Wisconsin Elections Commission

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November 4, 2022

Kenneth Brown	Tara McMenamin
610 Main Street	730 Washington Avenue
Racine, WI 53403	Racine, WI 53403

<u>Sent via email to</u>: alococo@will-law.org; scott.letteney@cityofracine.org; tara.mcmenamin@cityofracine.org

Re: In the Matter of: Kenneth Brown v. Tara McMenamin (Case No.: EL 22-59)

Dear Mr. Brown and Ms. McMenamin:

This letter is in response to the verified complaint submitted by Kenneth Brown ("Complainant") to the Wisconsin Elections Commission ("Commission"), which was filed in reply to actions taken by Clerk McMenamin of the City of Racine ("Respondent") concerning alleged violations of Wis. Stat. § 6.855 relating to Racine's use of a mobile van and alternate absentee sites in conjunction with in-office absentee return processes within the City Clerk's Office.

Complaints "…shall set forth such facts as are within the knowledge of the Complainant to show probable cause to believe that a violation of law or abuse of discretion has occurred or will occur." Wis. Stat. § 5.06(1). Probable cause is defined in Wis. Admin. Code § EL 20.02(4) to mean "the facts and reasonable inferences that together are sufficient to justify a reasonable, prudent person, acting with caution, to believe that the matter asserted is probably true."

The Commission has reviewed the complaint and the City of Racine Clerk's response. The Commission provides the following analysis and decision. In short, the Commission finds that the Complainant did not show probable cause to believe that a violation of law or abuse of discretion occurred.

Complaint Allegations and Response

On August 10, 2022, Mr. Brown filed a sworn complaint with the Commission pursuant to Wis. Stat. § 5.06 alleging that Clerk McMenamin violated Wis. Stat. § 6.855 by designating and using alternate absentee ballot sites while still allowing absentee processes to be conducted within the Racine City Clerk's Office.

Specifically, the following allegations were made:

- Wis. Stat. § 6.855 provides that the office of the municipal clerk is the default location "to which voted absentee ballots shall be returned by electors for any election."

Commissioners
Don Millis, chair | Marge Bostelmann | Julie M. Glancey | Ann S. Jacobs | Robert Spindell | Mark L. Thomsen

Administrator
Meagan Wolfe

EXHIBIT H

- If a clerk determines that, for some reason, the clerk's office is unavailable for in-person absentee voting, then the clerk may designate an alternate absentee ballot site or sites, but any other location must be designated in the manner set forth in § 6.855 and "The designated site shall be located as near as practicable to the office of the municipal clerk or board of election commissioners and no site may be designated that affords an advantage to any political party."
- Further, if the governing body of a municipality makes an election to designate an alternate site to the clerk's office under this section, then "no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners."
- Clerk McMenamin allowed voters to cast absentee ballots at alternate absentee ballot sites in the City of Racine during in-person absentee voting for the August 9, 2022, primary without complying with the requirements of Wis. Stat. § 6.855.
- In-person absentee voting processes were conducted in Racine at City Hall and at a mobile "election van" that moved to 21 locations during the two-week period allowed for early in-person absentee voting.
- In December of 2021, the Racine City Council pre-approved over one hundred fifty locations as alternate absentee ballot sites for all elections to be conducted during Calendar Year 2022.
- Conducting an election in this fashion would lead to voter confusion and create opportunities for partisan advantage in contradiction to Wis. Stat. § 6.855.
- Complainant Brown personally observed at least one voter casting an in-person absentee ballot at the election van on August 3, 2022, near Regency Mall, which was a site listed on the voteracine.org website as an alternate location for that day. Complainant Brown personally observed voters casting in-person absentee ballots at Racine City Hall that same afternoon.
- Complainant contends this constitutes a violation of statute in several ways (numbered sequentially for reference herein):
    1. Wis. Stat. § 6.855 provides that alternate absentee ballot sites "shall be located as near as practicable to the office of the municipal clerk or board of election." Here, the 21 alternate sites are not as near as practicable to the office of Ms. McMenamin. Many of the pre-approved locations being used were closer to the clerk's office than others that were utilized.
    2. Wis. Stat. § 6.855 also provides that "no site may be designated that affords an advantage to any political party." Many of the 21 alternate sites advantage the Democratic Party and some advantage the Republican Party. Collectively, however, the sites used by Ms. McMenamin afforded an advantage to the Democratic Party. Exhibit E to the complaint provides supportive analysis, most particularly by looking at the voting trends in the wards associated with the alternate sites.
    3. Wis. Stat. § 6.855 provides that if "the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners." The simultaneous use of Racine City Hall for absentee voting activities is a violation of this provision. It is no defense to argue that conducting in-person absentee voting activities outside of the clerk's office in Room 103 of City Hall complies with the statute. The city's website indicated, "You may also request and vote an absentee ballot in the clerk's office." Further, as alleged above, if voters went to the clerk's office to

cast an absentee ballot – as the Clerk's website stated they could – they were directed to Room 207. Room 207 was simply an extension of the clerk's office. Any other interpretation would make a mockery of the statutory requirements.

4. Wis. Stat. § 6.855 provides that "An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s. 7.15 (1) (cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for the election under s. 7.15 (1) (cm), if a primary is not scheduled to be held, and shall remain in effect until at least the day after the election." This provision requires a fixed location for the entire period of time and does not permit the temporary shifting locations permitted by Ms. McMenamin.
5. Ms. McMenamin is permitting in-person absentee voting, not in the buildings at the addresses designated, but at a van parked somewhere near those addresses. The statute does not permit that sort of temporary, unfixed location, and the notice to voters and the designation of the site does not reflect the actual location where ballots will be available and can be cast by the voter. Specifically, Wis. Stat. § 5.25 which governs "polling places" states that "public buildings" shall be used as polling places "unless the use of a public building for this purpose is impracticable or the use of a nonpublic building better serves the needs of the electorate." The plain language of the statute contemplates that "polling places" shall be in buildings and not in a transitory vehicle such as a van. Other statutory provisions also support this plain language, common-sense interpretation.

- The Complainant seeks an order from the Wisconsin Election Commission directing that, in her administration of the November 2022 general election and all future elections, Ms. McMenamin conform her conduct to the law and ensure that if alternate in-person absentee ballot sites are used that: (a) they be located as near as practicable to the office of the municipal clerk, (b) that they be in locations that confer no partisan advantage, (c) that no in-person absentee voting be done at City Hall, (d) that any in-person alternate absentee ballot locations be in fixed locations and available for the entire period established by statute, and (e) that no in-person absentee voting be permitted at a mobile location such as an RV, van, truck, automobile, etc.

The Respondents countered with the following:

- On August 5, 2020, the City of Racine Common Council lawfully approved the purchase of a vehicle generally to be used for voting purposes. Municipal governments are permitted to designate alternate absentee voting sites pursuant to Wis. Stat. § 6.855. There is nothing in Wis. Stat. § 6.855 prohibiting the use of a vehicle at an alternate absentee voting site. The Racine Common Council did not select sites based on a consideration of whether any location would confer a political advantage, but chose locations all over the City of Racine that were best suited for the City's goal of having voting accessible to all legal voters in the City of Racine.
- Specifically, the Respondent addresses each of the Complainant's allegations in order, contending that all five arguments fail and represent an effort to prevent the city from allowing as many legal voters to do so as possible:
  1. "Near as practicable" is a legal term of art, and the term does not represent a purely geographic standard. It is long standing precedent that the phrase "as near as practicable" encompasses something other than simply a pure geographic standard resolved through the use of a ruler on a map. *See Ashwaubenon v. Pub.*

Serv. Com., 22 Wis. 2d 38, 50-51, 125 N.W.2d 647, 654 (1963). In fact, treating the legal term of art "as near as practicable" as purely distance based is an "erroneous concept of law." *Id*. The Complainant's reading of the statute also necessarily contradicts itself. Under Wis. Stat. § 6.855(1), the designated sites shall be located as near as practicable to the office of the municipal clerk. However, under Wis. Stat. § 6.855(5), the legislature expressly permitted more than one alternate absentee ballot site to be designated. There can only be one "closest" under a measurement based interpretation of statute. The City of Racine chose alternate absentee sites on the basis of making voting accessible to every single legal voter in the City of Racine, and it required placing alternate absentee ballot sites across the entire city to do so.

2. The Complainant's math is based on incorrect information, and on May 17, 2022, the City of Racine approved new district wards as part of the redistricting process. The Complainant combined old ward boundaries that applied in the previous decade and their resultant partisan split with the locations selected for use in the August 9, 2022, primary and November 1, 2022, general election. Also, Wis. Stat. § 6.855 does not specify in what way an alternate absentee site may be determined to advantage any political party. Complainant has chosen one measure, which again relies on inaccurate wards, but he also ignores other factors that impact how a voter may rely on an alternate absentee site (*e.g.* business districts, bus routes, etc.). Under this method of calculation, where exactly would be an allowable place to locate an alternate absentee ballot site? There are no evenly split wards between the Republican Party and Democratic Party. To the extent that the Complainant argues that Clerk McMenamin has a duty to complete statistical models in an effort only to select sites that are proportionally similar to the total percentage of votes the Democratic Party receives in the City of Racine, such argument is equally absurd for the same reasons. Under Wisconsin's method of statutory interpretation, absurd or unreasonable results are to be avoided. It cannot be that the alternate absentee ballot sites are understood to "afford an advantage to any political party" simply by the sake of being located in an area in which the population votes for one party over the others. This would practically prohibit every municipality from selecting alternate absentee ballot sites. A more reasonable reading would be to have the city prevent direct and unambiguous advantages, such as placing a site near a party's local office or near a party's political rally.
3. The City of Racine properly followed Wis. Stat. § 6.855 and did not allow voting and returning absentee ballots in the Office of the City Clerk. The statute clearly states "[i]f the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted *in the office of the municipal clerk* or board of election commissioners." Wis. Stat. § 6.855. (*emphasis added*). As is well known, "statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry. *Kalal*, 2004WI 58, ¶45 (internal quotations removed). The Respondent did not allow any votes to be cast or returned *in* the City Clerk's office, as the Complainant admits. Instead, the Complainant takes issue with the City allowing votes to be cast and/or returned in a different portion of City Hall, a conference room, on a different floor of City Hall from the City Clerk's office, specifically not part of the City Clerk's office or overseen by her department. There is no support in the statute that the

voting cannot occur within a specific proximity of the clerk's office or that the entire building in which the city clerk's office resides becomes the city clerk's office by inference.

4. The City of Racine has fully complied with the requirement that alternate site designations are in effect for the requisite length of time. Wis. Stat. § 6.855 states "An election by a governing body *to designate an alternate site* under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s 7.15 (1) (cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for the election under s. 7.15 (1) (cm), if a primary is not scheduled to be held, and *shall remain in effect* until at least the day after the election." (*emphasis added*). The Respondent elected to use alternate sites, and those same alternate site elections will be in use for both primary and general elections. On December 7, 2021, the City of Racine designated numerous alternate sites, and that designation will remain in effect until at least the day after the November 8, 2022, election. The statute very specifically states "designate" and not "use" and provides a deadline upon which the designation must be made. If the Legislature had wanted to require a municipality continuously to use the sites it designated, the Legislature could draft a statute that states this requirement. It has not done so.
5. The final argument by the Complainant is that the City of Racine has used a mobile van as an alternate absentee ballot site when the statute requires a building also fails. Nothing in Wisconsin Statutes section 6.855 requires the use of a permanent building. The statute does not include the word building and does not specify that the alternate sites must be a building. Further, Complainant misreads the statutes he cites in support of the assertion that the alternate site must be a public building. Wisconsin Statute § 5.25 plainly states that polling places must be public buildings, with two exceptions: 1) the use of a public building is impracticable; 2) the use of a nonpublic building is better to serve the needs of the electorate. These options are plainly stated as disjunctive, and both are at the discretion of the governing body. The Racine Common Council found that the use of a public building was impracticable compared to a mobile alternate absentee site, because of the cumbersome nature of otherwise being required to set up and take down equipment every day. Wisconsin Statute § 6.55(2)(c)1 is inapplicable and applies to election day voting, not early voting at alternate absentee sites. The third statute cited has the same error as the second. Wisconsin Statutes § 12.03(2)(b)2 states that "No person may engage in electioneering during the hours that absentee ballots may *be cast on any public property within 100 feet of an entrance to* a building containing the municipal clerk's office or *an alternate site under s. 6.855*." (*emphasis added*). Again, it is clear that the statute contemplates that voting will be done in one of two locations, either a building containing the municipal clerk's office, or at an alternate site under section 6.855, citing to a statute in which the word "building" does not appear. The final statute cited by the Complainant, Wisconsin Statutes § 6.88, relates to the chain of custody required upon the return of absentee ballots. Again, a municipal clerk has been granted two options, either store the ballot at the clerk's office, or store the ballot at the alternate site. City Clerk McMenamin has opted to store the ballots at the clerk's office. The assertion that storing ballots in the clerk's office would be in violation of Wis. Stat. § 6.855 is unsupported by the plain text of the statute. Section 6.855 clearly prohibits two actions at the clerk's office while alternate

absentee ballot sites are used, voting a ballot and returning an absentee ballot. Storing ballots voted elsewhere and returned elsewhere is not a prohibited activity in the clerk's office as asserted by Complainant.

Complainant's final reply noted the following:

- Respondent does not dispute any of the facts alleged by the Complainant. In other words, the parties agree that this is purely a dispute of law over the meaning of Wis. Stat. § 6.855 regulating alternate absentee ballot sites and whether Racine complied with that statute.
- Point by point analysis of the five original arguments and the response was submitted as follows:
    1. Respondent misapplies the law in her contention that "near as practicable" is a purely geographic standard. Rather, while the distance limitation in Wis. Stat. § 6.855 is primarily geographical, the words "as practicable" must be given meaning. "Practicable" is a word in common usage with an easily-understood meaning: "capable of being put into practice or of being done or accomplished," "capable of being used," "feasible," or "usable." Respondent makes no attempt at all to explain why the other locations selected and pre-approved by the City Council were not actually capable of being used. Racine also fails to give the statutory language its common, ordinary, and accepted meaning, while reading the distance requirement out of the statute, making it entirely illusory (*e.g.* focus on accessibility instead of the distance limitation). For similar reasons, even if Respondent is correct that the word "practicable" allows clerks to select sites based on a variety of chosen goals, there is one goal that simply cannot be available: that of spreading locations as far around a municipality as possible. This is because that one goal is directly at odds with the Legislature's stated, statutory purpose of locating sites "near" to the clerk's office. Finally, setting all of the foregoing aside, Respondent quietly ignores the fact that its City Council, by approving the very locations the Complainant says should have been used, already determined that those locations were feasible or capable of being used. The formal selection of these sites by the Council contradicts Ms. McMenamin's attempt to now suggest their use was not "practicable." Respondent's only real response to the Complainant's interpretation of Wis. Stat. § 6.855 is to argue that it "contradicts itself" since multiple sites can be designated but "there can only be one closest location." Not so. Once an alternate site is selected, it is no longer part of the pool of possible sites (no longer "usable") so the next-closest site must be selected. That is perfectly consistent with the statute.
    2. Respondent suggests that applying the Complainant's interpretation will be too difficult, asking "where exactly would be an allowable place to locate an alternate absentee ballot site?" But that problem only arises when a municipality like Racine illegally scatters alternate sites all over the city. If an alternate site is instead placed "as near as practicable to the office of the municipal clerk"—which will be within the same ward—then the political makeup of the surrounding area will remain unchanged. Contrary to Respondent's suggestion otherwise, the goal is not to find a ward with an even political split (impossible anyway given the presence of third parties) but instead a ward that has the same political makeup as the one in which the clerk's office is located. Here, Racine's alternate sites should have remained in Ward 1 (which happens to have a 71% Democrat makeup). No party, whether Republican, Democrat, or a third party, is made worse off if the alternate site or sites are located in that same ward. And, importantly, this interpretation is in harmony with the

statutory command in the same sentence of § 6.855 that sites be as near as practicable to the clerk's office. Respondent's point about shifting ward lines is thus a red herring. Complainant has relied on the election data that was available prior to the August primary—the same data on which the City Council would or should have relied when it pre-approved its sites. This data shows that except for the alternate sites in Ward 1, every other alternate site used by Respondent provided an advantage to one party or the other and Respondent has not rebutted that conclusion. Further, the data showed that the pattern of the alternate sites approved by the City Council and used by Respondent provided an overall advantage to the Democrat Party. The notion that an elector must wait until after an election occurs to know whether the alternate sites advantaged a political party—in other words, when it is too late—is silly.

3. Respondent admits that it allowed in-person absentee voting in the same building as the clerk's office but argues this is permissible because the conference room in which it occurred was "not part of the City Clerk's office." Respondent is making another error of statutory interpretation. Words "are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) (per Story, J.). For example, in *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶¶3, 46, 373 Wis. 2d 543, 892 N.W.2d 233, a city could not circumvent a law forbidding cities from passing "ordinances" or "resolutions" regulating firearms by passing "rules" doing so. Only the most hyperliteral reading of § 6.855 allows Respondent to argue that informing voters that they can vote at the clerk's office and directing them to a place that shares the same address somehow does not constitute voting at the clerk's office. It is clear what happened here: Respondent tried to creatively circumvent a clear statutory prohibition so that it could achieve its personal goal of "accessibility" by conducting voting at both the clerk's office and alternate sites. But the statute forbids clerks from having it both ways. In its response Respondent actually admits to another violation of the statute. Respondent declares that it "opted to store the ballots" collected in its van "at the clerk's office." Storing absentee ballots at the clerk's office is again manifestly a "function related to voting and return of absentee ballots." This is an important point because, as Respondent acknowledges, the only other option it has is storage of the ballots at the alternate sites—which in this case is not possible since the sites were set up for only a few hours each. Respondent tries to dispute this point by misquoting the statute: "Section 6.855 clearly prohibits two actions at the clerk's office while alternate absentee ballot sites are used, voting a ballot and returning an absentee ballot." That is not what the statute says. The statute says "no function related to voting and return of absentee ballots," not just voting and return of absentee ballots. That is a much broader prohibition, and one that includes the return of ballots for storage. This single point, by itself, demonstrates that Respondent violated § 6.855 when it conducted absentee voting in a mobile van. A van cannot be used consistently with these ballot integrity measures.

4. In responding to the Complainant's assertion that use of a van is not authorized by Wis. Stat. § 6.855, Racine once again errs. This year the Supreme Court of Wisconsin rejected an argument that the absence of an express statutory prohibition on certain conduct relating to absentee ballots means that the conduct is legal, see *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶54, 976 N.W.2d 519; instead, Respondent must point to authorization for the use of a van as an alternate site. Obviously, no such authorization exists—vans are nowhere mentioned in the

statutes. But the same is not true for buildings. Buildings are repeatedly referenced in the election laws as the setting for voting. This makes sense since, unlike vans, buildings have addresses that can be publicly noticed. Respondent's attempts to distinguish certain of the statutes referencing buildings (§§ 6.55(2)(c)1. and 12.03(2)(b)2.) as applying to election day voting thus misses the larger point that buildings, not vans, are contemplated as voting sites throughout Wisconsin law. With respect to Wis. Stat. § 5.25, which requires use of a public building for polling places "unless the use of a public building for this purpose is impracticable or the use of a nonpublic building better serves the needs of the electorate," the emphasis on both sides of the disjunctive is patently whether the building will be public or nonpublic. Further, neither the City Council nor Ms. McMenamin have explained why the use of buildings, as opposed to a van, was actually impracticable, so even if their interpretation is correct, they have violated the statute anyway. Finally, Respondent has no real answer to § 6.88 regarding storage of ballots.

5. Respondent argues that it complied with Wis. Stat. § 6.855's requirement that the designation of an alternate site "remain in effect until at least the day after the election" even though most of its sites, being non-permanent, were used for only a few hours on a single day. It suggests a difference between "designation" and "use." That that difference is illusory can be illustrated with a single question: if Respondent is right, how could a municipality ever violate the limitation? This problem can be viewed in another way. If Respondent's interpretation is correct, but the "day after the election" restriction were then removed from the statute, what would change? Absolutely nothing at all. A city would not gain any new authority and could continue to act in the same way. No matter how one slices it, Respondent's interpretation renders the restriction meaningless, which is a disfavored interpretation. In contrast, the Complainant's view—that an alternate site, as a proxy for the clerk's office, is supposed to be in place throughout the election cycle, gives meaning to the statute (and makes good practical sense).

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 in the complaint of Mr. Brown.

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

***Allegations #1 and #2*:**

In accordance with the complaint structure, and the chosen response structure, the Commission has deemed it appropriate to issue its decision addressing each of the five allegations at issue. Allegations #1 and #2 need not be addressed with significant analysis here, and it is hereby

determined that those allegations do not present probable cause to believe that a violation of law or abuse of discretion occurred.

With respect to allegation #1, addressing the meaning of “as near as practicable,” the Respondent’s arguments are accepted as an accurate interpretation of the law. Most specifically, Wisconsin Statutes contemplate the use of multiple alternate absentee voting sites (*See* Wis. Stat. § 6.855(5): “A governing body may designate more than one alternate site under sub. (1)”). It would thus be illogical to argue that the distribution of multiple alternate absentee voting sites throughout the geographic confines of a city need be “near as practicable to the office of the municipal clerk,” provided all sites are within the municipal boundaries and are relatively politically equitable, geographically equal, and otherwise lawful in their distribution. It is difficult to fit the “near as practicable” requirement into a statutory mold that allows multiple sites, and thus we look to the other requirements placed upon those sites (*e.g.* does not afford an advantage to any political party, broad and relatively equal distribution, etc.). The record sufficiently supports Respondent’s arguments that the site distribution is geographically equal.

Complainant also argues that the volume and movement of sites, “more than one hundred and fifty,” could create voter confusion. The governing body determines these sites, and it is not the Commission’s place to interfere in municipal governance, unless the choice represents a violation of election law (*i.e.* it is correctly argued by Respondent that the governing body is best positioned to make decisions not based on political advantage, but rather on practical/equitable bases such as bus routes and business districts). That burden is not met as to Allegation #1, and the Commission is not swayed by Complainant’s arguments as to voter confusion. These sites were all properly approved and noticed, and though the mobile unit does move amongst those locations, voters were properly advised of the movement/schedule. Additionally, the Respondent maintains the alternate site in Room 207 as a static site upon which voters can always rely, with physical signage directing the voter to that location if they go to the clerk’s office. This leaves the substance of allegation #2 to consider, essentially that the site selection constitutes political inequity. Were there no static site also in use, the Commission may have been moved by certain of the Complainant’s arguments.

Allegation #2 also fails on the merits. Respondent submitted compelling arguments as to the inaccuracy of the Complainant’s data analysis and misinterpretation/misapplication of the statutes. That said, the Commission finds it necessary to add brief, further context here. Examining “political inequity” in any governmental process is an extremely complex undertaking, and such alleged inequity is sometimes near impossible to quantify or define under the law. Therefore, it becomes a fact-intensive inquiry that may never have a universally applicable legal standard to apply.

Indeed, even the United States Supreme Court wrestled with this very question when examining Wisconsin’s previous redistricting process, the same process that precipitated ward changes at issue in the instant matter (*See Gill v. Whitford*, 138 S.Ct. 1916, and related cases in which the Court decided that partisan gerrymandering presented a nonjusticiable political question). These types of issues have often been examined through the lens of constitutional equal protection, and this, and similar issues, are likely best left to the judiciary.

This is not to say that the Commission may never be presented with a justiciable claim under Wisconsin Statute that compels it to examine political inequity in electoral processes, but this is not that complaint. Selecting multiple alternate absentee voting sites is not, in and of itself, a

political advantage. It is not the Commission's prerogative to develop an impossible standard under which to examine political equal protection claims, although again, it may find itself in a position to do so in the context of Wisconsin Statutes at some point in the future. Indeed, the parties to this complaint mention a few examples that might warrant more thorough factual analysis if they were to occur (*e.g.* an alternate absentee site located near the Democratic Party's office, a site near a Republican Party get out the vote rally, etc.). Even if the Commission found the Complainant's analysis more compelling in this complaint, the allegation would be further undermined by the sheer volume of alternate absentee sites, which are widely distributed and otherwise dilute the claim of political advantage.

It is important to note that, in a separate complaint, the Commission did otherwise determine the mobile alternate absentee voting site to be noncompliant with Wisconsin's Statutes (*See Weidner et al. v. Coolidge,* EL 22-24). On the facts and analysis in the instant matter, the Respondent sufficiently rebutted allegation #2 of the complaint.

Wisconsin Statute § 6.855 states that a governing body may elect to designate an alternate absentee voting site, and "If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners." In the instant matter, the Commission finds no further fault with the use of this alternate absentee voting site in conjunction with Racine City Hall, which will be addressed in the analysis below.

***Allegations #3, #4, and #5*:**

The Commission now examines the substantive allegations remaining, which require closer examination here. In short, the Commission finds that the Complainant did not show probable cause to believe that a violation of law or abuse of discretion occurred as to allegations 3, 4, or 5.

A. Allegation #3: Simultaneous Use

Allegation #3 focuses on the "simultaneous use" prohibition found in Wis. Stat. § 6.855(1) which states, "If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners." The Commission fully agrees with the Complainant that there is a statutory prohibition on simultaneous use, and for that reason, a specific reminder has been included in the "Absentee and General Reminders for the November 8, 2022 General Election" clerk communication which has been published as of November 4, 2022. This communication will be otherwise distributed to clerks and posted on the Commission's website, given increasing concern that some clerks may not be aware of this prohibition.

Based on the facts at issue herein, the Commission finds that the Respondent's use of Room 207 and the mobile unit as alternate absentee voting sites did not violate the simultaneous use prohibition found in Wis. Stat. § 6.855. The Complainant argues, "Room 207 was simply an extension of the clerk's office. Any other interpretation would make a mockery of the statutory requirements." A reasonable, alternative viewpoint would see the difficulties created by not interpreting the statute to allow clerks to utilize separate space within existing municipal

properties (*e.g.* ease of use by voter, reduced voter confusion, consolidating cost, minimizing of staff transit time and equipment transfer, etc.).

The difficulty with Complainant's analysis of the statutory use of terms like "building," and his contention that space such as Room 207 is an extension of the clerk's office, is that it does not make clear where the line should be drawn. It also ignores the obvious benefits of utilizing existing municipal property, as detailed above. Does the Complainant wish to disallow use of Room 207 simply because it is a conference room, or because it is in the same building? If, for example, the Racine County Office of Corporation Counsel or the County Treasurer's Office offered their own vacant space in the same building as an alternate voting site, would that be considered "the office of the municipal clerk or board of election commissioners," or an "extension of the clerk's office?" No, those are separately assigned spaces, with separate statutory functions, and may be more contiguous to the clerk's office than county-owned property on a separate floor that has been lawfully approved and noticed as an alternate absentee voting site.

The Commission believes there is no bright line standard to apply when examining alleged simultaneous use violations. It requires fact-specific analysis. That said, the Commission does not foreclose the idea that use of municipal facilities could represent non-compliance with Wis. Stat. § 6.855(1). Problematic examples that would require increased review or scrutiny might include, but are not limited to: 1) a clerk using interconnected space with a separate entrance such as the clerk's conference or storage rooms, 2) a clerk using a space separate from her office but moving other clerk's functions beyond those "related to voting and return of absentee ballots" to the same room/facility, 3) a clerk using her "satellite offices" throughout the municipality as alternate absentee voting sites while also performing other clerk functions there.

Wisconsin Statute § 6.855(1), as discussed above, has requirements about an alternate absentee site being as "near as practicable to the office of the municipal clerk." In examining the term practicable, the Complainant focused on a specific definition: "capable of being put into practice or of being done or accomplished," "capable of being used," "feasible," or "usable." The Commission applies this same definition, or that of the similar term "practical," in its application of the simultaneous use provision to the current fact-set, using the Complainant's same resource for definitions. "Practical" is defined as "capable of being put to use or account." *Practical*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/practical.

While the Complainant's examination of "practicable" related to statutory location requirements, it is important to look at that word, and its related application to the facts herein…although non-clerk's office space within the same building is as near as practicable and as practical of a system as can be used, particularly when combined with lawful satellite sites throughout the city. Complainant's submitted definition seems to have two requirements, that the site be statutorily compliant, and that it be capable, feasible, usable, etc. What would be more "practicable" or practical than the utilization of existing municipal space? Beyond that, for the reasons stated above, the site is hereby determined to be statutorily compliant.

The Commission is also compelled to briefly address one final allegation related to simultaneous use raised by the Complainant. It was alleged in the final reply that the Respondent admitted to a violation of Wis. Stat. § 6.855(1) when she acknowledged storing ballots from alternate absentee sites at the clerk's office, because "no function *related* to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk."

(*emphasis added*) The Commission is not swayed by this argument (that storage is included in the meaning of "related" to "voting/return"), and even if it were, it would be a significant infringement on the authority of local election officials for the Commission to opine on the most secure and appropriate location at which to store ballots. That critical decision needs to rest with the officials responsible for safeguarding and delivering ballots. The Respondent has a statutory duty to secure and deliver the ballots to the polling place or applicable tabulation site by the close of voting activity. That responsibility far outweighs any minor, procedural, alleged conflict with Wis. Stat. § 6.855(1).

B. Allegation #4: Fixed and Continuous Use

Wisconsin Statute § 6.855(1) also contains "continuous use" requirements:

> An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s. 7.15 (1) (cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for the election under s. 7.15 (1) (cm), if a primary is not scheduled to be held, and shall remain in effect until at least the day after the election. If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.

Complainant not only alleges that Respondent violated this continuous use requirement, but also that she improperly utilized a van as a mobile, alternate absentee voting site. Complainant goes on to note that "…the Supreme Court of Wisconsin rejected an argument that the absence of an express statutory prohibition on certain conduct relating to absentee ballots means that the conduct is legal," and that various statutes do not contemplate mobile polling places or alternate absentee voting sites, while they often refer to "buildings" (at least in the context of a polling place). That argument is of no consequence here.

The Commission interprets the continuous use provisions of Wis. Stat. § 6.855(1) to require proper *designation*/approval, notice, and a *designation that remains in effect* (if not continuous designation and continuous use) throughout the full election cycle. (*emphasis added*) Respondent properly conducted all statutory processes to activate and utilize these alternate absentee ballot sites, as well as the mobile unit. The Complainant's questions are important ones, though. The Commission hereby determines that the designation of an alternate absentee ballot site must remain in effect throughout the full statutorily required cycle, and that the site need not be a fixed building.

Complainant's interpretation of law would open the door to a variety of problematic applications and issues, as the statute would be overinterpreted to mean continuous use, rather than continuous designation including scheduled or possible use of a site. For example, how could a clerk utilize an alternate absentee ballot voting site that was approved for peak historical periods of return only, or an unexpected influx of absentee voting such as a pandemic, if continuous use is necessary?

Also, what would be considered "continuous use?" A certain number of days, a certain number of hours, or the same hours as the clerk's office? Many clerks do not have the staffing, resources, time, and/or capability of continually using each alternate absentee site. Complainant's read of the statute would require more Commission interpretation and interjection into the process than the more logical and necessary interpretation espoused by the Respondent. A continuous designation approach provides proper notice to the public while allowing the governing body and clerk to utilize the sites in the most appropriate and effective manner. It also allows them to adapt as necessary (*e.g.* approve and reserve one site for emergency use only, utilize an existing part-time site if there is damage or catastrophe at another approved site, etc.).

Even smaller municipalities may designate an alternate absentee voting site that it has little to no intention of using. Such a designation could simply be made for the purpose of ensuring a location is approved for conducting absentee voting processes if the primary site becomes unavailable for any reason. The Commission has long advised taking this precaution in the context of approving polling places, as distinguished from alternate absentee voting sites, but the same principles apply. It gives the voters ample advance notice of a potential backup site and ensures compliance with statutory approval requirements and timelines.

The same goes for mobile sites, vans, or temporary structures. Wisconsin Statute does not dictate that an alternate absentee voting site be a "building," as contended by the Complainant, through argument that, among other things, separate statutes reference a "building." It would be unreasonably restrictive to apply such a rigid interpretation to Wis. Stat. § 6.855, where such a requirement does not exist within the confines of the exact statutory language, and possibly to apply that standard to other statutes as well.

Indeed, the Commission has regularly witnessed municipal clerks and governing bodies need to adapt to evolving challenges, particularly in the last three years (*e.g.* the pandemic required voter lines and/or voting activities to be moved to temporary adjacent structures or new permanent sites with more space, fires and floods have necessitated last minute movement to alternate/temporary/backup sites, etc.). Removing any consideration of use for mobile or temporary structures is not mandated by statute, nor would it be the best practice to ensure the integrity and ability of voters to lawfully cast their vote under any circumstances.

C. Allegation #5: Disallowance of a Mobile Alternate Absentee Voting Site

In addition to the analysis above, the Commission hereby determines that mobile, temporary, or non-public structures may be allowable under the statute, and that compliance determinations require fact-specific review. For example, while the Commission finds the van at issue in the instant matter to be compliant with Wis. Stat. § 6.855, the van was otherwise found non-compliant with state and federal accessibility statutes/requirements. (*See Weidner et al. v. Coolidge,* EL 22-24)

Complainant again seeks to apply separate statutory constructs to the interpretation of Wis. Stat. § 6.855. For instance, Mr. Brown seeks application of Wis. Stat. § 5.25 and its "public building" requirements to Wis. Stat. § 6.855. However, the Wisconsin Legislature ("Legislature") even drafted that provision to contemplate statutory exceptions similar to those put forth by the Commission in this decision. For example, Wis. Stat. § 5.25(1) details that elections shall be held in public buildings, "*unless the use of a public building for this purpose is impractical or the use*

of a nonpublic building better serves the needs of the electorate, as determined by the authority charged with the responsibility for establishing polling places under sub. (2)." (*emphasis added*)

The Commission views the Legislature as having explicitly allowed for at least two exceptions to the public building requirement, and that is assuming it intended the word "building" to be interpreted under the strictest interpretation possible (*e.g.* a physical and static structure). The enumerated exceptions include an "impracticality" determination, or a determination that a nonpublic building would better serve the needs of the electorate. What is more, the Legislature contemplated some level of approval and discretion by the governing body or local commission. Impracticality, and perhaps even impossibility, has prompted the use of unique and non-static structures by clerks in the past. It is the Commission's position that this is, and must continue to be, lawful, given a reasonable interpretation of the statute and the needs of clerks in administering election activities regardless of circumstance.

It is for all the aforementioned reasons that the Commission finds no probable cause to believe a violation of law or abuse of discretion has occurred with regard to the City of Racine's use of alternate absentee voting sites and mobile facilities as alleged in this complaint.

Commission Decision

Based upon the above review and analysis, the Commission finds no probable cause to believe that a violation of law or abuse of discretion occurred.

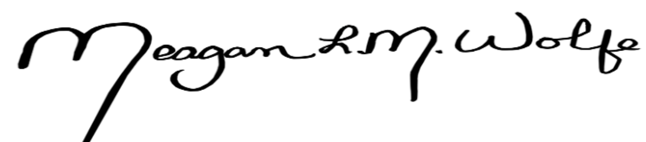
Right to Appeal – Circuit Court

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 any of the parties should have questions about this letter or the Commission's decision, please feel free to contact me.

Sincerely,

WISCONSIN ELECTIONS COMMISSION



Meagan Wolfe
Administrator

cc: Commission Members