

ROBERT PELLEGRINI  
425 E. Capital Drive  
Hartland, WI 53029,

Plaintiff,

v.

Type: Declaratory Judgment  
Case Code: 30701

WISCONSIN ELECTIONS COMMISSION  
212 E. Washington Ave 3rd Floor  
Madison, WI 53703,

Defendant.

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## COMPLAINT

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Robert Pellegrini, by his undersigned attorneys at the Wisconsin Institute for Law & Liberty, hereby alleges as follows against Defendant Wisconsin Elections Commission (“WEC”):

### INTRODUCTION

1. This case challenges the validity of the delegation by WEC of its power and duty to investigate and decide complaints by voters under Wis. Stat. § 5.06.

2. Under Wis. Stat. § 5.06, a voter may file a complaint with WEC if a decision, action or omission of an election official with respect to election administration (as defined in the statute) is contrary to law, or if the official has abused the discretion vested in him or her by law with respect to any such matter of election administration.

3. State law requires the WEC Commissioners to decide all such complaints filed under Wis. Stat. § 5.06. Despite this requirement, the WEC Commissioners have delegated their

authority to WEC's Administrator, or in some cases to its Chairperson, who makes those decisions instead of the WEC Commissioners.

4. The Wisconsin Supreme Court has recognized that when the Legislature assigns an important duty to a multi-member commission like WEC, that body cannot re-delegate its duty to an employee or one of its members, but must act as a commission.

5. Nevertheless, through Wis. Admin. Code § EL 20.04(10) (and potentially Wis. Admin. Code § EL 20.04(6), as explained further herein). and a written delegation order (described in more detail herein), WEC has unlawfully delegated its power and duty under Wis. Stat. § 5.06 to WEC's Administrator, or in some cases to its Chairperson.

6. WEC's purported "delegation" of investigation and decision making of complaints filed under Wis. Stat. § 5.06 is unlawful. This action challenges the legality of the delegation order and the rule(s) on which it purports to be based, and seeks to have them declared invalid.

## **PARTIES**

7. Plaintiff Robert Pellegrini is a registered Wisconsin voter who qualifies as an elector within the meaning of Chapters 5 and 6 of the Wisconsin Statutes. Plaintiff resides in the Village of Hartland in Waukesha County. As an elector, Plaintiff Pellegrini has an interest and statutory right, under Wis. Stat. § 5.06(1), in ensuring that Wisconsin's election laws are scrupulously followed.

8. Plaintiff Pellegrini previously submitted a complaint to WEC pursuant to Wis. Stat. § 5.06, which was decided under the Defendant's unlawful policy delegating the Commissioners' power and duty to others.

9. Plaintiff Pellegrini is also a Wisconsin taxpayer.

10. Defendant Wisconsin Election Commission (WEC) is a governmental agency created under Wis. Stat. § 5.05 and charged with the responsibility for the administration of Chapters 5 through 10 and 12 of the Wisconsin Statutes. WEC is responsible for hearing and resolving complaints alleging election law violations, and, if a violation is found, for ordering local election officials to conform their conduct to the law.

### **JURISDICTION AND VENUE**

11. This is a challenge to the validity of administrative rules and to an illegal delegation order by WEC. This Court has jurisdiction pursuant to Wis. Stat. § 227.40 and/or Wis. Stat. § 806.04.

12. Venue in this court is proper pursuant to Wis. Stat. § 227.40 and 801.50(3)(b).

### **BACKGROUND**

13. On June 29, 2021, Plaintiff Pellegrini filed a complaint against the Village of Hartland Municipal Clerk, Darlene Igl with WEC, pursuant to Wis. Stat. § 5.06, asking WEC to order Defendant Igl to comply with the law in her administration of the upcoming 2022 primary and general elections.

14. Specifically, Plaintiff's complaint to WEC alleged that Clerk Igl was relying upon unlawful guidance from WEC which was issued via memorandum in August, 2020.

15. The August, 2020 memorandum dealt with absentee ballot drop boxes, and expressed WEC's view that dropping a ballot into an unstaffed drop box qualifies as "in person" delivery to the municipal clerk, and that drop boxes do not conflict with Wis. Stat. § 6.855.

16. On December 6, 2021, WEC Administrator Meagan Wolfe issued a decision dismissing Plaintiff's complaint (Case No. EL 21-35). **A copy of that Decision is attached hereto as Exhibit A.**

17. The decision is signed only by WEC administrator Meagan Wolfe, with a line “cc-ing” the Commissioners.

18. Nothing in the decision indicates that the WEC Commissioners voted on or affirmatively approved the decision.

19. After Plaintiff received the decision, his counsel filed an open-records request for, among other things, any records “reflect[ing] the date(s) that the WEC Commissioners voted on the ruling in th[e] case” and records “reflect[ing] how each of the WEC Commissioners voted on this case.” A WEC staff attorney responded that “WEC does not possess any responsive records,” because “[t]he decision letter was issued in accordance with the Commission approved delegation of authority.” **A copy of that open-records response email (without attachments) is attached hereto as Exhibit B.**

20. As part of that open-records response, WEC also provided a document dated February 27, 2020, by which WEC delegated its authority to review and resolve complaints under Wis. Stat. § 5.06 to the Administrator and, to some extent, to the WEC Chair (the “Delegation Order”). **A true and accurate copy of that document is attached hereto as Exhibit C.**

21. WEC’s decision dismissing Plaintiff Pellegrini’s complaint was ultimately overturned by the Waukesha County Circuit Court in *Pellegrini v. WEC*, Case No, 22-CV-004 (“*Pellegrini I*”). **A true and correct copy of the October 4, 2022 Decision and Order in Pellegrini I is attached hereto as Exhibit D.**

22. In *Pellegrini I*, Plaintiff Pellegrini challenged the Delegation Order but WEC argued that because Pellegrini won on the merits of his complaint that his challenge to the Delegation Order was moot.

23. Specifically, in persuading the Court in *Pellegrini I* that the challenge to the Delegation Order was moot, WEC argued that “If Pellegrini wishes to challenge the underlying administrative rule, he can bring that kind of suit and properly comply with the statutory requirements. Any public interests in the delegation issue can be vindicated through such an action. This is not a matter that evades review.”

24. This case is precisely the type of action that WEC said was proper in *Pellegrini I*.

### **THE RULE AND THE DELEGATION ORDER**

25. In *Pellegrini I*, WEC asserted to the Court that its authority to delegate its power and duty to decide cases under Section 5.06 came from Wis. Admin. Code § EL 20.04(10). Specifically, WEC stated that:

Pellegrini claims that the Commission’s delegation policy is statutorily unauthorized. But that policy is directly authorized by Wis. Admin. Code § EL 20.04(10), which provides that “[w]here the commission has delegated to the administrator the authority to resolve complaints, the administrator shall issue an order making findings and resolving the complaint.” Therefore, if the delegation policy is statutorily unauthorized, as Pellegrini contends, then EL 20.04(10) must be, as well.

*Pellegrini I*, Dkt. 39:8.

26. Wis. Admin. Code § EL 20.04(10) states in full that “After all pleadings are filed under s. 5.06, Stats., the administrator shall proceed as the commission authorizes by duly adopted motion or, where no motion is in effect, the administrator shall proceed after consultation with the commission's chair. *Where the commission has delegated to the administrator the authority to resolve complaints, the administrator shall issue an order making findings and resolving the complaint.*” (Emphasis added.)

27. Wis. Admin. Code § EL 20.04(10) does not expressly authorize delegation by the Commission, nor does it actually delegate any authority to anyone. But because WEC relies on

that section of the Administrative Code for its authority for the Delegation Order, this action challenges the validity of Wis. Admin. Code § EL 20.04(10).

28. Wis. Admin. Code EL 20.04(6) states that “If the complaint meets the standards under sub. (1), as applied to complaints under s. 5.06, Stats., the administrator shall proceed as the commission authorizes by duly adopted motion and, where no motion is in effect, the administrator shall proceed after consultation with the commission's chair.” WEC did not refer to EL 20.04(6) in *Pellegrini I*, but to the extent that WEC relies on any part of EL 20.04(6) as well as EL 20.04(10) for the Delegation Order, this action challenges both. All references to the “Rule” from here on in are to Wis. Admin. Code § EL 20.04(10) as well as Wis. Admin. Code § EL 20.04(6) to the extent that WEC relies on both.

29. On February 27, 2020, WEC adopted the Delegation Order (Exhibit C). The Delegation Order delegates, to the Administrator, WEC’s power “[t]o issue compliance review orders under the provisions of Wis. Stat. § 5.06.”

30. The Delegation Order states that “[i]f time permits, as determined by the Administrator in consultation with the Chair, [WEC] staff shall provide draft decisions to all Commissioners prior to their issuance.”

31. The Delegation Order also gives “[t]he Administrator and Chair” power to “determine whether it is feasible to permit Commissioners to submit comments regarding the draft decision.”

32. If the Administrator and Chair decide to allow comments, the Delegation Order gives the Administrator power to “determine whether any comments or input provided by Commissioners will be incorporated into the final decision.”

33. The Delegation Order also prohibits Commissioners from “discuss[ing] the case with other Commissioners,” but requires them to “contact the Administrator” with any comments on the draft decision.

34. Finally, the Delegation Order allows “two or more Commissioners [to] *ask* the Administrator to request a special meeting regarding a Section 5.06 draft decision,” but then lets the Commission Chair alone decide whether to hold such a meeting: “the Administrator will discuss with the Commission Chair such requests and the Chair will determine whether to hold a special meeting prior to release of the decision.”

35. The Delegation Order is an unlawful delegation of the WEC’s power and duties (acting as a commission) under Wis. Stat. § 5.06.

36. In response to the open records request described above in Paragraph 19, WEC staff also provided an email chain showing how the process outlined in the Delegation Order described above played out in this case. **A true and accurate copy of that email chain is attached hereto as Exhibit E.**

37. A WEC staff attorney emailed the draft decision to the WEC Commissioners on Tuesday, November 2, with a message indicating that staff “will send this out if no feedback or special meeting requests are received by 4pm on Thursday, November 4.”

38. In response to the Plaintiff’s open records request, WEC produced no records showing that the WEC Commissioners voted on or affirmatively approved the decision at issue in *Pellegrini I* and WEC stated that it had no such records.

39. Upon information and belief, WEC Commissioners did not vote on or approve the decision in *Pellegrini I*.

## **THE RULE AND THE DELEGATION ORDER ARE UNLAWFUL**

40. Wis. Stat. § 5.06 requires “the Commission” to “decide” complaints filed under that section, *e.g.*, Wis. Stat. § 5.06(6), (8) (referring to “the decision of the commission”), and nowhere authorizes the Commission to delegate its quasi-judicial role under this section to the Administrator, WEC staff, or to one of the commissioners alone.

41. Furthermore, Wis. Stat. § 5.05(1e) provides that “[a]ny action by the commission, except an action relating to procedure of the commission, requires the affirmative vote of at least two-thirds of the members.”

42. The Wisconsin Supreme Court has held that “[w]here authority to do an act of public nature is given by law to more persons than one, or a majority of them, if the act is one which requires the exercise of discretion and judgment, unless the law provides for some exception, the members of the board to whom the authority is given must meet and confer when the act is performed.” *State ex rel. Mayer v. Schuffenhauer*, 213 Wis. 29, 250 N.W. 767, 768 (1933).

43. Similarly, in *State v. Haugen*, the Supreme Court recognized that this non-delegation principle applies with special force to the quasi-judicial functions of a multi-member body: “The very nature of the authority thus granted, repels the idea that it was intended to authorize the [tax] commission to delegate to one of its members, or its secretary or engineer, quasi-judicial duties. ... [W]e have no hesitancy in saying that the requirement clearly indicates that the commission, as a quasi-judicial tribunal, is required to act.” *State v. Haugen*, 160 Wis. 494, 152 N.W. 176, 178-179 (1915).

44. WEC violated state law when it delegated its decision-making role under Wis. Stat. § 5.06 to the Administrator and/or the Chair of WEC under the Rule and/or the Delegation Order.



**CLAIM 1 – DECLARATORY JUDGMENT – THE RULE  
CONFLICTS WITH STATE LAW AND IS INVALID**

45. Plaintiff re-alleges and incorporates by reference the allegations made above as if fully set forth herein.

46. Under Wis. Stat. § 227.10(2) “No agency may promulgate a rule which conflicts with state law.”

47. To the extent that the Rule authorizes delegation by the Commission, the Rule is invalid because it conflicts with state law which requires the Commission, itself, to decide complaints under Wis. Stat. § 5.06(6).

48. Plaintiff Pellegrini has a legal right for WEC to abide by the statutory process to resolve complaints.

49. The Rule interfered with and impaired and impairs the legal rights and privileges of the Plaintiff.

50. Accordingly, to the extent that the Rule authorizes delegation of WEC’s duties and powers to decide complaints under Wis. Stat. § 5.06(6), Plaintiff is entitled to a declaration that the Rule is invalid and unenforceable.

**CLAIM 2 – DECLARATORY JUDGEMENT – The “DELEGATION ORDER” IS *ULTRA VIRES* BECAUSE IT EXCEEDS WEC’S AUTHORITY UNDER STATE LAW**

51. Plaintiff re-alleges and incorporates by reference the allegations made above as if fully set forth herein.

52. Under Wisconsin law, WEC may not delegate its duty and power to decide complaints under Wis. Stat. § 5.06(6). It must exercise that duty and power as a commission and by a two-thirds vote.

53. The Delegation Order exceeds the statutory authority granted to WEC, because WEC has no statutory authority to delegate its statutorily granted authority under Wis. Stat. § 5.06.

54. Plaintiff Pellegrini has a legal right for WEC to abide by the statutory process to resolve complaints.

55. As set forth above, the Delegation Order interferes with the Plaintiff's right to file a complaint under Wis. Stat. § 5.06 and to have that complaint decided by the WEC Commissioners and not by the Administrator or any person other than the WEC Commissioners.

56. Further, WEC is unlawfully spending taxpayer funds in having paid staff perform the Commissioners' duties and powers under Section 5.06.

57. Plaintiff is entitled to a declaration that the Delegation Order is *ultra vires* and unlawful because it exceeds the Defendant's authority under state law.

**CLAIM 3 – IN THE ALTERNATIVE, THE “DELEGATION ORDER” IS A RULE WHICH WAS NOT PROMULGATED IN COMPLIANCE WITH STATUTORY REQUIREMENTS, AND IT VIOLATES A CONSTITUTIONAL PROVISION AND EXCEEDS THE STATUTORY AUTHORITY OF WEC AND, AS A RESULT IS INVALID**

58. Plaintiff re-alleges and incorporates by reference the allegations made above as if fully set forth herein.

59. In the alternative, if WEC does have the authority to delegate its duties under Wis. Stat. § 5.06, then it has done so unlawfully because the Delegation Order is a “rule” as that term is defined in Wis. Stat. § 227.01(13), and it was not promulgated in compliance with statutory rulemaking procedures, as required by law.

60. Under Wis. Stat. § 227.10(1), “[e]ach agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.”

61. Under Wis. Stat. § 227.40(4)(a), a court shall declare a rule invalid “if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated or adopted without compliance with statutory rule-making or adoption procedures.”

62. The Delegation Order meets the definition of a rule under § 227.01(13) but was not properly promulgated by WEC under Chapter 227.

63. Plaintiff Pellegrini has a legal right for WEC to abide by the statutory process to promulgate rules, and to participate in that process by receiving notice of the rulemaking and having the opportunity to provide public comment.

64. WEC’s Delegation Order interferes with and impairs the legal rights and privileges of the Plaintiff because WEC denied him the opportunity to participate in the statutorily mandated rulemaking process.

65. Accordingly, Plaintiff is entitled to a declaration that the Delegation Order is an unlawfully promulgated rule, and is invalid.

### **REQUEST FOR RELIEF**

Plaintiff therefore requests the following relief:

- A. An order declaring that the Rule is invalid and void;
- B. An order declaring that the Delegation Order is *ultra vires* and invalid;
- C. In the alternative, an order declaring that the Delegation Order is a rule which was adopted without compliance with statutorily mandated rulemaking procedures, and is invalid;
- D. An injunction requiring WEC to decide future § 5.06 complaints by voting on the decision before it is issued; and
- E. Awarding costs and any such other relief as the Court deems appropriate.

Dated: November 17, 2022

Respectfully Submitted,

*Electronically signed by Lucas T. Vebber*

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