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VIA ELECTRONIC MAIL

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RE: Emergency Rule pertaining to curing absentee ballot certificates

Dear Members of the Joint Committee for Review of Administrative Rules:

We are writing with respect to the Emergency Rule promulgated by the Wisconsin Elections Commission (“WEC”) on July 11, 2022 to create Wisconsin Administrative Code EL 6.06 (pertaining to curing absentee ballot certificates). Specifically, we urge JCRAR to suspend all parts of the rule under Wis. Stat. § 227.26(2)(d) except for the proposed opening paragraph and subsection(1) which defines “address.” The rest of the Emergency Rule should be suspended because: (1) it conflicts with state law, and (2) it rule fails to comply with legislative intent. (See, Wis. Stat. § 227.19(4)(d) for list of factors which justify suspension of a rule by JCRAR).

First, we provide some history regarding the rule. On October 18, 2016, WEC issued a memo to municipal clerks interpreting Wis. Stat. § 6.87(6d) which provides, “If a certificate is missing the address of a witness, the ballot may not be counted.” In its October 18, 2016 memo WEC interpreted the statutory sentence - “If a certificate is missing the address of a witness, the ballot may not be counted” – to mean that if the address is not contained on the envelope that clerks must add the missing information to the ballot envelope if they are reasonably able to discern it and then count the ballot.

In the Legislative Audit Bureau’s October 19, 2021 report on Election Administration, the LAB reviewed the details of WEC’s interpretation and stated that if WEC believes that clerks should be permitted/required to correct or add missing witness addresses on certificates, then WEC ought to promulgate a rule on this subject. (Report at p. 44.)

On January 10, 2022 this Committee issued an order under Wis. Stat. § 227.26(2)(b) directing WEC to promulgate a rule within 30 days’ time relating to curing of absentee ballots by municipal clerks.¹ That statutory section states as follows:

1

https://docs.legis.wisconsin.gov/code/register/2022/793A3/register/actions_by_jcrar/actions_taken_by

If the committee determines that a statement of policy or an interpretation of a statute meets the definition of a rule, it may direct the agency to promulgate the statement or interpretation as an emergency rule under s. 227.24 (1) (a) within 30 days after the committee's action.

Despite the 30-day requirement in the statute and the express notice by this Committee that the new rule must be promulgated by February 9, 2022, WEC did not comply. WEC published a scope statement (Scope Statement 009-22) on February 7, 2022, but not the rule. WEC's noncompliance is not explained, and in violation of state law.

In addition to being more than 5 months late, the proposed rule is invalid because it conflicts with state law. Wis. Stat. § 227.10(2) specifically states that "No agency may promulgate a rule which conflicts with state law" and Wis. Stat. § 227.19(4)(d) provides that JCRAR may suspend a rule that conflicts with state law. That the rule conflicts with state law is obvious by comparing the rule to the statute which WEC says it is interpreting.

As stated above, Wis. Stat. § 6.87(6d) states as follows:

If a certificate is missing the address of a witness, the ballot may not be counted.

The language of the statute does not permit the clerk to take any "corrective actions" whatsoever. Instead, it directs the clerk not to count the ballot if the address of the witness is missing. Contrary to the statute's command not to count such a defective ballot, WEC's rule directs the clerks to add information to the absentee ballot envelope and then count it. In fact, it directs the clerks to add information to the ballot envelope without even notifying the voter ("The municipal clerk is not required to contact the voter, and may personally correct the certificate deficiency, if the municipal clerk can reasonably discern any missing or inaccurate information from outside sources, through independent research, or based on personal knowledge.", Proposed EL 6.06(2)(a)).

WEC has known for years that the clerks, themselves, are concerned about altering the ballot envelopes. In its October 18, 2016 interpretation WEC states that:

The Commission recognized the concern some clerks have expressed about altering information on the certificate envelope, especially in the case of a recount. On balance, in order to promote uniformity in the treatment of absentee ballots statewide, the Commission determined that clerks must attempt to obtain any information that is missing from the witness address and document any addition by including their initials.

But that balance of concerns is not WEC's to make. This state's election policies are made by the Legislature and not WEC. Simply put, it is up to the Legislature and not WEC to determine the proper balance. WEC's new rule directing clerks to add information to or alter information supplied by voters to absentee ballot envelopes when the full address is not provided, rather than

[jcrar on january 10 2022 wec ballot corrections/actions taken by jcrar on january 10 2022 wec ballot corrections](#)

following the Legislature's decision not to count them, infringes on the Legislature's core legislative function in violation of the separation of powers.

The Wisconsin Constitution provides that the "legislative power shall be vested in a senate and assembly," Wis. Const. Art. IV, § 1, and expressly confirms that laws may be enacted concerning suffrage and providing for absentee voting. Wis. Const. Art. III, § 2. "Laws" are enacted by the Legislature and not the executive branch. WEC is an executive branch agency and may not exercise legislative power (unless such power is expressly delegated by the Legislature).

This is not an instance of shared power or authority, and the Legislature did not delegate such authority to WEC. WEC's rule goes well beyond even the most liberal understanding of "interpreting or implementing" statutes, the limited rule making authority granted to WEC under Wis. Stat. § 5.05(1)(f).

WEC's "interpretation" of the sentence – "If a certificate is missing the address of a witness, the ballot may not be counted" – to mean that if the address is missing the clerk must take steps to try to obtain the missing information and then alter the ballot envelope by adding the information that the clerk thinks is correct and then count the ballot, is not an "interpretation" at all. Put differently, WEC's "interpretation" of the law changes the statute from one which tells the clerk what must be present on an absentee ballot certificate to one in which the clerk must assume responsibility to accurately complete certificates. It requires this to be done even though the clerk may not – and in almost all cases will not – be present when a certificate is completed and is now being directed to investigate (or guess at) the identity or address of a witness.

This amounts to a veto of the statutory command that a witness must provide an address and, in its absence, the associated ballot shall not be counted. This is especially true because Section 6.86(6d) must be read in conjunction with Wis. Stat. § 6.86(9) which states:

If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. 6.

Those two sections taken together give the clerk two, and only two options, to deal with an absentee ballot envelope with a missing address. Under subsection 6.86(9) clerks may: (1) return the defective ballot to the voter to be cured and then count the ballot if it is timely cured by the voter, or (2) not count the ballot. The new procedure now created by WEC is not an interpretation of the statute at all. Instead, it ignores the statutory directions to the clerk and creates a new procedure for handling defective absentee ballot envelopes.

Nor can the rule be said to be an "implementation" of the statute. WEC could adopt a rule providing for a procedure for the ballots (and associated ballot envelopes) that are not counted based on Wis. Stat. § 6.87(6d). For example, WEC could adopt a rule that all such ballots and associated ballot envelopes be kept separately with a notation that they were not counted per Wis. Stat. § 6.87(6d). That would be an "implementation" of the statute. But a rule that says that such ballots should be counted is the exact opposite of an "implementation" of the statute. It is an order

to clerks not to implement the statute. The executive branch cannot do that and the rule should be suspended for that reason.

Nor will WEC’s modification of the statutory command result in greater consistency. How much effort must clerks – and the employees of clerks – devote to “discerning” (i.e., attempting to uncover) the address of a witness. How certain must he or she be that the address that has been “discerned” is the correct one? How can we be certain that the degree of effort and the requisite certainty will be followed with a disinterested neutrality. WEC’s rule, apart from being unauthorized by statute, would introduce radical inconsistency into the counting of absentee ballots.

We do agree with WEC that the word “address” in Wis. Stat. § 6.87(6d) is somewhat ambiguous. We also agree that WEC has the authority to interpret the word “address” in this context under its rule making powers granted by Wis. Stat. § 5.05(1)(f). But we would reiterate that no interpretation given to the word “address” could justify any rule directing the clerks to alter absentee ballot envelopes. Whatever definition of address applies, the clerk’s task would only be to determine if the information required by that definition is contained on the ballot envelope or not. If it is present, the clerk continues the process for handling the ballot. If it is not present, then the ballot is not counted. The clerk should not add anything to or alter the ballot or the ballot envelope.

It could be argued that WEC’s definition in the proposed rule is insufficient because it does not include the state and zip code. In fact, WEC, itself, has previously determined that the witnesses address in this context includes the state and zip code. WEC did that when it created the form of absentee ballot envelope to be used in this state. That form, contained in WEC’s 2020 Election Day Manual and designated EL 122, sets forth the witness certification as follows:

CERTIFICATION OF WITNESS (signature and address of witness are required) I, the undersigned witness, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), certify that I am an adult U.S. Citizen and that the above statements are true and the voting procedure was executed as stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the voter to vote for or against any candidate or measure. I further certify that the name and address of the voter is correct as shown.

1. _____
▲ Signature of ONE adult witness

2. _____
▲ If witnesses are Special Voting Deputies, both must sign. ▲

▼ Address of witness or addresses of both SVDs ▼

1. _____

2. _____

Provide house number and street name or fire number and street name, city, state and zip code. OR If your rural address does not include a house number/fire number and street name, provide rural route number and box number, city, state and zip code

(Emphasis added.)

WEC is required to create and maintain the Election Manual by Wis. Stat. §7.08(3). In the process of doing so it determined that “address” in this context means house number and street name or fire number and street number, city, state and zip code.” WEC provides no reason for changing its interpretation at this point.

But we also note that Wis. Stat. §6.34(3)(b)2 which requires an identifying document for establishing residence to contain “[a] current and complete residential address, including a numbered street address, if any, and the name of the municipality” for the document to be considered proof of residence. WEC’s interpretation in the proposed rule is consistent with that statute. In addition, little seems to be added by requiring the state and there does not appear to be any reason to require the zip code, which exists solely to make the Post Office’s job easier and accomplished more quickly.

So WEC’s definition of “address” in the proposed rule does not appear to be inconsistent with any express provision in the statutes and whether it is consistent with legislative intent is unclear to us. However, the rest of the proposed rule is inconsistent with state law and fails to comply with legislative intent and we urge JCRAR to suspend the entire rule except for the opening paragraph and subsection (1).

Sincerely,

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Enclosure

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