Potter to properly certify the circulator section and due to the alleged illegibility and/or ambiguity of the date as it appears on the page. He also reaffirms his argument that Mr. Potter's nomination papers were officially filed when the clerk first accepted physical possession of them, that the Respondent handed back pages 1, 3, and 4 and Mr. Potter altered those pages after they were filed, and that, in any case, a correcting affidavit is required to correct any consequential errors on Nomination Papers either before or after filing them. The Complainant states that the situation in this complaint is

distinguishable from that in EL 22-03 Voelker v. Cook because in that complaint the Clerk allowed the circulator to add a missing signature to incomplete Nomination Papers, whereas in this complaint the Respondent allowed Mr. Potter to correct dates that were complete but incorrect.

Regarding the second allegation, the Reply alleges that Mr. Potter did not supply affidavits in support of any of the three challenged signatories, and thus failed to rebut the challenge that the Complainant argues the Respondent should have accepted as valid, and which was an abuse of discretion not to accept as valid. The Complainant alleges that the Respondent did not use a demonstrably rational process or reach a conclusion that a reasonable person would reach in this situation. The Complainant alleges that the Respondent did not have any evidence in support of the email provided during the challenge being fake, and therefore any determination that the email was fake was not based on any evidence and thus an abuse of discretion. The Complainant alleges that a reasonable person following a demonstrably rational process would have made some attempt to authenticate the email, given any authenticity concerns. Further, the complainant states that there is no requirement that evidence presented during a challenge be authenticated beyond the notarization of the challenge itself. The Complainant notes that Mr. Potter's response to the challenge states that when he knocks on doors he asks anyone answering if that individual lives at that residence, but his response does not specify that he carried out this practice in these three cases. The Complainant alleges that there is no evidence that the three signatories actually reside at the residence listed and that the evidence in this complaint shows that they do not reside there. The Complainant also alleges that no evidence shows that the property manager was incorrect regarding any statement made in the email presented as evidence in the challenge.

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

Under Wis. Stat. §§ 5.05(1)(e) and 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 Mr. Petersen's complaint.

The Commission's role in resolving verified complaints filed under Wis. Stat. § 5.06, which challenge the decisions or actions of local election officials, is to determine whether a local official acted contrary to applicable election laws or abused their discretion in administering applicable election laws.

Commission Findings

Regarding the Complainant's first allegation there are two primary issues for the Commission to consider. First, were the nomination papers filed with the Rock County Clerk the moment that the Respondent had them in her physical possession. Second, was Mr. Potter required to use a changing affidavit when he altered the dates on pages 1, 3, and 4. There are no factual disputes over these two issues as the parties agree that Mr. Potter handed the Nomination Papers to the Respondent, the Respondent handed them back to Mr. Potter, and Mr. Potter then altered three certification dates. These issues require an interpretation of statutes and rules to determine when something may be considered filed and when a correcting affidavit is needed. A third issue, whether the dates as they appear on the nomination papers after being altered are legible, is a question of fact. The supporting evidence provided by both parties will allow the Commission to make a factual determination on this matter.

The Commission finds that Mr. Potter's Nomination Papers were not filed the moment the Respondent first gained physical possession of them. Following Wis. Stat. § 8.07, "[t]he commission shall promulgate rules under this chapter for use by election officials in determining the validity of nomination papers and signatures thereon," the Commission created Chapter EL 2. EL § 2.05(2) establishes that "[i]n order to be timely filed, all nomination papers shall be in the physical possession of the filing officer by the statutory deadline." It is thus a necessary requirement that Nomination Papers be in the physical possession of the filing officer by the deadline in order to be timely filed. EL 2.05(2) does not state that physical possession alone must be sufficient or that a filing officer must consider Nomination Papers to be filed the moment they are in the officer's physical possession. This rule allows for the reasonable exercise of a filing officer's discretion.

In this case, the Commission finds the Respondent's discretion to be not only reasonable but particularly clear. The Respondent stated that her office follows a procedure involving a signed agreement on what is being accepted as filed. The video evidence provided in this complaint supports this statement as the Respondent can be seen handing a form to Mr. Potter, who signs this form after he has made the alterations described in this complaint. After receiving this form, the clerk can be seen stamping the Nomination Papers. Considering Nomination Papers to be filed after both parties have agreed upon what is being received, signing a form to that effect, and after stamping the papers as received is a reasonable exercise of discretion that removes any doubt that the Commission might have had about when these Nomination Papers were considered filed by the filing officer.

The hypotheticals detailed in the Reply by the Complainant could be valid considerations under different circumstances, but in a case by case analysis such as this, the Commission cannot find that the procedure used by the Respondent was anything but a clear and orderly manner of accepting Nomination Papers as filed. If the Respondent did not know that Mr. Potter was the circulator, then it would have been improper to ask him about making an alteration to the nomination papers. However, the Respondent's statement that she asked Mr. Potter whether he watched each signatory sign the nomination papers was not contested and addressed this potential issue by requiring him to state that he was in fact the circulator. If rigid adherence by a clerk to this or another filing procedure caused Nomination Papers, which were intended by the person dropping them off to be filed the moment they were handed to a clerk at 4:59 PM, to be submitted at 5:05 PM, leading to a failure to timely file, the Commission might consider that an abuse of discretion in those circumstances. Because the Respondent and Mr. Potter appear to have agreed on their intentions, such a last-minute circumstance is not before the Commission.

Because the Commission finds that the Nomination Papers were not filed at the time they were altered, the Commission must next consider whether EL § 2.05(4) requires a changing affidavit for alterations made to nomination papers that have not yet been filed. EL § 2.05(4) states that:

Any information which appears on a nomination paper is entitled to a presumption of validity. Notwithstanding any other provision of this chapter, errors in information contained in a nomination paper, committed by either a signer or a circulator, may be corrected by an affidavit of the circulator, an affidavit of the candidate, or an affidavit of a person who signed the nomination paper. The person giving the correcting affidavit shall have personal knowledge of the correct information and the correcting affidavit shall be filed with the filing

officer not later than three calendar days after the applicable statutory due date for the nomination papers.

The first sentence of this rule makes sense only in the context of filed Nomination Papers. Those reviewing a Nomination Paper must presume the validity of the information appearing on it. This situation can only arise after a nomination paper has been filed. The end of the last sentence of EL § 2.05(4) also supports this interpretation and demonstrates the context of the rule: “the correcting affidavit shall be filed with the filing officer not later than three calendar days after the applicable statutory due date for the nomination papers.” This provision allows for a period after Nomination Papers have been filed for correcting errors of information on the nomination papers. The rule allows for more lenience by allowing incorrect but correctable information to be corrected even after the filing deadline. This prevents Nomination Papers from being rejected due to correctable technicalities. For these reasons, the Commission finds that EL § 2.05(4) applies after Nomination Papers have been filed. However, this finding does not resolve this issue.

Not all incorrect information on a Nomination Paper is correctable. EL § 2.05(4) applies to incorrect information on a filed nomination form that is capable of being corrected. An example of a correctable error after a Nomination Paper has been filed would be a signatory writing an incorrect address. However, if the correct address is not in the proper district, then the error would not be correctable. Further, there are errors of information that cannot be corrected before a Nomination Paper is filed. Were a candidate or circulator to write the wrong office being sought on a Nomination Paper, that information could only be corrected before filing the nomination paper if no signatories had signed under the incorrect information. If any signatories had signed, the error could not be corrected because the intent of a signatory to support a candidate for a different office cannot be presumed. These examples are to show that while a correcting affidavit is not required for corrections before a Nomination Paper has been filed, that does not mean that any correction is allowed. The question in this case is whether a correction to the circulator date before the Nomination Paper has been filed is an allowable correction.

Wis. Stat. § 8.10(3) states in relevant part that: “[t]he certification of a qualified circulator under s. 8.15 (4) (a) shall be appended to each nomination paper.” EL § 2.05(14) states in relevant part that “[n]o signature on a nomination paper shall be counted unless the elector who circulated the nomination paper completes and signs the certificate of circulator and does so after, not before, the paper is circulated. . . .” EL § 2.05(15)(b) states that “an individual signature on a nomination paper may not be counted when . . . (b) [t]he signature is dated after the date of certification contained in the certificate of circulator.”

EL § 2.05(14) & (15)(b) make clear that the signature of the circulator must be dated on or after the date of the latest signatory. These rules underscore the provisions of Wis. Stats. §§ 8.10(3) and 8.15(4)(a), which are incorporated in the certification of the circulator at the bottom of each nomination paper. By signing below the certification language, Mr. Potter agreed that he “personally circulated” and “personally obtained each of the signatures on this paper.” Further, he agreed that each signatory signed on the date opposite to the signatory’s name. Put simply, the circulator must observe each signing, and a date before the last date of a signature cannot demonstrate that this occurred. The Commission does not recommend the practice of pre-signing and dating Nomination Papers before collecting the signatures, as this may be a challengeable offense.

However, the Respondent in this case acted reasonably and did not violate the law or abuse her discretion. She asked the circulator if he personally witnessed each signature before pointing out that the date under the circulator's certification failed to align with that statement. By correcting the date, Mr. Potter was not altering anything that a signatory relied on when signing the Nomination Paper. He corrected only his own statement, and the information available to the Commission demonstrates that this was a correction and not a falsification. The circulator, in correcting the date, demonstrated to the filing officer that he personally did witness each signatory sign each nomination paper, and that he can be held to account for all information present on the form.

Finally, regarding the first allegation, the Commission finds that the corrected certification dates, though not perfectly clear, are nonetheless legible, and that it was not an abuse of discretion for the Respondent to accept them as legible and as showing the corrected date.

Regarding the Complainant's second allegation, the Commission must decide if the Respondent abused her discretion when she rejected the challenge to the signatures of Josh Fillmore, Sara Munz, and Betty Hawk. For the purposes of this Complaint, the Commission will assume that the email provided as evidence to the Respondent during the challenge was authentic, came from the property manager of the apartment building, and genuinely reflected the knowledge of that individual. The Commission does not find it necessary to examine this aspect of the Complaint, given that the Respondent also made a determination based on the content of the evidence provided. The Commission will thus examine this determination for an abuse of discretion based on the strongest reading of the evidence.

In reviewing a challenge to Nomination Papers, EL § 2.07(1) directs filing officers to apply the standards of EL § 2.05. EL § 2.07(3) establishes that "[t]he burden is on the challenger to establish any insufficiency," and EL § 2.07(4) makes clear that the burden of proof is "clear and convincing evidence." Wis. Stat. § 8.10(4)(a) states that, "[a]ll signers on each nomination paper shall reside in the jurisdiction or district which the candidate named on the paper will represent, if elected." EL § 2.05(15)(e) states that, [a]n individual signature on a nomination paper may not be counted when . . . (e) [t]he signature . . . is that of an individual who was not . . . a qualified elector at the time of signing the nomination paper."

The Commission finds that the Respondent did not abuse her discretion in finding that the evidence presented did not meet the standard of clear and convincing evidence. The respondent stated in denying the challenge that, "in many instances, not all occupants of an apartment are on the lease" and that "[t]he challenged candidate states in his response that he asked each individual if they lived at the residence." The respondent's reasoning that a property manager may not be aware of all people residing at a rental is reasonable. The statements from the property manager only provided conclusions about the individuals and did not supply the reasons for those conclusions. Renters may not reveal to property managers who is residing in their apartments. Though this may be an issue in the context of a lease, it is not an issue of residency under election laws. Because of the possibility that individuals were living in the apartments listed without the knowledge of the property manager, the conclusion that the property manager's statements do not amount to clear and convincing evidence is reasonable. Evidence that does not account for an easily imaginable possibility cannot be sufficient to overturn a filing officer's determination for an abuse of discretion.

Though it cannot use the evidence presented in exhibits 7 and 8 to determine whether the Respondent's determination was reasonable because the Respondent did not have the ability to weigh its strength, the Commission will briefly address the evidence. Under EL §§ 2.05(3) and 2.07(1), the Respondent was permitted but not required to gather extrinsic evidence. These provisions account for the busy circumstances of nominations and encourage challengers to present all evidence necessary to meet the burden of proof. Had the Respondent been presented with the evidence of exhibits 7 and 8, it is possible that she would have found this evidence convincing and disqualified Mr. Filmore's signature. Though the loss of this signature would not have taken the number of signatures below the threshold required for ballot access, the Commission would encourage anyone with evidence such as presented in exhibit 7 to submit it to the relevant filing officer in a challenge.

Commission Decision

Based upon the above review and analysis, the Commission does not find probable cause to believe that a violation of law or abuse of discretion has occurred with regards to Wis. Stats. §§ Wis. Stats. §§ 8.07, 8.10, and 8.15 or Wis. Admin. Code §§ EL 2.05 and 2.07.

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,

COMMISSION

A handwritten signature in black ink that reads "Megan L.M. Wolfe". The signature is written in a cursive, flowing style.

Megan Wolfe
Administrator

cc: Commission Members