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2022CV001656

BY THE COURT:

DATE SIGNED: September 5, 2024

Electronically signed by Michael P. Maxwell
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT- BRANCH 8 WAUKESHA COUNTY

ROBERT PELLEGRINI,
Plaintiff,

Case No: 22-CV-1656

vs.

WISCONSIN ELECTIONS COMMISSION,
Defendant.

DECISION AND ORDER

RELEVANT FACTS

This case arises out of a challenge to the validity by the Wisconsin Elections Commission ("WEC" or "the Commission") delegation of its power and duty to investigate and decide complaints by voters under Wis. Stat. § 5.06. (See Summon and Complaint, Dkt. 2, p. 3). This case has some history in a previous challenge brought by Mr. Pellegrini against the WEC in Waukesha County Circuit Court Case No.: 2022CV0004 ("Pellegrini I").

In that previous case, the plaintiff challenged the use of unstaffed drop boxes by filing a

complaint against the Municipal Clerk for the Village of Hartland where the Clerk used unstaffed drop boxes to collect absentee ballots. (Id., p. 23 at ¶1, Ex. D). When the Supreme Court of Wisconsin declared that unstaffed absentee ballot boxes are not permitted in ***Teigen v. WEC***, 2022 WI 64, 976 N.W.2d 519, Pelligrini I was rendered moot. (Id., p. 23 at ¶2). The plaintiff received the WEC Administrator's decision on December 6, 2021. (Memo in Support of P.'s MSJ, Dkt. 34, p. 3). Plaintiff filed for an open-records request for, among other things, any records "reflect[ing] how each of the WEC Commissioners voted on the case" and the "date(s) that the WEC Commissioners voted on the ruling in th[e] case." (Id.; Summon and Complaint, Dkt. 2, pg. 3).

The current litigation deals with a situation that was not fully addressed in that prior case due to the sudden end after the ***Teigen*** decision. which is whether or not it was proper for the Wisconsin Elections Commission to delegate its authority to review and resolve complaints under Wis. Stat. § 5.06 to the Administrator and, to some extent, to the WEC Chair. (Id., p. 6 at ¶20; Memo in Support of P's MSJ, Dkt. 34, p. 3; see First Amended Complaint, Dkt. 4, Exhibit A the "Delegation Order").

DISCUSSION

Summary judgment "shall be rendered 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." ***Tatera v. FMC Corp.***, 2010 WI 90, ¶15, 328 Wis. 2d 320, 786 N.W.2d 810.; Wis. Stat. § 802.08(2) (2022-23).

The case is of statutory interpretation which requires a two-step process: (1) determine whether the meaning of the statute is plain in the language; (2) if the meaning is not plain in the statute's language, and the statute is therefore ambiguous, examine extrinsic sources of

interpretation such as legislative history. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶43-45, 271 Wis. 2d 633, 681 N.W.2d 110. To determine the plain language the history, scope, and purpose of the statute can be weighed. *Id.* at ¶¶46, 48, 51. The goal of statutory interpretation is to give effect to legislative intent. *Id.* at ¶43.

Words are given their common, ordinary, and accepted meaning. *Id.* at ¶45; Wis. Stat. § 990.01(1). A dictionary definition is helpful to ascertain the common definition of a term. *See Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶¶ 28-29, 341 Wis. 2d 607, 619-20, 815 N.W.2d. 367, 375.

In addition, to considering the meaning of each individual word, courts consider the statute as a whole to give reasonable effect to every word. *Kalal*, 681 N.W.2d 110, ¶ 46. "The ordinary meaning of a statute is dictated by more than the literal meaning of a single phrase, read in isolation. Rather as we have emphasized before, statutes must be interpreted in their entirety, and in context." *Sojenhomer LLC v. Vill. of Egg Harbor*, 2024 WI 25, ¶15, 412 Wis. 2d 244, 7 N.W.3d 455*; Kalal*, 681 N.W.2d 110, ¶ 46 ("Statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results."); *e.g., Clean Wis., Inc. v. DNR*, 2021 WI 72, ¶10, 398 Wis. 2d 433, 961 N.W.2d 611.

The court interprets the statutory language the legislature enacts and "will not read into a statute language that it does not contain or reasonably imply." *Sojenhomer*, 7 N.W.3d 455, ¶20; *see, e.g. State v. Hinkle*, 2019 WI 96, ¶18, 389 Wis. 2d 1, 935 N.W.2d 271; *State v. Fitzgerald*, 2019 WI 69, ¶30, 387 Wis. 2d 384, 929 N.W.2d 165. Courts will favor an interpretation that fulfills the purpose of a statute over an interpretation that is incongruous with its objective. *Hubbard v. Messer*, 2003 WI 145, ¶ 9, 267 Wis. 2d 92, 112, 673 N.W.2d 676, 686.

I. WEC was given statutory authority to investigate complaints under Wis. Stat. §§ 5.05(1)(e), 5.05(1e), and 5.06, and WEC's argument that Wis. Stat. § 15.02(4) authorizes the delegation of such authority is unavailing as the statute does not apply.

The plain language of Wis. Stat. §§ 5.05(1)(e), 5.05(1e), 5.06, and 15.02(4) read in context and scope does not authorize the multi-member body of WEC to delegate its decisions on complaints. *See Kalal*, 681 N.W.2d 110, ¶43.

Wis. Stat. § 5.05(1)(e) provides:

> The elections commission shall have the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing. Pursuant to such responsibility the commission may . . . (e) Issue an order under s. 5.06.

The Wis. Stat. § 5.05(1)(e) statutory delegation of authority to the WEC for the "issu[ing] of order under s. 5.06" is plain and unambiguous, and therefore requires no further inquiry. *See Kalal*, 681 N.W.2d 110, ¶43. There is no dispute over definitions. The WEC does not dispute the application of Wis. Stat. § 5.05(1)(e). (See D.'s Reply Brief in Support for MSJ, Dkt. 55 at p. 4 ("the statutes [Wis. Stat. § 5.05(1)(e) and Wis. Stat. § 15.02(4)] are not in conflict.")).

Wis. Stat. § 5.05(1e) provides that, "[a]ctions by the commission. Any 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."

The meaning and language of Wis. Stat. § 5.05(1e) is plain and unambiguous, providing that the WEC's actions require two-thirds affirmative vote unless it relates to the procedure of the commission. *See Kalal*, 681 N.W.2d 110, ¶43.

Wis. Stat. § 5.06 provides that any Wisconsin elector may file a written complaint alleging that a decision or action of a local election official concerning the conduct of an election is contrary to law; and the procedure for WEC to handle such complaints. (See D.'s Brief in Support of Motion for MSJ, and Opp. To P.'s MSJ, Dkt. 48, p. 3).

Similarly, the meaning and language of Wis. Stat. § 5.06 is plain and unambiguous in stating the applicable procedure for the electoral complaint submitted in this case, and therefore requires no further inquiry. *See Kalal,* 681 N.W.2d 110, ¶43. WEC does not dispute that Pelligrini's complaint falls under Wis. Stat. § 5.06. (See id. at p. 9-11, 14-15).

Wis. Stat. § 15.02(4) provides:

> The head of each department or independent agency shall, subject to the approval of the governor, establish the internal organization of the department or independent agency and allocate and reallocate duties and functions not assigned by law to an officer or any subunit of the department or independent agency to promote economic and efficient administration and operation of the department or independent agency. The head may delegate and redelegate to any officer or employee of the department or independent agency any function vested by law in the head. The governor may delegate the authority to approve selected organizational changes to the head of any department or independent agency.

The plain language of Wis. Stat. § 15.02(4) is unambiguous when read in context and therefore requires no further inquiry. *See Kalal,* 681 N.W.2d 110, ¶43. The language plainly states that the internal organization of a department or independent agency may be reorganized, including the delegation or redelegation of any function vested by law in the head, by the head of such department or independent agency, ***subject to the approval of the governor***, or a delegated head of the governor. Wis. Stat. § 15.02(4) (emphasis added). The statute is not applicable to this case, as the governor does not approve any reorganization or delegation nor delegated authority to approve changes to WEC; and the second (middle) sentence cannot be read in isolation. *See Sojenhomer LLC,* 7 N.W.3d 455, ¶15.

WEC argues that Wis. Stat. § 15.02(4) "authorizes the Commission to delegate any function vested in it by law." (Id. at p. 10). WEC argues under Wis. Stat. § 15.02(4) that the "head" of WEC can thus "delegate and redelegate to any officer or employee of the . . . independent agency any function vested by law in the head." (Id.). WEC argues the "head" of the

Elections Commission, an independent agency, is the Elections Commission itself, based off of the definition of Wis. Stat. §15.01(8) where "head" "in relation to an independent agency, means the commission, commissioner or board in charge of the independent agency." (Id.).

The WEC's argument fails as it reads the middle (second) sentence of Wis. Stat. § 15.02(4) in isolation. *See Sojenhomer LLC*, 7 N.W.3d 455, ¶15 ("[S]tatutes must be interpreted in their entirety, and in context."). It is a single statute. It is not broken into three different parts with each sentence comprising 15.02(4)(a) or any similarly clear separation. As such the statute is read in its entirety. The first and third sentence highlight the requisite role of the governor in approval ("[t]he head of each department or independent agency shall, ***subject to the approval of the governor***, establish . . .") and his capacity to grant delegation approval authority ("[t]he governor may delegate the authority to approve selected organizational change"). Wis. Stat. § 15.02(4). The second sentence is read in context of these two sentences. Neither situation applies in this case as the governor is not involved. (See D.'s Brief in Support of MSJ and Opp. to P.'s MSJ, Dkt. 48, p. 6-9). WEC's argument interprets the second sentence in isolation, not mentioning the requisite, but nonexistent role of the governor, in an attempt to legitimize WEC's delegation to the single Administrator review and issuing of the Delegation Order. (Id. p. 7-8, 10).

Wis. Stat. § 15.02(4) is "dictated by more than the literal meaning of a single phrase." *Sojenhomer,* 7 N.W.3d 455, ¶15. WEC's argument centers on the middle sentence of Wis. Stat. § 15.02(4) "read in isolation" to authorize its delegation. *Id.* This is improper statutory interpretation. Statutes "must be interpreted in their entirety, and in context." *Id.* WEC improperly delegated their required authority over Wis. Stat. § 5.06 complaints.

II. Pelligrini satisfactorily notified the Legislature's Joint Committee for Review of Administrative Rules ("JCRAR"), complying with Wis. Stat. § 227.40(5)

and, therefore, the court has competency and jurisdiction over the plaintiff's case.

As the WEC points out, "Plaintiff challenges the validity of a promulgated administrative rule, Wis. Admin. Code EL § 20.04(10) (the "Rule") and the Delegation Order as an unpromulgated rule, both under Wis. Stat. § 227.40." (D.'s Brief in Support of MSJ and Opp. To P.'s MSJ, Dkt. 48, at p. 15); see Wis. Stat. §227.40(1).

Wis. Stat. § 227.40(5) states "[t]he joint committee for review of administrative rules shall be served with a copy of the petition in any action under this section and, with the approval of the joint committee on legislative organization, shall be made a party and be entitled to be heard."

WEC argues the court lacks competency because Pellegrini failed to comply with JCRAR service requirements of Wis. Stat. § 227.40(5). (D.'s Brief in Support of Motion for MSJ, and Opp. To P.'s MSJ, Dkt. 48, p. 15-17). Pelligrini timely served JCRAR with a copy of his pleadings on November 22, 2022. (P.'s Reply in Support of MSJ and Response in Opp. To D.'s MSJ; Ehlenbach Aff. ¶¶ 3–6 and Exs. 1 and 2). Pelligrini does not need to serve JCRAR with an amended complaint because "the petition" is the initial complaint. The statute does not state to serve "any amendments or updates" to the complaint. WEC did not dispute such assertions. (See D.'s Reply Brief in Support of MSJ, Dkt. 55, p. 8-10). As such, Pelligrini satisfied the plain and unambiguous requirement of Wis. Stat. § 227.40(5), and the court has competency and jurisdiction. *See Kalal,* 681 N.W.2d 110, ¶43; Wis. Stat. § 227.40(5).

CONCLUSION

Under Wis. Stat. §§ 5.05(1)(e), 5.05(1e), and 5.06 the WEC has the authority to issue orders over Wis. Stat. § 5.06 complaints and must do so with an affirmative vote of at least two-thirds members. Wis. Stat. § 15.02(4) has a clear and unambiguous meaning. Read its full

context, Wis. Stat. §15.02(4) does not apply to the current case. As such, the WEC cannot delegate its authorized responsibility to settle complaints under Wis. Stat. § 5.06 with a two-third affirmative vote. Pelligrini satisfactorily served JCRAR per the Wis. Stat. §227.40(5) requirements. For the reasons above, the court grants summary judgment to Pellegrini.

IT IS HEREBY ORDERED,

1) Plaintiff's Motion for Summary Judgment is GRANTED.
2) Defendant's Motion for Summary Judgment is DENIED.
3) Those portions of the February 27, 2020 Delegation Order with regard to *Wis. Stat. §* 5.06 are *ultra vires* and unlawful.
4) Those portions of *Wis. Admin. Code §§* EL 20.04(6) and 20.04(10) which are inconsistent with this decision are invalid and unenforceable.
5) WEC shall decide all future *Wis. Stat. §* 5.06 complaints in compliance with the statute by a vote of the commission.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL