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Waukesha County
2022CV001336

BY THE COURT:

DATE SIGNED: September 5, 2023

Electronically signed by Michael P. Maxwell
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT- BRANCH 8 WAUKESHA COUNTY

RICHARD BRAUN,

Plaintiff,

vs.

Case: 2022CV1336

WISCONSIN ELECTIONS COMMISSION,

Defendants,

DECISION AND ORDER

INTRODUCTION

The Plaintiff, Richard Braun ("Braun"), is a registered voter and Waukesha County taxpayer who seeks declaratory and injunctive relief related to the use of the National Mail Voter Registration Form for voter registration in Wisconsin. Braun contends that this form is incompatible with *Wis. Stat. §* 6.33(1), the statute prescribing the content of Wisconsin's voter registration form. Braun further contends that the Wisconsin Elections Commission ("WEC") never authorized use of the national form and never engaged in statutory rule making with regard to the information requested on the national form that is not required under *Wis. Stat. §* 6.33(1).

WEC argues that Braun lacks standing to pursue the requested relief. Further, WEC argues that the national form complies with Wisconsin election laws and that WEC has not engaged in any rulemaking with regard to the form or guidance offered. *Amicus Curiae*, Vote.Org, makes arguments similar to WEC supporting the conclusion that the national form is lawful under Wisconsin election law and that use of the national form does not constitute administrative rule-making. Both parties have moved for summary judgment.

FINDINGS OF FACT

1. The National Mail Voter Registration Form ("National Form") is a form made available by the United States Election Assistance Commission for voter registration by mail. (*See Doc.: 57, p. 3*)
2. The Election Administration Manual published by WEC and distributed to all municipal clerks and the public indicates that the National Form is approved for use for voter registration by mail in Wisconsin. (*See id., p. 32*)
3. Plaintiff made an open records request of WEC to provide records that demonstrated when WEC approved use of the form. (*See id., p. 32*)
4. In response to the open records request, WEC provided no records that demonstrated that WEC approved use of the form. (*See id., p. 39*)
5. WEC did provide information related to two previous state agencies that were involved in election administration that showed discussion of the National Form. (*See id.*)
6. Kevin Kennedy, the nearly thirty-three year former agency administrator of the two previous state election agencies, could not provide any specific date or previous agency action that approved use of the National Form. (*See Doc.: 81, p. 1-2*)
7. Wisconsin residents have used the National Form to register to vote in Wisconsin in multiple municipalities. (*See Doc.: 57, p. 35*)

STANDARD OF REVIEW

Under *Wis. Stat. §* 802.08(2), summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Wis. Stat. §* 802.08(2). When considering the motion for summary judgment, the Court applies a two-step test. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). First, the Court determines whether the plaintiff

has stated a claim for relief. *Id.* at 315. And second, applying *Wis. Stat. §* 802.08(2), the Court determines if there is any factual issue exists that precludes summary judgment. *Id.*
The Wisconsin Supreme Court held that "any doubts as to the existence of a genuine issue of material fact are resolved against the moving party." *L.L.N. v. Clauder*, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997). "A 'material fact' is a fact that is significant or essential to the issue or matter at hand." *State v. Allen*, 2004 WI 106, ¶ 22, 274 Wis. 2d 568, 682 N.W.2d 433 (citing Black Law Dictionary 611 (7th ed. 1999)).

In deciding whether there are any material factual disputes, the Court must consider whether more than one reasonable inference may be drawn from the undisputed questions. *H&R Block E. Enters., Inc. v. Swenson*, 2008 WI App 3, ¶ 11, 307 Wis. 2d 390, 745 N.W.2d 421. Competing reasonable inferences may constitute a genuine issue of material facts. Id. Further, at the summary judgment stage, the Court does not "decide issues of credibility, weigh the evidence, or choose between differing but reasonable inferences from the undisputed fact . . . ." *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991). However, "the [C]ourt takes evidentiary facts in the record as true if not contradicted by opposing proof." *Lambrecht v. Kaczmarczyk*, 2001 WI 25, ¶ 23, 241 Wis. 2d 804, 623 N.W.2d 751.

A properly supported motion for summary judgment is not defeated by the mere allegation of a factual dispute. *Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.*, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). To defeat a motion for summary judgment, the opposing party must set forth "'specific facts,' evidentiary in nature and admissible in form, show that a genuine issue exists for trial." *Id.* "[U]nsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge" is insufficient. *Id.*

DISCUSSION

Wisconsin uses a decentralized approach to voting by relying on WEC to provide general guidance for lower electors. *State ex rel. Zignego v. Wis. Elections Comm'n*¸ 2021 WI 32, ¶, 396 Wis. 2d 391, 400, 957 N.W.2d 208, 212 (2021) (citing *Jefferson v. Dane County*, 2020 WI 90, ¶ 24 n.5, 394 Wis. 2d 602, 951 N.W.2d 556).

When dealing with Wisconsin election matters, such as rules and guidance put out by WEC, Wisconsin statutes provide for a form of declaratory relief by proclaiming that the:

> exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the rule or guidance document brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides or has its principal place of business.

Wis. Stat. § 227.40(1).

This statute allows a Court to issue a ruling on both rules and guidance documents that do not comport with proper rule-making procedures set up by Wisconsin Statutes. *Heritage Credit Union v. Office of Credit Unions*, 247 Wis. 2d 589, 607, 634 N.W.2d 593, 602 (Ct. App. 2001) (explaining that logically a Court can declare rules invalid if those rules are not properly promulgated). Guidance documents are reviewable as a result 2017 Wis. Act 369 Sections 65-71 which incorporated them into Wis. Stat. § 227.40 but the methods of judicial review for both rules and guidance documents remain the same. *SEIU, Local 1 v. Vos*, 2020 WI 67, ¶ 111, 393 Wis. 2d 38, 107-110, 946 N.W.2d 35, 71 (2020).

I. A voter and taxpayer has standing to challenge the alleged unlawful government conduct.

Standing in Wisconsin "is construed liberally"; even "a trifling interest may suffice."

McConkey v. Van Hollen, 2010 WI 57, ¶ 15–16, 326 Wis. 2d 1, 783 N.W.2d 855 (citation omitted). It "is not a matter of jurisdiction," but "sound judicial policy," to ensure the issues are "carefully developed and zealously argued." *Id.*

Braun argues that WEC's failure to perform the duties imposed upon WEC by the Legislature with respect to election administration which include making WEC responsible for ensuring that voter registrations are done on forms prescribed by WEC and that meet all of the requirements in *Wis. Stat. §* 6.33. He also argues, as a voter, he is harmed if WEC fails to administer elections as required by law.

Wisconsin has established a two-step standing analysis which asks, first, whether there is an "injury" to the plaintiff's interest and, second, whether that interest is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 18, 402 Wis. 2d 587, 977 N.W.2d 342, reconsideration denied sub nom., *Friends of Black River Forest v. DNR*, 2022 WI 104.

Mr. Braun satisfies this two-step analysis. First, if as alleged, WEC fails to lawfully administer how voters lawfully register and then cast lawful votes, then Mr. Braun as a lawful voter, would have his vote cancelled by an unlawful vote cast by someone who has not lawfully registered due to WEC's failure to lawfully administer voter registration. Mr. Braun, like every other lawfully registered voter, has an interest in making sure voter registration is administered lawfully. In fact, the Wisconsin Supreme Court has said that when it comes to the voter registry "every voter is made or may become an agent in the execution of the law." *State ex rel. Wood v. Baker*, 38 Wis. 71, 85 (1875). The Supreme Court further emphasized the "erroneous interpretation and application of [Wisconsin's election laws] affect matters of great public

importance." *Jefferson v. Dane Cty.*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556. If an individual voters who were not lawfully registered were able to vote and dilute the votes cast by a lawfully registered voters, this certainly would "affect matters of great importance."

This Court is loath to wade into the tortured decision that the Wisconsin Supreme Court gave lower courts in *Teigen v. WEC*, 2022 WI 64, 403 Wis.2d 607, but it is necessary in the context of the arguments put forth on standing. While the Supreme Court was unable to give lower court's clear guidance on the standing issue in the context of election law cases, what can be gleaned from *Teigen* is that a majority of justices held that a voter, such as Mr. Braun, does have standing to bring the type of action against WEC as is brought here. Three Justices found that voters suffer an injury to their right to vote from illegal election administration because "voters[ ] are entitled to have the elections in which they participate administered properly under the law. Allowing WEC to administer … elections in a manner other than that required by law causes doubts about the fairness of the elections and erodes voter confidence in the electoral process." *Id. at* ¶ 21. They also found that voters are within the zone of interests of the statutes for similar reasons. *Id. at* ¶ 23. A fourth justice concluded that voters have standing to challenge illegal election administration based upon a combination of the Legislature's grant of the right to citizens to challenge illegal election administration under a specific statute, as Braun does here under the statutory language of *Wis. Stat. §* 227.40. That fourth justice, Justice Hagedorn, went on to ask whether WEC's conduct "at least threaten[s] to interfere with or impair *Teigen's* right to have local election officials comply with the law." *Teigen*, 2022 WI 64, ¶ 165. He then answered that question saying that he concludes that they do. *Id.* WEC concedes that a majority of justices in *Teigen* concluded that a voter has standing to challenge the lawful actions of WEC. (*See Doc.: 82, p. 21*)

Mr. Braun also has standing as a Wisconsin taxpayer. Wisconsin taxpayers have standing to "contest governmental actions leading to an illegal expenditure of taxpayer funds" in declaratory judgment actions under *Wis. Stat.§* 806.04(2). *Fabick v. Evers*, 2021 WI 28, ¶10, 396 Wis. 2d 231, 956 N.W.2d 856. When a plaintiff contests the "illegal expenditure of taxpayer funds," even a "slight loss" of taxpayer funds is enough to satisfy the "injury" that Wisconsin's standing doctrine requires. *Fabick*, 2021 WI 28, ¶¶ 10–11. *See also City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878, 419 N.W.2d 249 (1988). Given that tax dollars are used to fund the salaries and operating expenses of WEC staff, who created and were paid to publish the Election Administration Manual that advises local clerks and the public on the use of the National Form and who generally administer the election laws, Mr. Braun has a right to challenge WEC's unauthorized expenditure of tax dollars in support of those allegedly illegal efforts.

The primary case on taxpayer standing in Wisconsin is *S.D. Realty Co. v. Sewerage Commission of Milwaukee*, 15 Wis. 2d 15, 112 N.W.2d 177 (1961). In that case, the Supreme Court held that taxpayers have standing to challenge any unlawful action by a government entity which results in the expenditure of public funds. This view was later confirmed by the Supreme Court's decision in *Hart v. Ament*, 176 Wis. 2d 694, 699, 500 N.W.2d 312, 314 (1993) in which the Court held that the "alleged pecuniary loss need not be substantial in amount. Even a loss or potential loss which is infinitesimally small with respect to each individual taxpayer will suffice to sustain a taxpayer suit." This view of taxpayer standing is broad and encompasses the allegations of Mr. Braun here. WEC has spent (and will continue to spend) money to produce and publish the Election Administration Manual, to process voter registrations that use an

allegedly illegal form, to maintain the statewide voter registration list that contains the names of voters improperly registered using the allegedly illegal forms.

To conclude that a voter and taxpayer in the position such as Mr. Braun did not have standing, would be to conclude that WEC is beyond judicial review. There is nothing in the law that suggests the State Legislature who created WEC intended that result.

II. The National Form has not been properly prescribed or promulgated by WEC.

Wis. Stat. § 6.33 provides in part: The commission **shall prescribe** the format, size, and shape of registration forms. [emphasis added.] The Supreme Court has instructed that the term "prescribe" means "[t]o dictate, ordain, or direct; to establish authoritatively (as a rule or guideline)." *Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶25, 374 Wis. 2d 513, 527, 893 N.W.2d 212, 219 citing *Prescribe, Black's Law Dictionary* at 1373 (10th ed. 2014). Clearly, the legislature intended, and neither party disputes, that *Wis. Stat. §* 6.33 requires WEC to approve the National Form. WEC claims, without evidentiary foundation, that the National Form was approved by a prior election agency at some point in the past. Mr. Braun challenged WEC to produce any evidence that WEC had approved the National Form and WEC produced no evidence showing approval. WEC attempts feebly to rely upon the affidavit of Mr. Kevin Kennedy, the election agency administrator for the prior two state elections agencies, but Mr. Kennedy as the former chief administrator of elections in this state for nearly thirty-three years can not provide any credible evidence as to where, when, or how the National Form was approved. Certainly, Mr. Kennedy offers no evidence that WEC approved the National Form as is required by *Wis. Stat. §* 6.33. WEC was not an extension of the previous state election agencies, but a new creation by the State Legislature with a governing structure completely difference than previous entities. *See 2015 Wis. Act 118*. As an administrative agency created

by statute, WEC has no independent authority beyond that which can be found in the Wisconsin Statutes. *See, e.g., Martinez v. Dep't of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992) ("We have long recognized that administrative agencies are creations of the legislature and that they can exercise only those powers granted by the legislature."). WEC was empowered by the State Legislature to administer Wisconsin's election laws and then directed WEC to exercise that power by prescribing the voter registration forms which are accepted for use in this State. WEC has failed in this most basic duty by allowing the National Form to be used in Wisconsin where WEC has never actually proscribed its use.

Having determined that the National Form was never lawfully prescribed by WEC, the Court need not determine whether the National Form complies with *Wis. Stat. §* 6.33(1).

IT IS HEREBY ORDERED:

1) The Defendant's Motion for Summary Judgment is DENIED.
2) The Plaintiff's Motion for Summary Judgment is GRANTED in part. The use of the National Form to register a voter in Wisconsin is unlawful as the Wisconsin Elections Commission has never prescribed use of the form as required by *Wis. Stat. §* 6.33.
3) Until such time as the Wisconsin Elections Commission prescribes use of the National Form, the Commission is enjoined from issuing guidance of any kind that the National Form is approved for use or that the National Form may be used to register voters in Wisconsin.
4) Within fourteen days of the date of this Order, the Commission shall withdraw any such guidance and notify all Municipal Clerks that the National Form may not be used for voter registration in Wisconsin. Further, the Commission shall file an affidavit with this Court indicating completion of the same.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL