

**STATE OF WISCONSIN  
WISCONSIN ELECTIONS COMMISSION**

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<b>In the Matter of:</b>	)	
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<b>Nomination Papers Filed by David D. King</b>	)	<b>Decision and Order</b>
<b>David D. King,</b>	)	
	)	
<b>    Petitioner,</b>	)	<b>WEC Case No. EL 20-03</b>
	)	
<b>and</b>	)	
	)	
<b>City of Milwaukee Election Commission,</b>	)	
	)	
<b>    Respondent.</b>	)	
	)	
	)	

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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. David D. King has filed a verified complaint with the Commission appealing the decision of the City of Milwaukee Election Commission (“CMEC”) to deny Mr. King ballot access for the 2020 Spring Election as a candidate for Mayor. The Commission has reviewed the complaint and supporting documentation as well as the verified response of the CMEC filed by Executive Director Neil Albrecht. The Commission issues the following Decision and Order.

Procedural Background

Nomination papers for the Office of Mayor for the City of Milwaukee containing 1,556 signatures were submitted to the City of Milwaukee Election Commission by Candidate David D. King on January 7, 2020. There is no dispute that all other required ballot access documents were timely submitted to the CMEC by Candidate King. Following a review of these signatures after the filing deadline had passed, the CMEC determined that Candidate King had submitted 1490 valid signatures, which is 10 signatures short of the 1,500 valid signatures needed to qualify for ballot access. No formal challenge to Candidate King’s nomination papers pursuant to Wis. Admin. Code EL § 2.07 was filed with the CMEC by the January 10, 2020 deadline.

Executive Director of the CMEC, Neil Albrecht, initially informed Candidate King on January 10, 2020 (at approximately 5:50 p.m.) that he could file corrective affidavits to rehabilitate up to 15 signatures that were struck due to nomination paper circulator issues if they were filed by Monday, January 13, 2020. On the morning of January 13, 2020, Candidate King’s nomination paper circulators appeared at the CMEC and submitted corrective affidavits. There appears to be no dispute that if the corrective affidavits were honored, 15 additional signatures would have been deemed valid and Candidate King’s

nomination papers would have contained 1,505 valid signatures, exceeding the 1,500 signatures required to qualify for ballot access.

On the afternoon of January 13, 2020, Deputy Director of the CMEC, Terri Gabriel and Mr. Albrecht contacted the Wisconsin Elections Commission to confirm the due date for filing corrective affidavits. Commission staff noted the Administrative Code provision, EL § 2.05(4), which states that corrective affidavits must be filed with the filing officer “not later than three calendar days after the applicable statutory due date for the nomination papers.” Pursuant to this provision, the deadline to file corrective affidavits was the close of business on January 10, 2020.

This information corrected Mr. Albrecht and Ms. Gabriel’s belief that the deadline for Candidate King to file corrective affidavits was January 13, 2020 because he had not been notified of the deficiencies in his papers until after the deadline to file corrective affidavits had passed. Mr. Albrecht and Ms. Gabriel believed the applicable deadline was the same as the deadline for filing a response to a nomination paper challenge, which would have been January 13, 2020 if a challenge had been filed on January 10, 2020. Wis. Admin. Code EL § 2.07(2). Unfortunately for Candidate King, the review of his nomination papers by the CMEC and notification of the deficiencies in his papers occurred after the deadline to correct any issues had passed. Mr. Albrecht notified Candidate King on the afternoon of January 13, 2020 that the corrective affidavits could not be accepted as they were not filed timely and that his nomination papers did not contain the 1,500 valid signatures required to appear on the ballot.

On January 16, 2020, the Commission received a timely, verified complaint from Candidate King, appealing the CMEC’s decision to the Commission. Candidate King’s complaint requests that the Commission honor the corrective affidavits that were filed, and requests that his name be placed on the ballot. Candidate King states that the Wisconsin Supreme Court “has long recognized that election statutes are discretionary, not mandatory.” He states that the law allows the Commission to view the failure to comply with the directory provisions in state law as an irregularity which does not invalidate the signatures of those electors who stated their desire to include him on the ballot.

On January 16, 2020, Mr. Albrecht filed a timely, verified response to Candidate King’s complaint. Mr. Albrecht confirmed that his initial reading of the Wis. Admin. Code EL § 2.05(4) lead him to believe that the deadline for filing corrective affidavits was January 13, 2020. The subsequent clarification of that rule lead Mr. Albrecht to revisit that interpretation and determined the deadline was in fact January 10, 2020. Mr. Albrecht’s response detailed the process used to review and process nomination papers for 50 candidates for citywide and aldermanic offices, which included the review of nearly 48,000 signatures. The response described the “first-in/first-out” review process used by the CMEC and indicated that Candidate King was among the last candidates to file nomination papers.

As a result, CMEC staff reviewed Candidate King’s nomination papers only after reviewing nomination papers other candidates. Mr. Albrecht’s response also stated that because the number of signatures submitted by Candidate King was so close to the statutory minimum,

additional time was invested to review his papers to be certain of the outcome. Mr. Albrecht, in consultation with the Milwaukee City Attorney, determined there was no statutory deadline for a filing officer to complete the review of nomination papers other than the deadline for certification of the names to be on the ballot, which was January 14, 2020. The response also noted that there is no statutory requirement for a filing officer to contact candidates prior to the corrective affidavit deadline and notify them of the process to fix errors. Candidates are responsible for reviewing his or her nomination papers and ensuring they are sufficient. Wis. Admin. Code EL § 2.05(1). Mr. Albrecht noted that the deadline for filing corrective affidavits is three days after the statutory deadline for filing nomination papers and there is no grace period contained in that section of the administrative code.

Mr. Albrecht's response stated that his phone call to Candidate King stating he could file corrective affidavits on January 13, 2020 was incorrect, however the outcome of the review of the nomination papers was not incorrect. Without corrective affidavits on file by the January 10, 2020 deadline, Candidate King did not have a sufficient number of signatures to qualify for ballot placement. The response also noted that Mr. Albrecht's phone call to Candidate King about filing corrective affidavits occurred after the deadline for filing such affidavits.

Mr. Albrecht stated that it was not clear to the staff of the CMEC or the members of the CMEC which election laws are considered "directory" or discretionary and which are not. At the time of Candidate King's hearing before the CMEC, the members felt it appropriate to follow "the letter of the law" and enforce the deadline, understanding that Candidate King had the opportunity to file an appeal with the Commission for further guidance on this issue.

Candidate King chose not to file a reply to the CMEC'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 his or her discretion in administering applicable election laws.

### Commission Findings

The Commission makes the following findings:

#### **Correcting Affidavits**

The Commission's administrative rules allow candidates that file nomination papers which contain errors to file a correcting affidavit to rehabilitate the page or signature(s) contained on the page. "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 deadline for the nomination papers." Wis. Admin. Code EL § 2.05(4).

For correcting affidavits to be accepted by a filing officer for the Spring 2020 election cycle, correcting affidavits needed to be filed with the filing officer by the close of business on Friday, January 10, 2020. The Commission considers a filing deadline, clearly articulated in the administrative code provisions governing nomination paper review to be mandatory, and not directory or discretionary. If the correcting affidavit is properly completed and timely filed, it can correct filing dates, clarify addresses for which a signature was collected, correct the circulator date included in a circulator's certification statement and add information to the circulator's certification such as the municipality of residence.<sup>1</sup>

However, upon reviewing two of the nomination papers at issue, the Commission concludes that seven of the excluded signatures should be counted as valid. CMEC staff struck five signatures were struck on Page 106 of Candidate King's nomination papers because of an issue that could have been corrected with an affidavit – the circulator did not include her municipality in the address listed in the circulator's certification. The Commission believes all signatures on this page should have been counted in the first instance, meaning there was no need for a correcting affidavit to be filed for these signatures to be counted. Page 106 was circulated by Coretta Burchette on December 2, 2019. While she did not include "Milwaukee" in her address as a circulator, she completed her information and full address, including "Milwaukee," as a signer of the nomination paper on Line 1 of this page.

Based on past decisions of the Commission, if a circulator's address is supplied by reference to other information on the same page, even if it is not on the address line of the circulator's certification statement, substantial compliance with the requirement can be found. Wis. Admin. Code EL § 2.05(5). The Commission finds that the five signatures contained on Page 106 should be added to Candidate King's total of verified signatures.

In addition, the Commission believes that two signatures excluded on page 107 should be counted as valid. This page was also rejected because the circulator had omitted her municipality in the address listed in the circulator's certification. The circulator was listed as Rosie Harvey-King and the address was listed as "5922 N. 34<sup>th</sup> Street 53209." While the address is incomplete in the circulator's certification, the same street address and zip code is listed, along with "Milwaukee" as the municipality in both the candidate's information in the header and as the campaign's return address.

Given that the candidate and circulator share the same surname, street address and zip code, the Commission concludes that the circulator's municipality can be supplied by reference to the other information on the same page, and this constitutes substantial compliance pursuant to Wis. Admin. Code EL § 2.05(5). The Commission finds that the two signatures on Page 107 should also be counted as valid. Even with these additional seven signatures, Candidate King's nomination papers contain 1,497 valid signatures and remain short of the required 1,500 signatures to be granted ballot access.

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<sup>1</sup> This is not an exhaustive list of all information that could be corrected by affidavit.

## **Responsibility of Candidate to File Sufficient Nomination Papers**

“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.” Wis. Admin. Code EL § 2.05(1). While the responsibility to prepare nomination papers with all required information clearly falls on the candidate, the statutes and administrative code still allow discretion on the part of the filing officer to make decisions as to whether papers that do not fully comply with all the requirements, substantially comply with the law. “Where 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.” Wis. Admin. Code EL § 2.05(5). Under Wis. Stat. § 8.30(1), “the official or agency with whom declarations of candidacy are required to be filed may refuse to place the candidate’s name on the ballot if . . . (a) [t]he nomination papers are not prepared, signed, and executed as required under [Wis. Stat. ch. 8].”

Ultimately, it is the candidate’s responsibility to ensure that the nomination papers they file have the minimum number of required signatures. The Commission certainly acknowledges that Candidate King was not made aware of any issues with his nomination papers until the time period to correct those errors had passed. As discussed below, the fact that the CMEC was not able to communicate the correctable errors contained in the nomination papers prior to the deadline does not invalidate that deadline.

Candidate King had three days to correct the errors contained on his nomination papers but did not do so. Other candidates for the same office, or other offices in the City of Milwaukee were held to the same filing deadline for correcting affidavits. More broadly, Candidate King’s decision to file his nomination papers close to the filing deadline contributed to the abbreviated timeframe for CMEC to review the nomination papers and detect errors in time for correction. The nomination paper circulation period for the Spring 2020 election was from December 1, 2019 through January 7, 2020 (38 days).

In some rare cases, if a candidate clearly demonstrated they were misled or relied on their detriment on information provided by a filing officer, and but for the information they received they could have complied with a requirement, the Commission has determined that it was appropriate to allow a candidate on the ballot despite noncompliance with a technical requirement. That however is not the case here because of the timing of events. Mr. Albrecht, in good faith unfortunately provided an incorrect deadline for Candidate King to file correcting affidavits, but at the time Mr. Albrecht conveyed this information, the deadline had already passed. Even if Candidate King had immediately acted upon Mr. Albrecht’s incorrect information, the deadline had already passed, and the affidavits would not have been valid.

## **Responsibility of Filing Officer to Conduct Facial Review of Nomination Papers and Determine Sufficiency**

Based on the Commission’s administrative code, the filing officer has the responsibility to receive the nomination papers from candidates and determine if they were in the physical possession of the filing officer by the deadline; conduct a facial review of the nomination

papers and where circumstances and time permit, consult extrinsic information to ascertain the correctness of the information submitted; and determine if the nomination papers contain the minimum number of signatures from the appropriate district or municipality.

“The filing officer shall review all nomination papers filed with it, up to the maximum number permitted, to determine facial sufficiency of the papers filed. Where circumstances and the time for review permit, the filing officer may consult maps, directories and other extrinsic evidence to ascertain the correctness and sufficiency of information on a nomination paper.” Wis. Admin. Code EL § 2.05(3).

“In order to be timely filed, all nomination papers shall be in the physical possession of the filing officer by the statutory deadline.” Wis. Admin. Code EL § 2.05(2). “Nomination papers shall contain at least the minimum required number of signatures from the circuit, county, district or jurisdiction which the candidate seeks to represent.” Wis. Admin Code EL § 2.05(6).

“Any information which appears on a nomination paper is entitled to a presumption of validity.” Wis. Admin. Code EL § 2.05(4). “Where 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.” Wis. Admin. Code EL § 2.05(5).

Neither the Commission’s administrative code nor Wisconsin Statutes prescribe a deadline for a filing officer to conduct and complete a facial review of a candidate’s nomination papers. The Commission’s administrative code and Wisconsin Statutes also do not require a filing officer to contact a candidate that has filed nomination papers and inform them of the errors they have made or inform them of their opportunity under the administrative code to correct errors by filing a correcting affidavit. As outlined in the section above, candidates are responsible for filing nomination papers that contain sufficient signatures to get on the ballot. In this instance, it is certainly unfortunate that Candidate King was not made aware of the errors on his nomination papers until the deadline to correct the errors had passed, but the CMEC did not miss any legal deadline or fail to carry out an affirmative duty to notify Candidate King of the issue.

The purpose of the facial review conducted by a filing officer is to discover obvious errors or omissions that a candidate may or may not be able to correct by filing a correcting affidavit. In some instances, if nomination papers are filed early enough in the process and a facial review is completed before the deadline, candidates have been required to recirculate nomination papers because the error was in the header of the paper which cannot be corrected by affidavit. The facial review is an important step in the process and is required by the administrative code, however, there is no definition of what a facial review of nomination papers is specifically required to include.

The facial review conducted by the CMEC (as described in the response to the complaint) appears to have delayed the review of some nomination papers until three days after the filing deadline, and thus negatively impacting a candidate’s ability to correct errors. Mr. Albrecht’s response stated that the CMEC “completes a thorough, line-by-line review of all nomination

papers.” The process “includes an initial review, followed by an executive review.” Mr. Albrecht’s response states that completing the review at “this level is considered imperative by the Election Commission to the ballot certification process.” Mr. Albrecht stated that the review for this cycle involved 50 candidates for citywide and aldermanic offices, which included the verification of nearly 48,000 signatures and required a substantial investment of staff time, hiring of temporary staff, overtime and other resources.

It is apparent to the Commission, that the resources expended to conduct the review of the nomination papers did not meet the demand in the City of Milwaukee, as the review of papers could not be completed prior to the correcting affidavit deadline. While a “first-in/first-out” system of review makes sense from a fairness perspective, it is also likely that because the review process took so long, some candidates were provided information about errors on their papers and were able to correct them, while some candidates (namely Candidate King) were provided no such information or opportunity. The problem was compounded by the CMEC staff’s misunderstanding of the deadline for file correcting affidavits. Had the deadline been properly understood, it may have been more likely that the CMEC would have placed more emphasis on informing Candidate King of the errors on his nomination papers prior to the end of the business day on January 10, 2020.

As discussed above, the Commission acknowledges that there is no statutory deadline for the review to be completed. In addition, the Commission understands the significant time involved in verifying that the addresses of nomination paper signers are located within the City limits and within aldermanic district boundaries when appropriate.

At the State level, the Commission follows internal procedures which generate a staff decision on sufficiency within 24 hours of nomination papers being filed in the office. The 24-hour policy provides prompt customer service to candidates involved and allows all candidates some opportunity to correct errors via a correcting affidavit. This procedure has worked well and provides candidates an answer as to whether there are issues with the papers they submitted and whether any corrections can be made to ensure that signatures which are filed are in fact valid. The Commission’s internal procedures also require staff members to reach out to candidates that have filed nomination papers that contain enough errors that could put their ballot status in jeopardy.

When a candidate appears at the Commission to file nomination papers, Commission staff sit with the candidate and conduct a review (facial) of all papers by looking for obvious errors in dates, signatures, circulator information and header information. Based on this facial review, Commission staff provides a receipt and informs the candidate whether it appears that they have a sufficient number of signatures. The nomination papers are then put into a queue and reviewed on a first-in/first out basis, with staff conducting a first review and second final review where the number of valid signatures is determined. This process is completed within 24 hours of receipt and the number of valid signatures accepted is communicated to the candidate. If the candidate’s nomination papers are close to the minimum number required, Commission staff explores ways that some pages could be corrected via affidavit, or if prior to the deadline, advise that the candidate may collect additional signatures up to the maximum allowed.

The Commission considers these internal procedures best practices, and not mandated by statute. But the Commission encourages CMEC to consider revisions to its facial review processes which would make it more likely that candidates would be informed of the need to file correcting affidavits or collect additional signatures in a timely manner. Had Candidate King's nomination papers been reviewed within 24 hours of filing, he would have received an answer regarding the sufficiency of his papers by 4:00 p.m. on January 8, 2020, allowing him two full days to contact his circulators and obtain correcting affidavits. The Commission recommends that the CMEC explore internal procedures that would involve a facial review that could assist candidates in discovering obvious errors prior to the deadline for filing correcting affidavits.

### Conclusion

While the Commission recognizes that Candidate King was not provided with information about insufficiencies on his nomination papers until after the deadline to correct the information via affidavit, the Commission finds that CMEC did not violate any election statute or administrative code provision in denying Candidate King ballot access and did not abuse its discretion in administering the election laws.

The Commission finds that Candidate King filed 1,497 valid signatures with the CMEC, three signatures short of the required minimum number to achieve ballot access. David D. King's name shall not appear on the ballot for the office of Mayor at the 2020 Spring Primary or Spring Election.

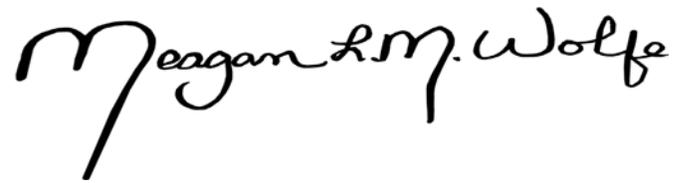
The Commission notes its concern that the CMEC's process for reviewing nomination papers delayed notification to Candidate King until after the deadline for filing corrective affidavits. The Commission encourages CMEC to explore revisions to its procedures so that its facial review can assist candidates in discovering obvious errors prior to the deadline for filing correcting affidavits. The Commission recommends that CMEC consider a policy of providing candidates an answer regarding sufficiency of nomination papers and potential correctable errors within 24 hours of receipt of the nomination papers.

### 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 21<sup>st</sup> day of January, 2020.

**WISCONSIN ELECTIONS COMMISSION**

A handwritten signature in black ink that reads "Megan H.M. Wolfe". The signature is written in a cursive style with a large initial 'M' and a distinct 'H.M.' in the middle.

Meagan Wolfe  
Administrator