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MEMORANDUM

TO: Challengers to Nomination papers and other Interested Parties
2018 General Election

FROM: Michael Haas, Staff Counsel
Nathan W. Judnic, Senior Elections Specialist

DATE: June 1, 2018

SUBJECT: Filing Challenges to Nomination Papers

This memorandum provides information to persons who are considering filing a challenge to the nomination papers of a candidate whose papers are required to be filed with the Wisconsin Elections Commission.

All challenges to nomination papers filed with the Wisconsin Elections Commission for the 2018 General Election will be considered and determined by the Commission at its June 11, 2018 meeting. The Commission's **meeting on June 11, 2018 will begin at 10:00 a.m.** (or as soon thereafter as a quorum is obtained) and is scheduled to be held in the Joint Committee on Finance Hearing Room, 412 East, State Capitol, Madison, Wisconsin 53703.

Challengers should familiarize themselves with the requirements of Wisconsin Statutes Chapter 8, the statutory chapter governing nomination papers and nominations. In addition, administrative rules further explain requirements of nomination papers and the challenge procedure, which can be found in the Wisconsin Administrative Code EL §§ 2.05 - 2.07. Wis. Adm. Code EL §§ 2.05 - 2.07 are the rules governing the treatment and sufficiency of nomination papers and challenges to nomination papers.

Wis. Adm. Code EL § 2.05 sets forth the standards for determining whether nomination papers comply with Wis. Stat. Ch.8 and Wis. Adm. Code EL § 2.07 sets forth the bases for challenges to those nomination papers. Both Wis. Adm. Code EL §§ 2.05 and 2.07 are rules attempting to interpret and clarify statutes; they are not statutes themselves. Because Wis. Adm. Code EL § 2.05(4) provides that "[a]ny information on a nomination paper is entitled to a presumption of validity," any challenge to that information bears the burden of rebutting that presumption.

Complaints challenging nomination papers are filed by complying with Wis. Adm. Code EL § 2.07(2)(a) of the Wisconsin Administrative Code, which reads as follows:

*(a) Any challenge to the sufficiency of a nomination paper shall be made by verified complaint, filed with the appropriate filing officer. **The complainant shall file both an original and a copy of the challenge at the time of filing the complaint.** Notwithstanding any other provision of this chapter, the failure of the complainant to provide the filing officer with a copy of the challenge complaint will not invalidate the challenge complaint. **The filing officer shall make arrangements to have a copy of the challenge delivered to the challenged candidate within 24 hours of the filing of the challenge complaint.** The filing officer may impose a fee for the cost of photocopying the challenge and for the cost of delivery of the challenge to the respondent. The form of the complaint and its filing shall comply with the requirements of ch. EL 20. Any challenge to the sufficiency of a nomination paper shall be filed within 3 calendar days after the filing deadline for the challenged nomination papers. The challenge shall be established by affidavit, or other supporting evidence, demonstrating a failure to comply with statutory or other legal requirements.*

2018 DEADLINES¹

For the 2018 General Election, the schedule for filing nomination papers and determining their validity and the validity of a challenge to them is as follows:

1. **June 1, 2018** - Nomination papers must be filed not later than 5:00 p.m., (Wis. Stat. § 8.15(1)), for all nominations for the Partisan Primary (offices to be elected at the November General Election).
2. **June 4, 2018** - Challenges to nomination papers must be filed not later than 4:30 p.m. (Wis. Adm. Code EL § 2.07). **The verified complaint must be delivered to the Commission at its offices at 212 E. Washington Avenue, 3rd Floor, Madison, Wisconsin, 53703, or preferably emailed to: elections@wi.gov not later than the prescribed time.**
 - a. Challenges must be made by verified complaint and must establish probable cause to believe that the paper or signature challenged does not comply with Wisconsin Statutes or the rules of the Wisconsin Elections Commission. (See discussion below.)

¹ Please be aware that, under Wis. Stat. § 8.15(1), Stats., for any office for which the incumbent has failed to file a Notification of Non-candidacy and has also failed to file nomination papers and a declaration of candidacy, a 72-hour extension of the time in which to file nomination papers and a declaration of candidacy for that office will be granted to any person other than the incumbent. Therefore, the deadlines set forth in this Memorandum do not apply in such circumstances and any challenges to nomination papers filed pursuant to that extension will be resolved on a case-by-case basis.

- b. The challenge should be accompanied by affidavits or other relevant documentation. Any challenge which is not established by the materials submitted as of the deadline for challenges will be denied.

3. **3 Days After Challenge Filed (June 7, 2018 is the Response Deadline if the Challenge is filed on June 4, 2018)** – A challenged candidate may file a written response not later than 3 days after the challenge has been filed. They may also appear before the Commission in person to respond to the challenge. A written response should be verified and should also be accompanied by affidavits or other documentation. Just as the burden of establishing a challenge is placed upon the challenger, the burden of rebutting an established challenge is placed upon the candidate whose papers are challenged.

4. **June 8-10, 2018** - The Commission's staff will prepare a written report on the challenges and any available responses. To whatever extent possible, the Commission's staff will contact circulators, affiants and other persons with personal knowledge of the circumstances under which the signatures were obtained. Given the time frame involved, however, staff verification will probably be limited to close cases, if at all.

5. **June 11, 2018** - The Commission will meet to consider the challenges, responses and hear any oral presentations by the Commission staff, challengers, and candidates. The Commission's **meeting on June 11, 2018 will begin at 10:00 a.m.** (or as soon thereafter as a quorum is obtained) and is scheduled to be held in the Joint Committee on Finance Hearing Room, 412 East, State Capitol, Madison, Wisconsin 53703.

Both the challenger and the candidate may appear before the Commissioner in person, and/or by representation, and be heard on the challenge – whether or not the candidate has filed a written response to the challenge. The challenger and the candidate will each receive 5 minutes for his or her presentation to the Commission.

DISCUSSION

All challenges to nomination papers must be in the form of a verified complaint. Any challenge which is not in the form of a verified complaint will not be considered by the Commission and will be returned to the complainant by the Commission's staff. A verified complaint is a complaint that the complainant swears, under oath, is true based on the personal knowledge or information and belief of the complainant. The oath must be sworn to before a notary or other person authorized to administer oaths.

Nomination paper challenge complaints should also follow the methodology provided below:

All challenges must refer to the nomination paper page number as shown on the nomination papers filed with the WEC for each nomination paper, any part of which is challenged. If a nomination paper page does not have a page number, contact the Commission's staff to establish a number for that page. (For instance: John Smith. Page 1 or Tom Jones Pages 3-12 and 15-23, etc.)

To be considered by the Commission, a complaint/challenge must establish probable cause to believe that a violation of election law has occurred. The "probable cause" requirement means that a complaint must allege facts, which, if true, would constitute a violation of Wisconsin's elections (not campaign finance) statutes. In the case of challenges to nomination papers, the complaint must allege a violation of Wis. Stats. ch.8, the statutory chapter governing nominations for the General Election ballot.

According to Wis. Adm. Code EL §§ 2.05(4) and 2.07(3)(a): "Any information which appears on a nomination paper is entitled to a presumption of validity," and "[t]he burden is on the challenger to establish any insufficiency. If the challenger establishes that the information on the nomination paper is insufficient, the burden is on the challenged candidate to establish its sufficiency. The invalidity or disqualification of one or more signatures on a nomination paper shall not affect the validity of any other signatures on that paper."

New grounds for a challenge which are not raised in an initial complaint, and which are not raised until after the deadline for filing a challenge, will not be considered by the Commission. Grounds which are alleged in a timely-filed complaint, but which are based on information and sworn statements to be provided after the deadline for filing challenges to nomination papers also will not be considered.

Challengers should be aware that signatures which have been questioned and not counted by the Commission staff may be the subject of "rehabilitation." Rehabilitation means that the candidate may have subsequently corrected the deficiency and thereby added the "rehabilitated" signature(s) to the candidate's total number of qualifying signatures. Consequently, challengers cannot rely on staff disqualification of signatures as a final determination and must raise any challenges to such signatures in the same time period in which all other challenges are required to be raised.

Challengers should also be aware that nomination paper challenges are political activity and may not be researched and/or prepared by State employees on State time.

Challenges may be made to an entire page or series of pages of a nomination paper, and challenges may also be made to individual signatures on a nomination paper page.

The Commission has published a manual titled "Common Nomination Paper Challenges," which generally outlines the challenge process, but also includes prior Commission decisions on common challenges. This manual can be found here:
<http://elections.wi.gov/publications/manuals/common-nomination-paper-challenges>

I. Challenges to a whole paper (or series of papers)

The first part of any challenge to nomination papers should consist of challenges (if any) to a whole paper, or a group of papers that have the same deficiency in the composition of

the paper. Challenges to a whole paper consist of two categories: (A.) Challenges to the heading of the nomination paper and (B.) challenges to the certification of the circulator.

Challenges to an entire page or to a group of pages, because of a deficiency (or deficiencies) in the heading or in the certificate of the circulator, should include a copy of at least one of the pages with the deficiency (or deficiencies) circled and, again, must refer, by page number, to the page or pages challenged. (*For instance: John Smith pages 1 through 27 fail to name the candidate or Tom Jones pages 2,3,6-11 &15-19 fail to identify the office sought, and pages 5-23 fail to contain the signature of the circulator, etc.*)

A. Challenges to the heading of the nomination paper

Wis. Stat. § 8.15(5)(a) and (b) requires that the heading of a nomination paper contain the following:

a) Each nomination paper shall have substantially the following words printed at the top:

I, the undersigned, request that the name of (insert candidate's last name plus first name, nickname or initial, and middle name, former legal surname, nickname or middle initial or initials if desired, but no other abbreviations or titles) residing at (insert candidate's street address) be placed on the ballot at the (general or special) election to be held on (date of election) as a candidate representing the (name of party) so that voters will have the opportunity to vote for (him or her) for the office of (name of office). I am eligible to vote in (name of jurisdiction or district in which candidate seeks office). I have not signed the nomination paper of any other candidate for the same office at this election.

(b) Each candidate shall include his or her mailing address on the candidate's nomination papers.

What the statute requires, but does not say, is that the heading must be substantially complete before the nomination paper is circulated. Otherwise, the signers would have no knowledge of what they were signing and that would render their signatures meaningless. Therefore, none of the information in the heading of the nomination paper, (i.e., candidate's name, candidate's address, political party represented, date of election, office sought, name of jurisdiction or district in which candidate seeks office), may be altered, amended, or added after circulation of the nomination paper. A challenge to the heading of a nomination paper should identify the page or pages (by number) and the defect or deficiency in the heading.

B. Challenges to the certification of the circulator

In most, if not all, cases, defects in the certificate of the circulator may be "repaired" by a correcting affidavit of the circulator -- because the defect has no effect on the validity of the signatures or on the information presented to the signatories when they signed.

Defects in the heading of a nomination paper, however, may not be “repaired” or altered after the paper has been circulated. The Commission ultimately decides whether the header of a nomination paper substantially complied with the requirements set forth in the statute.

II. Challenges to Individual Signatures

The second part of any challenge to nomination papers consists of challenges (if any) to individual signatures. Challenges to individual signatures on various pages should include a copy of **each and every page** on which one or more signatures are challenged. Each page should be numbered as described above and the challenge should refer to the signature(s) challenged, by page and line number. (*For instance: John Smith Page 3, Line 6 - the address of the signatory is outside the XX Assembly District.*)

Challenges to individual signatures, like any other challenge, must be based on the personal knowledge of the complainant or that of a person whose affidavit or sworn statement accompanies the challenge. Therefore, as an example, a challenge to the eligibility to sign of various signers of a nomination paper, based on the non-residency of those signers, must be accompanied by a map of the district showing their address to be outside the district; or by a signed statement from the election official (municipal clerk or deputy clerk) whose responsibility it is to determine the residency of electors of the district. The allegation by the complainant – that the signers are not residents of the district - without the attached map or statement from the election official, or other corroborating forensic evidence, is not sufficient to show probable cause.

If you have any questions about the Commission’s meeting to consider the challenges to nomination papers, please contact Michael Haas at 608-266-0136 (michael.haas@wisconsin.gov) or Nathan W. Judnic at 608-267-0953 (Nathan.judni@wisconsin.gov).

Relevant Wisconsin Statutes and Administrative Code Provisions:

Wis. Stat. Ch. 8: <http://docs.legis.wisconsin.gov/statutes/statutes/8>

Wis. Adm. Code EL Ch. 2: https://docs.legis.wisconsin.gov/code/admin_code/el/2