STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY
BRANCH 1

TIMOTHY ZIGNEGO, DAVID W. OPITZ and FREDERICK G. LUEHRS, III,

Plaintiffs,

v.

Case No. 19-CV-449

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, JULIE GLANCEY, ANN JACOBS, DEAN KNUDSON, and MARK THOMSEN,

Defendants.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR A TEMPORARY INJUNCTION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS

I. THE DEFENDANTS ARE COVERED BY WIS. STAT. § 6.50(3)

In the Defendants' view, they are not administering statutory commands but rather are engaged in a sort of standardless freelancing - just making it up as they go along. They are not acting in accordance with any particular statutory command and, in taking it upon themselves to update the rolls to remove persons who may have moved away from the address at which they are registered, they are not bound by legislative prescriptions as to how such removal is to be accomplished.

If the obligation to remove "movers" set forth in 6.50(3) does not apply to WEC, then WEC's efforts here are *ultra vires* meddling. But that is not the case. As more fully recited below, WEC has a statutory obligation to remove movers from the voter rolls. Wisconsin Stat. § 5.05(15), enacted after the adoption of § 6.50(3), has placed responsibility for design and maintenance of the registration list with WEC. And while WEC may believe it is free to do this in any way it chooses without regard to any other statutory command, the legislature, in moving responsibility for the rolls from local entities to WEC, did not repeal sec. 6.50(3). WEC is also charged with

administering chapters 5 through 12 and, in doing so, it is bound by the strictures and obligations included in those statutes.

Until 2003, Wisconsin Act 265 ("Act 265"), Wisconsin did not have statewide voter registration and did not maintain a statewide voter registration list. *See*, Legislative Council Act Memo for Act 265, https://docs.legis.wisconsin.gov/2003/related/lcactmemo/ab600.pdf. Prior to Act 265, municipalities maintained their own voter registration lists. But all of that changed when Wisconsin went to a top-down system of voter registration in order to be in a better position to comply with the Federal Help America Vote Act. *Id.*

Act 265 created Wis. Stat. § 5.05(15) to read (and currently still reads):

> Registration list. The board is responsible for the design and maintenance of the official registration list under s. 6.36. The board shall require all municipalities to use the list in every election and may require any municipality to adhere to procedures established by the board for proper maintenance of the list.

Thus, by law, WEC (and its predecessors) have assumed the obligations formerly imposed on the clerks and local election boards. Not only does WEC maintain the list, it may require municipalities to adhere to whatever procedures it properly establishes. *Id.* Thus, WEC's actions to remove movers from the rolls is not extrastatutory meddling. They are part and parcel of WECs legal duties and within its statutory authority.

But that authority must be exercised in accordance with the statutes. Nothing in the statutory changes that authorized WEC to carry out these duties freed it from pre-existing prescriptions as to how those duties were to be performed. WEC is, after all, a board of election commissioners and, thus, literally covered by § 6.50(3).

In addition, Act 265 authorized WEC to perform the obligations formerly placed on local officials by 6.50(3). But it did not change the nature of thoses duties. WEC may exercise the powers set forth in 6.50(3) but only in the way that they are set forth therein.

Any other interpretation of the law would render § 6.50(3) meaningless. In maintaining the registration list, the legislature dictated how movers were to be treated. It decided when the rolls should be updated and what obligations ought to be placed on voters to maintain their registration. It decided that, if there is sufficiently reliable information to conclude that someone has moved, that person must be given notice and must continue their registration within thirty days of that notice or have their registration status changed to ineligible.

Given that Act 265 placed maintenance of the registration list with WEC and that WEC is empowered to administer chapters 5 through 12, WEC must carry out its duties consistent with the direction provided by the legislature in those chapters. Statutes that are in *pari materia* are to be construed together. *Winebow, Inc. v. Capitol-Husting Co.*, 2018 WI 60, ¶30 & n.6, 381 Wis. 2d 732, 914 N.W.2d 631. It is reasonable to think that, in placing the maintenance of registration lists in WEC, the legislature intended that it comply with pre-exisiting law governing maintenance of the rolls. Any other reading of the law would render the requirement of 6.50(3) superfluous and effectively result in its implicit repeal and that, of course, is disfavored. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."); *State v. Villamil*, 2017 WI 74, ¶37, 377 Wis. 2d 1, 898 N.W.2d 482 ("[I]mplied repeal is a disfavored rule of statutory construction."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 327 (2012) ("[r]epeals by implication are disfavored—"very much disfavored" (quoting James Kent, *Commentaries on American Law* *467 n.(y1) (Charles M. Barnes ed., 13th ed. 1884))).

The Defendants' argument that the requirements of Chapter 6 do not apply to WEC flies in the face of these statutory duties and is belied by its own behavior as set forth below. If WEC is

not obligated to remove movers from the rolls, then why is it acting at all? WEC cannot cherry pick from the law and exercise the duties it wants while avoiding the obligations it does not.

Here, the relevant language of § 6.50(3), broken into two parts and with the references to the board of election commissioner highlighted is as follows:

> Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or ***board of election commissioners*** shall notify the elector by mailing a notice by 1st class mail to the elector's registration address stating the source of the information.
>
> If the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or ***board of election commissioners*** shall change the elector's registration from eligible to ineligible status.

The Defendants contend that the references to "the … board of election commissioners" in the statute do not refer to WEC but to only a municipal board of election commissioners under Wis. Stat. § 7.20. As set forth above, WEC's statutory duties and its own conduct establishes that the Defendants are wrong.

Under § 6.50(3), the first duty of the board of elections commissioners is to send notices to voters who, based on reliable information, have moved. In that regard:

1. WEC, not any municipal board of election commissioners, sent the notices to movers in 2017. WEC March 11, 2019 Staff Report at pps. 2-3, McGrath Aff. Ex. B.

2. WEC acknowledges that it did so under Wis. Stat. § 6.50(3)) *Id*. at 2 ("At the March 14, 2017 meeting, the Commission approved staff's recommendation to follow the statutory process related to voters for whom there is reliable information that they no longer reside at their registration address (Wis. Stat. § 6.50(3)).")

3. WEC, not any municipal board of election commissioners, sent the notices to movers in 2019. Wolfe Aff. ¶ 30.

4. WEC decided which voters would receive the notices, the form of the notices and all policies applicable to the notices and then notified municipal clerks and municipal boards of election commissioners of all of those decisions on October

4, 2019, the Friday before the notices were to be sent out. WEC Memo Dated October 4, 2019, McGrath Aff. Ex. E.

Whatever the Defendants now say in their brief to this Court, they believed in both 2017 and 2019 that they had the power under § 6.50(3) to determine which voters would receive the notices to movers and the power to send the notices to movers. The only way they had such power was if WEC was covered under § 6.50(3).

Under § 6.50(3), the second duty of the board of election commissioners is to change the registration status of voters who are sent the notices and who have not responded in 30 days from eligible to ineligible. In that regard:

1. WEC, and not any municipal board of election commissioners, has the statutory authority to complile and maintain the voter registration list. Wis. Stat. § 6.36(1)

2. WEC, and not any municipal board of election commissioners, has the statutory power to make changes to the list. Municipal boards of election commissioners are not referred to in Wis. Stat. § 6.36(1)(b)1.b. as having the power to make changes to the list.

3. According to WEC, itself, in comparing Wisconsin to Virginia, "Wisconsin, is considered a "top-down" state as the Department of Elections provides a single application and central storage of registration and election data used by the localities." WEC March 11, 2019 Staff Report at p. 6, McGrath Aff. Ex. B.

4. Thus, it is impossible to read § 6.50(3) to order that a municipal board of election commissioners has the duty to change the registration of voters who do not respond to the relevant notices when such boards have no power to do so.

5. It was WEC, and not any municipal board of election commissioners that actually changed the registration of the voters who received notices under this statute in 2017. Wolfe Aff. ¶ 18.

6. In 2018, when Milwaukee (which has a board of election commissioners) along with Green Bay and Hobart wanted to reactivate the registrations of voters in their communities who had received a movers notice, they had to request WEC to reactivate them and they were reactivated by WEC and not by, for example, the Milwaukee board of election commissioners (Wolfe Affidavit ¶24.)

Again, without regard to what the Defendants are now arguing before this Court, the Defendants exercised the power under under § 6.50(3) in 2018 to deactivate (and in some cases

reactivate) 335,701 voter registrations who had received the 2017 movers notice. WEC cannot have it both ways. It cannot run the operation from start to finish and then argue that it has no legal responsibility for the result. WEC, therefore, is subject to the command of § 6.50(3).

II. THE ERIC REPORT CONTAINS RELIABLE INFORMATION

If WEC receives "reliable" information that a voter has moved, it must take the steps required by § 6.50(3). The Wisconsin legislature has chosen to belong to ERIC and has appropriated tax dollars to receive the data that ERIC gathers. WEC, itself, has determined that the ERIC reports are sufficiently reliable to trigger the requirements of §6.50(3). Based on ERIC data, WEC has decided to send notices to hundreds of thousands of voters and to adopt a procedure for removal of non-responding voters from the rolls.

But WEC does not want to actually follow the procedures set forth in § 6.50(3). It seeks to pick and choose and modify its statutory obligations. Whether this is rooted in disagreement with the law (a conviction that the agency "knows" better) or bureaucratic malaise (doing nothing is easier than doing something) is of no importance. Agencies do not get to change or "improve" the law. *Koschkee v. Taylor*, 2019 WI 76, ¶20, 387 Wis. 2d 552, 929 N.W.2d 600 (reaffirming that "an agency's 'powers, duties and scope of authority are fixed and circumscribed *by the legislature*'" (emphasis added) (quoting *Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis. 2d 687, 698, 478 N.W.2d 582 (1992)). If WEC believes that deactivating registrations is too harsh, then it can ask the legislature to adopt a more forgiving regime. Until then, it must exercise its responsibility to maintain the registration list and administer Chapter 6 as the legislature has mandated.

Notwithstanding the legislative command to join ERIC and pay for and use its reports and ignoring its own conduct, WEC now argues that the ERIC mover report is not "reliable." In doing

so, it misconstrues the meaning of the term "reliable" in the context of § 6.50(3) and distorts the facts to suggest an "error" rate that is clearly wrong – preposterously so.

The meaning of the term "reliable" must be ascertained in light of the statute's structure. *See Kalal*, 271 Wis. 2d 633, ¶46 ("Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes . . ."). It is clear that the legislature, in choosing the term, did not mean that reliable information must be "perfect" or in no need of verification. Sec. 6.50(3) clearly contemplates that "reliable" information need not be 100% accurate and may include errors. It requires that this "reliable" information be verified (by notice to the voters with an opportunity to respond) and sets forth the particular process by which it is to be verified and the conditions under which voter registrations may be accurate. If "reliable" meant perfect or sufficiently accurate to be acted upon without additional verification, there would be no need for this verification process or for restrictions on the deactivation of registrations. "Reliable" in the context of the statute means sufficiently accurate to trigger the requirements of § 6.50(3).

WEC argues that there was a 14% error rate in the WEC data. It does not explain how it reached this number and it does not match the underlying numbers in the Defendants' own brief at pages 7, 8 and 9.[1] Arguments that are not fully developed or adequately explained should be ignored.[2] *See, e.g.*, *Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin*, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 ("We will not address undeveloped arguments.").

[1] The brief describe 6,153 voters who affirmed their addresses in response to the notice, 12,123 voters who were reactivated by WEC due to inaccuracies, and 5,984 voters who were reactivated by actually voting in 2018.

[2] While the numbers do not add up, it appears that WEC added those persons in Milwaukee, Green Bay and Hobart who had been flagged as movers in Hobart and who remain "active" because the municipalites objected to their removal and they have not registered elsewhere. *But these persons did not vote in those municipalities in 2018 and*

WEC's own data suggests the following. In 2017, it sent notices to 341,855 potential "movers." After two election cycles, including the record-breaking 2018 midterms, only 14,746[3] of these 341,855 voters either continued their registration or voted at their original address. This does not mean that the ERIC data was "erroneous"; these voters presumably did report a new address in a government transaction but the voter believes that he or she remains qualified to vote at the old address.[4] Assuming that all of these voters actually continued to live at this original address, this constitutes an "error" or "non-mover" rate of 4.3%. While there could be additional voters who did not move but failed to vote in either the 2018 or 2019 elections, 2018 turnout was roughly 80% of turnout in a presidential year. The rate of "nonmovers" is likely to be no greater than 5-6%.

Given the structure of § 6.50(3), an accuracy rate of approximately 95% is "reliable." If a screening test for cancer accurately identified persons suffering from the disease 90-95% of the time, it would clearly be sufficiently "reliable" to warrant further action. And it is sufficiently reliable to ask voters to affirm their registration.

WEC's problem is that it wishes the legislature would have required more elaborate or forgiving verification procedures than a notice that must be responded to within thirty days. Whatever the merits of that objection, it is not WEC"s call to make. As we explained in our initial brief, the state of Wisconsin has a legitimate – perhaps even compelling – interest in maintaining its voter rolls and ensuring that only the votes of eligible voters are counted. Pl.s' Br. in Support of Mot. for Temp. Inj. 15-17.

2019. The continuation of their registration is predicated on a request by Milwaukee, Green Bay and Hobart that they be excluded from WEC's updating of the rolls and tells us precisely nothing about whether they still live at their original addresses.

[3] Even this number appears to involve double-counting but we will use it because it gives the benefit of the doubt to the Defendants.

[4] While most of the time, this means the voter did not move, there are circumstances where a voter obtains a second temporary residence but continues to consider the "old" address as his or her domicile for voting purposes.

It is up to the legislature – not WEC – to determine what steps need be taken to verify that a voter who has a 95% probablilty of having moved has actually moved. Wisconsin has been exempted from the requirements of the NVRA because it offers election day registration. 52 U.S.C. § 20503(b)(2). Because of this safeguard, Congress has determined that Wisconsin ought to be free to ask voters to confirm their registrations and to deactivate their registrations if they fail to do so. *See id.* In Wisconsin, deactivation will not result in disqualification or disenfranchisement of a single voter. WEC may wish that the legislature imposed fewer requirements on voters and election officials but balancing the need for accurate rolls and ballot integrity with the ease of voting is not its call.

CONCLUSION

For the reasons set forth herein and in Plaintiffs original brief the Plaintiffs request that their motion for a temporary injunction or in the alternative for a writ of mandamus be granted.

Dated this 2nd day of December, 2019.

Respectfully submitted,

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