

**STATE OF WISCONSIN
WISCONSIN ELECTIONS COMMISSION**

In the Matter of:)	
)	
Nomination Papers Filed by Bryan Kennedy Theodore A. Lipscomb, Sr.,)	Decision and Order
)	
 Petitioner,)	WEC Case No. EL 20-04
)	
and)	
)	
Milwaukee County Election Commission,)	
)	
 Respondent.)	
)	
)	

Pursuant to Wis. Stat. §§ 5.05(1)(e) and 5.06(6), the Wisconsin Elections Commission (“Commission”) is provided with the inherent, general, and specific authority to consider the submissions of parties to a complaint, and to issue findings and orders. Theodore Lipscomb, Sr. has filed a verified complaint with the Commission appealing the decision of the Milwaukee County Election Commission (“MCEC”) to approve ballot access for Candidate Bryan Kennedy for the 2020 Spring Election as a candidate for County Executive. The Commission has reviewed the complaint and supporting documentation as well as the response of the MCEC filed by Milwaukee County Clerk George Christenson and Elections Director Julietta Henry. The Commission issues the following Decision and Order.

Procedural Background

Candidate Bryan Kennedy filed nomination papers for the Office of Milwaukee County Executive containing 2,939 signatures with the Milwaukee County Election Commission on January 6, 2020. Following a review of these signatures, MCEC staff determined that Candidate Kennedy had submitted 2,684 valid signatures, which exceeds the total of 2,000 valid signatures required to qualify for ballot access for the Office of Milwaukee County Executive.

On January 10, 2020, Theodore Lipscomb, Sr. filed a challenge to the nomination papers of Candidate Kennedy. The challenge asserted that 844 signatures should be struck as invalid because the circulators who collected those signatures had previously circulated nomination papers for another candidate for the same office, in violation of Wis. Stat. § 8.04.

Candidate Kennedy’s response to the challenge argued that Wis. Stat. § 8.04’s prohibition regarding the same circulator collecting signatures for multiple candidates is directory rather than mandatory, there was no evidence of fraud on the part of the circulator or Candidate Kennedy, and that counting the signatures as valid gives effect to the will of the electors as required by Wis. Stat. § 5.01(1).

Based on the complaint filed with the Commission as well as the challenge and response filed with the MCEC, the relevant facts are not in dispute. Following its review, MCEC staff determined that Candidate Kennedy had filed nomination papers containing 2,684 valid signatures and qualified for ballot status. Mr. Lipscomb challenged 844 of the 2,684 signatures. The basis of the challenge was that three individuals who circulated nomination papers for Candidate Kennedy (Alisha Pettis, Lesa Trotter, and Dominique Thomas) also circulated and submitted nomination papers for David Crowley, another candidate for Milwaukee County Executive. Striking the challenged signatures would disqualify Mr. Kennedy from having his name on the Spring Election ballot.

The three individuals first circulated nomination papers for Candidate Crowley and subsequently circulated nomination papers for Candidate Kennedy. Candidate Kennedy's response to the challenge stated that the three circulators were hired by Urban Media, which was retained by Kennedy's campaign to assist with the circulation of nomination papers. Candidate Kennedy asserts that he was assured by Urban Media that its employees would not circulate nomination papers for any other candidates for County Executive.

On January 14, 2020, the Milwaukee County Election Commission conducted a hearing regarding the challenge filed by Mr. Lipscomb, Sr. After considering arguments of both parties, the MCEC considered a motion to approve the challenge and strike 844 signatures. The motion failed on a vote of 1-1, with one member of the MCEC being absent. As a result, the decision of MCEC staff to approve Candidate Kennedy for ballot status stood.

On January 17, 2020, the Commission received a timely, verified complaint from Mr. Lipscomb, Sr. appealing the MCEC's decision. The complaint asserts that Wis. Stat. § 8.04 requires striking the 844 signatures which were challenged before the MCEC, and that the MCEC abused its discretion by determining that § 8.04 was discretionary and permitting Candidate Kennedy's name to be placed on the Spring Election ballot. The complaint requests that the Commission strike signatures collected in violation of § 8.04 and determine that Candidate Kennedy does not qualify for ballot access.

On January 17, 2020, MCEC staff submitted a letter in response to the complaint. The letter states that, in light of the MCEC's tie vote regarding the challenge to Candidate Kennedy's nomination papers, the MCEC's response is limited to submitting the filings of the parties and the record of the proceedings. The Commission also notes that, while Candidate Kennedy is not a party to the appeal, the Commission has reviewed and considered his response to Mr. Lipscomb's challenge that was filed with the MCEC as well as the arguments made at the MCEC's January 14, 2020 hearing.

Candidate Kennedy chose not to file a reply to the MCEC's response to the 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 determining whether a local official acted contrary to applicable election laws or abused their discretion in administering applicable election laws.

Commission Findings

The Commission makes the following findings:

Wis. Stat. § 8.04 states as follows:

Nomination paper signatures. If any person signs nomination papers for two candidates for the same office in the same election at different times, the earlier signature is valid, and the later signature is invalid. *If any person circulates a nomination paper for two candidates for the same office in the same election at different times, the earlier paper is valid, and the later paper is invalid.*

Emphasis added.

There is no dispute that three individuals circulated nomination papers for two candidates for the same office at the same election at different times. The affidavits of each of the circulators state that they first circulated nomination papers for Candidate Crowley and subsequently circulated nomination papers for Candidate Kennedy. Based upon the plain language of Wis. Stat. § 8.04, these circumstances appear to require that the earlier papers circulated for Candidate Crowley are valid, and the later papers circulated for Candidate Kennedy are invalid and the signatures on those pages should be struck as invalid.

In his response to the challenge filed with the MCEC, Candidate Kennedy argued that the circulators' actions constituted an "innocent error by a third-party vendor" for which Candidate Kennedy should not be penalized. Candidate Kennedy noted that he was assured by Urban Media that the circulators retained by it would not circulate nomination papers on behalf of any other candidate for Milwaukee County Executive. Candidate Kennedy's response to the challenge argued that Wis. Stat. § 8.04 should be construed as directory, not mandatory, and that counting the challenged signatures as valid would give effect to the will of the electors as required by Wis. Stat. § 5.01(1) which states as follows:

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 with some of their provisions.

Candidate Kennedy cited several court decisions to attempt to support his assertion that Wis. Stat. § 8.04 should be construed as directory rather than mandatory and that counting the challenged signatures as valid would give effect to the will of the electors pursuant to Wis. Stat. § 5.01(1). The Commission concludes that the cases cited do not support this conclusion for several reasons.

Candidate Kennedy is correct that Wisconsin courts have long recognized that some election statutes should be construed as directory rather than mandatory, and that in such cases, the

term “shall” is construed to mean “may.” For example, in 1867 the Wisconsin Supreme Court found that

the statutory regulations for conducting an election are directory and not jurisdictional in their character, the main object of such laws being to afford all persons entitled to vote an opportunity to exercise the elective franchise, to prevent illegal votes, and to ascertain with certainty the true number of votes cast, and for whom. *State ex rel. Bancroft v. Stumpf*, 21 Wis. 586 (1867).

In 1966, the Wisconsin Supreme Court summarized the effect of determining whether an election statute is mandatory or directory:

An act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid. Deviations from directory provisions of election statutes are usually termed “irregularities,” and as has been shown in the preceding subdivision, such irregularities do not vitiate an election. *Gradinjan v. Boho*, 29 Wis. 2d 674, 682, 139 N.W.2d 557 (1966).

And in 1968, the Wisconsin Supreme Court described the type of election statutes which should be construed as directory instead of mandatory:

Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result, as where the statute merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election. *Lanser v. Kaconis*, 62 Wis. 2d 86, 91, 214 N.W.2d 425 (1974).

Candidate Kennedy cited other court decisions which have construed election statutes as directory. In each case, however, the statute at issue involved the mode or manner of conducting an election, such as processing and counting ballots, not the requirements or procedures for circulating and completing nomination papers and qualifying for ballot access. In 1978, the Wisconsin Supreme Court held that the deadline for filing nomination papers and the place of filing are mandatory requirements, and failing to satisfy those requirements disqualified a judicial candidate from ballot access. *Ahlgrimm v. State Elections Bd.*, 82 Wis.2d 585, 263 N.W.2d 152 (1978). In *Ahlgrimm*, the Court noted that the statute regarding the place of filing was not ambiguous, and also stated:

We view the requirements of sec. 8.10(2), Stats., and sec. 8.10(6), Stats., as being reasonable regulations of the right to be a candidate for public office. These regulations governing the time and place of filing nomination papers must be strictly enforced in order to insure the orderly exercise of such right. . . . Because the petitioner did not timely file with the State Elections Board his nomination papers for the office of circuit judge, his name cannot appear on the ballot. As

unfortunate and regrettable as this result might be, especially in this situation where there will be no candidate for circuit judge in the 21st Judicial Circuit on the ballot, nevertheless, the burden was on the petitioner to properly file. He did not do so. *Ahlgrimm*, 82 Wis. 2d at 597. (Citation omitted).

The Court of Appeals subsequently summarized how the “will of the electors” phrase in Wis. Stat. § 5.01(1) should be interpreted in determining whether an election statute is directory or mandatory:

However, our supreme court has interpreted this statute as applying only after an election has been held and the will of the electors manifested. See *State ex rel. Oaks v. Brown*, 211 Wis. 571, 579, 249 N.W. 50, 53 (1933). This holding remained undisturbed by our supreme court’s decision in *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis.2d 585, 263 N.W.2d 152 (1978). Accordingly, § 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, 604 N.W.2d 300 (Ct. App. 1999).

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 and only 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. To the contrary, regulations regarding nomination papers have been construed as mandatory, as in the *Ahlgrimm* decision, and regulations pertaining to the qualifications of circulators of a referendum petition have also been construed as mandatory, as in the *City of Chippewa Falls* decision.

Viewed in the framework established by the court cases cited above, it seems apparent that the prohibition on serial circulation of nomination papers in Wis. Stat. § 8.04 does not fit in the category of a directory statute. It is not related to the actual conduct of an election, the exercise of the right to vote, or the interpretation of a vote on a ballot. Rather, it is a regulation regarding the conduct of nomination paper circulators. It must be construed as mandatory and “must be strictly enforced in order to insure the orderly exercise” of the nomination process and ballot access decisions. *Ahlgrimm*, 82 Wis. 2d at 597.

In addition, because § 8.04 governs the process of circulating nomination papers and not the content of the papers, the challenged signatures cannot be counted as valid by virtue of EL § 2.05(5), Wis. Adm. Code, which states that “[w]here 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.” (Emphasis added). “Substantial compliance with the law” applies to the completeness of information on a nomination paper, not the process of circulating nomination papers.

The Commission recognizes that ruling the Kennedy nomination papers at issue are invalid may seem a harsh result when the candidate was assured by Urban Media that its circulators would not collect signatures for other candidates for the same office, and where there is no

evidence of fraudulent intent on the part of either the candidate or the circulators. However, as in *Ahlgrimm*, the statutory prohibition is unambiguous and it is a reasonable regulation regarding of the right to be a candidate for office, which the Legislature has created and the Commission is required to administer and enforce. As part of Chapter 260, Laws of 1979, the Legislature amended Wis. Stat. 8.04 as follows:

SECTION 55m. 8.04 of the statutes is amended to read:

8.04 Nomination paper signatures. If any person signs nomination papers for 2 candidates for the same office in the same election at different times, the earlier signature is valid and the later signature ~~shall be stricken. Any person who signs or circulates nomination papers for one candidate may later circulate nomination papers for another candidate for the same in the same election if he changes his mind and intends to support the latter candidate is invalid.~~ If any person circulates a nomination paper for 2 candidates for the same office in the same election at different times, the earlier paper is valid and the later paper is invalid.

This amendment specifically eliminated the ability of a circulator to collect signatures for multiple candidates for the same office at the same election, even if they changed their mind and intended to support the latter candidate. Instead, the Legislature created a strict prohibition against counting signatures as valid on the second set of nomination papers submitted. It is also instructive to note that even the earlier version of § 8.04 did not permit counting signatures as valid for both candidates involved.

Candidate Kennedy's response to the challenge argues that § 8,04 should be construed as directory because the Legislature has not "included an express and clear command," citing a 1981 decision of the Court of Appeals, *Matter of Hayden*, 105 Wis. 2d 468, 483, 313 N.W.2d 869 (Ct. App. 1981). In the Commission's opinion, however, § 8.04 itself is the "express and clear command." Rather than using the terms "shall" or "may," the statute plainly states that "the earlier paper *is* valid and the later paper *is* invalid." It leaves no room for the filing officer to guess as to whether the prohibition is mandatory or directory.

In addition, the first clause of Wis. Stat. § 8.04 invalidates signatures of individuals who have signed the nomination papers of another candidate for the same office at the same election. This is consistent with Wis. Stat. § 8.10(4)(b) which states that "[o]nly one signature per person for the same office is valid." Candidates would be hard pressed to argue that signatures of the same individual can be counted on nomination papers of two candidates, and yet that would be the logical result of treating the serial circulator provision of Wis. Stat. § 8,04 as directory.

Declining to enforce the prohibitions in Wis. Stat. § 8.04 would put other candidates that comply with the rules at a disadvantage. Also, if § 8.04 is construed as directory rather than mandatory, applying the same logic to other procedural requirements would effectively eliminate all rules governing the nomination paper process. In addition, such an interpretation would eliminate any certainty regarding what, if any, rules apply to the circulation process and govern review by filing officers.

Ultimately, it is the candidate's responsibility to ensure that the nomination papers they file have the minimum number of required signatures. "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." *EL § 2.05(1), Wis. Adm. Code*. The circulation period affords candidates the opportunity to screen their nomination papers and to proactively strike signatures that are invalid prior to filing. "After a nomination paper has been signed, but before it has been filed, a signature may be removed by the circulator. . . ." *EL § 2.05(16), Wis. Adm. Code*.

A candidate who does not vet their nomination papers prior to filing assumes the risks and mistakes resulting from circulators who are unaware of or do not comply with the regulations governing the circulation of nomination papers. It is true that a violation of Wis. Stat. § 8.04 cannot be detected by simply reviewing the candidate's own nomination papers. But given the number of candidates circulating nomination papers for the Office of County Executive, the apparently common practice of relying on paid circulators rather than circulators who support a single candidacy, and the filing of nomination papers late in the circulation period, candidates are responsible for ensuring that procedural requirements such as § 8.04 are satisfied. Noncompliance with the requirements of nomination paper circulation cannot be excused simply because circulators acted based upon their mistaken understanding of or disregard for the laws. Furthermore, the consistent evaluation of nomination papers by filing officers cannot be based upon the knowledge or expertise of individual circulators.

Conclusion

For the reasons stated above, the Wisconsin Elections Commission finds that the Milwaukee County Election Commission did not comply with the election laws when it accepted signatures on nomination papers for Candidate Bryan Kennedy which were collected by circulators who had previously collected signatures for Candidate Crowley in violation of Wis. Stat. § 8.04. The Commission finds that § 8.04 is unambiguous and is to be construed as a mandatory regulation of the circulation process.

The Commission finds that 844 signatures submitted by Candidate Kennedy shall be stricken as invalid, resulting in a total of 1,840 valid signatures, which is less than the 2,000 valid signatures required to obtain ballot status.¹ The Commission orders that Bryan Kennedy's name shall not appear on the ballot for the Office of County Executive at the 2020 Spring Primary or Spring Election.

¹ Based upon the record in the companion appeal regarding nomination papers of Candidate Jim Sullivan, the actual number of invalid signatures may be greater because circulators collected signatures for both Candidate Sullivan and Candidate Kennedy, and the dates of circulation appear to overlap. The record does not reflect a calculation of these additional signatures by the complainant, Candidate Kennedy or the MCEC. The Commission's calculation of invalid signatures is therefore the minimum number that should be stricken.

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.

Dated this 21st day of January, 2020.

WISCONSIN ELECTIONS COMMISSION

A handwritten signature in black ink that reads "Megan Wolfe". The signature is written in a cursive style with a large, prominent initial "M".

Meagan Wolfe
Administrator