



Wisconsin Elections Commission

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July 10, 2020

Nicholas McVey
3463 N. 98th St., #A
Milwaukee, WI 53202

Neil Albrecht, Executive Director
Milwaukee Election Commission
200 E. Wells St., Room 501
Milwaukee, WI 53202

Sent via USPS and email to:

officeofnicholasmevey@gmail.com and nalbrecht@milwaukee.gov

Re: In the Matter of: Nicholas McVey v. City of Milwaukee Election Commission
Case No. EL 20-14

Dear Mr. McVey and Mr. Albrecht:

This letter is in response to the verified complaint filed by Nicholas McVey with the Wisconsin Elections Commission (“Commission”) on May 18, 2020 in response to actions taken by election officials at the Marshall High School voting location during the April 7, 2020 Partisan Primary election. The complaint alleges that the Milwaukee Election Commission directed poll workers to knowingly attempt to destroy official election materials and to improperly store ballots away from the polling location, concealing and diminishing ballots.

The Commission has reviewed Mr. McVey’s complaint, Mr. Albrecht’s response on behalf of the Milwaukee Election Commission, and Mr. McVey’s reply along with all supporting documentation and provides the following analysis and decision. In short, the Commission finds that the Milwaukee Election Commission did not violate Wis. Stat. § 7.23(1)(k) or Wis. Stat. § 12.13(3)(L).

Complaint Allegations and Response

On May 18, 2020, Mr. McVey filed a complaint with the Commission pursuant to Wis. Stat. § 5.06 alleging that the Milwaukee Election Commission violated Wis. Stat. § 7.23(1)(k) and 12.13(3)(L) by directing election officials at the Marshall High School voting location to knowingly destroy official election materials and improperly storing ballots away from the polling location during the April 7, 2020 Partisan Primary election. The complaint alleges that the report tape from the DS200 voting machine which was thrown in the trash was a result tape that should not have been discarded. The complaint also alleges that the ballot boxes should not have been removed from the room in which voting was taking place. Finally, the complaint alleges that the total number of ballots cast at the Marshall High School voting location should

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have been in excess of 5,000 ballots based upon the Chief Inspectors' Statement that the machines were at capacity at 2:00 p.m. and the DS200 machines having a capacity of 2,500 each.

During the April 7, 2020 Partisan Primary election, a machine tape from one of the DS200 voting machines at the Marshall High School voting location was thrown in the trash. The photographs submitted by Mr. McVey of the DS200 machine tape are time stamped at 7:32 a.m. and include the report title "*Hardware Configuration Report*." The complaint included a link to a video posted on Facebook that documents a worker removing a machine tape and discarding it in a trash can within the polling location. Incident 6 on the EL-104 (Chief Inspectors' Statement) states that an "observer questioned the machine tape that was in the trash. He thought it was a results tape. We showed him it was not, but rather a test configuration tape run in the morning."

According to a notation on the EL-104, at approximately 2:00 p.m., the ballot boxes on the DS200 voting machines at the Marshall High School voting location were emptied and the ballots were stored and supervised in a lunchroom within the school. The EL-104 (Incident 3) stated that "around 2:00 p.m. two machines were at capacity with ballots. Emptied machine by putting ballots in ballot bags and securing in guarded lunchroom." The complaint included an untitled document that stated the DS200 voting machines have a capacity of approximately 2,500 pieces of paper in the main storage bin and approximately 100 pieces of paper in the emergency storage bin. The number of ballots emptied out of the voting machines is disputed.

On May 26, 2020, Mr. Albrecht filed a verified response with the Commission on behalf of the Milwaukee Election Commission. The response states that the DS200 report tape disposed of by election officials at the Marshall High School voting location was a hardware configuration report, not a results report. Mr. Albrecht noted that the hardware configuration tape is a report unique to the DS200 and generates whenever the machine is opened and runs prior to the zero-count tape. Mr. Albrecht notes in his response that the image of the retrieved tape is titled *Hardware Configuration Report* and contains a timestamp of 7:32 a.m. Mr. Albrecht states that the machine tape in question is not the zero-count report nor a results tape as those are both maintained as official election materials. Further, Mr. Albrecht states that the City of Milwaukee Elections Commission did not produce any results tapes after the polls closed on April 7 (presumably due to the WEC's guidance based on the clarification provided by the Federal Court in the Western District of Wisconsin).

The response also states that the ballot boxes were emptied at the direction of the chief inspector in an effort to prevent ballot jams. Mr. Albrecht stated that just under 4,000 people voted at the polling site in which Mr. McVey was observing, and given this "unprecedented turnout at a single site, efforts were made to prevent ballot jams in voting equipment by removing ballots when the Chief Inspector thought it was prudent. Mr. Albrecht documents the procedure used to remove the ballots and store them:

- 1) The removal of the ballots was publicly announced,
- 2) The incident was documented on the EL-104,
- 3) Ballots were removed by two Election Inspectors and placed inside ballot bags,
- 4) The ballot bags were located in a secure space inside the voting site (a school lunch room),
- 5) The space was supervised until the polls were closed and all the ballots were consolidated.

Finally, the response states that the steps following were consistent with ballot removal guidelines provided by the Wisconsin Elections Commission.

Mr. McVey filed a reply on June 4, 2020. The reply claims that the Milwaukee Election Commission did not respond to the complaint of knowingly attempting to destroy official election materials. The reply also asserts that Wis. Stat. § 5.02(15) clearly defines the polling place as the actual location wherein the elector's vote is cast and that no ballots should have ever left that room.

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. McVey'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

Voting Machine Tape

During the April 7, 2020 Partisan Primary election, a machine tape produced by one of the DS200 voting machines at the Marshall High School voting location was discarded in a trash bin. Evidence presented by Mr. McVey and the sworn response filed by Mr. Albrecht on behalf of the Milwaukee Election Commission clearly indicates that the discarded machine tape was a "Hardware Configuration Report" which is produced by the DS200 voting machines when they are turned on and are calibrating.

The statute cited by Mr. McVey in relation to the retention (Wis. Stat. § 7.23(1)(K)) of "all other official materials and supplies associated with an election may be destroyed 90 days after the election" is part of a larger statute that contain many provisions specific to materials used at an election (unused ballots, registration forms from election day, poll lists, the detachable recording units of a piece of equipment, voted ballots, election notices and ballot proofs). *See generally* Wis. Stat. § 7.23(1).

The "Hardware Configuration Report" generated is not related to any specific election and has no bearing on the results of the election. Additionally, the photograph of the report tape submitted by Mr. McVey is timestamped 7:32 a.m., which corroborates Mr. Albrecht's assertion that the tape was printed in the morning after the last DS200 was opened at that location to accept ballots. Based on the evidence presented, the Commission does not believe the Milwaukee Election Commission knowingly attempted to destroy official election materials in violation of Wis. Stat. § 7.23(1)(k). Some municipalities that use DS200 machines may keep this report generated from the equipment, and some may discard it as the City of Milwaukee did in this instance. The Commission has provided guidance regarding the retention of the zero count report and the results tape, but does not advise on the treatment of this report as it has very

little practical value and is not generally considered an official material related to an election that must be retained under Wis. Stat. § 7.23(1).

Ballot Removal

During the April 7, 2020 Partisan Primary election, at around 2:00 p.m., it was announced that ballots would be removed from the DS200 voting machines at the Marshall High School voting location, the incident was documented on the EL-104 form, the ballots were removed by 2 election inspectors and placed into ballot bags, and the bags were taken to a secure lunch room within the school. The ballot bags were supervised until the polls were closed and all ballots were consolidated. When asked, the Commission staff recommends openly and transparently emptying ballot boxes in a similar fashion. There is no statutory or administrative code provision which dictates where ballots are to be stored until consolidated, so the Commission recommends storing removed ballots in a safe location which can be observed by the public within the polling site until polls close. The Commission staff has provided municipalities guidance on how to properly remove ballots from voting machines and secure them in ballot bags. The guidance given emphasizes transparency, suggesting that election officials announce to the public that they will be emptying the voting machine and then quickly transitioning the ballots from the machine to ballot bags. The process is to be completed by 2 inspectors of the opposite political party (if possible based on party lists provided) and done in the full view of the public observers present.

The complaint claims that there should have been over 5,000 ballots cast if the 2 machines were at capacity at 2:00 p.m. when ballots were removed. The documentation of the incident on the EL-104 form states that ballots were emptied from the machines because they were at capacity. The response states that the machines were emptied to proactively prevent jams. After polls closed, the Milwaukee Election Commission reported 3,910 ballots cast. Mr. McVey did not provide any additional evidence that more ballots were cast than were reported or documented on the poll list.

Wis. Stat. § 12.13(3)(L) provides that no person may:

When not authorized, during or after an election, break open or violate the seals or locks on a ballot box containing ballots of that election or obtain unlawful possession of a ballot box with official ballots; conceal, withhold or destroy ballots or ballot boxes; willfully, fraudulently or forcibly add or diminish the number of ballots legally deposited in a ballot box; or aid or abet any person in doing any of the acts prohibited by this paragraph.

Based on the evidence provided, the Commission does not believe the Milwaukee Election Commission violated this statute by storing ballots that had been removed from the equipment in the cafeteria of the school that was being used as the polling location, or diminished the number of ballots legally deposited in a ballot box in violation of Wis. Stat. 12.13(3)(L). The chief inspector specifically authorized the inspectors to remove the ballots to proactively reduce the risk of jamming, which is reasonable given the high number of ballots being cast at that polling location. The process documented by Mr. Albrecht in his response is consistent with the advice Commission staff provides when training chief inspectors or answering questions from municipal clerks on this topic.

Commission Decision

Based upon the above review and analysis, the Commission finds that the Milwaukee Election Commission did not violate Wis. Stat. § 7.23(1)(k) by discarding a “Hardware Configuration Report” printed by a DS200 voting machine, or Wis. Stat. § 12.13(3)(L) by removing ballots from a DS200 to another secured room within the polling location, and therefore acted within its authority.

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 either of you have questions about this letter or the Commission’s decision, please feel free to contact me.

Sincerely,

WISCONSIN ELECTIONS COMMISSION

A handwritten signature in black ink that reads "Megan L.M. Wolfe". The signature is written in a cursive style with a large, stylized 'M' at the beginning.

Meagan Wolfe
Administrator

cc: Claire Woodall-Vogg, City of Milwaukee Election Commission(via email)
Wisconsin Elections Commission Members