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May 13, 2024

The Honorable Josh Kaul
Attorney General of Wisconsin
Wisconsin Department of Justice
PO Box 7857
Madison, WI 53707-7857

**Re: Comment and Response to Request for Legal Opinion from
Dane County Corporation Counsel: Interpreting Article III §
7(2) of the Wisconsin Constitution**

Dear Attorney General Kaul:

This letter is our comment on and response to the April 24, 2024, request from the Dane County Corporation Counsel for an attorney general opinion interpreting Article III, § 7(2) of the Wisconsin Constitution.

The relevant section of the Wisconsin Constitution says that "No individual other than an election official designated by law may perform any task in the conduct of any primary, election, or referendum."

Corporation Counsel does not clearly set forth what would typically be called the "question presented" but in general he asks that you issue an opinion defining who is an "election official designated by law" and what constitutes a "task" in the conduct of primaries, elections, and referendums.

This letter addresses two items: (1) the request is not a proper request for an Attorney General Opinion, and (2) this letter addresses the meaning of "election official designated by law" and "task in the conduct of any primary, election or referendum."

- 1. The April 24, 2024, request is not a proper request for a formal Attorney General Opinion.*

The April 24, 2024, request is not a proper request for a formal Attorney General Opinion. The request does not comply with the criteria that your office has published relating to requests for a formal opinion at 77 Op. Att'y Gen. Preface (1988). The April 24, 2024, request does not satisfy a number of those criteria.

Section 3 of your Office's published guidelines contains the following criteria which apply to **all** requests for a formal opinion from any source:

3. All opinion requests from any source should comply with the following criteria:
 - A. The request should state each question upon which an opinion is desired. 62 Op. Att'y Gen. Preface (1973).
 - B. The request should state all of the facts giving rise to each question presented. 62 Op. Att'y Gen Preface (1973).
 - C. Any request requiring the resolution of questions of fact should not be submitted, since the attorney general has no authority to decide questions of fact. 77 Op. Att'y Gen. 36 (1988); 68 Op. Att'y Gen. 416 (1979); 40 Op. Att'y Gen. 3 (1951).
 - D. An opinion should not be requested on an issue that is the subject of current or reasonably imminent litigation, since an opinion of the attorney general might affect such litigation. 62 Op. Att'y Gen. Preface (1973).
 - E. Opinions on matters involving the exercise of legislative or executive judgment or the exercise of discretion by public officers should not be requested. 77 Op. Att'y Gen. 36 (1988); 62 Op. Att'y Gen. Preface (1973); 40 Op. Att'y Gen. 3 (1951).

The April 24, 2024, request fails most of these criteria. As previously pointed out, the request does not contain a clear question presented so it fails the first criterion. It also does not state the relevant facts giving rise to the question presented so it fails the second criterion. For example, if the question is whether clerks can use a particular vendor to assist on a particular task then the facts relating to that situation must be stated in the request. That is crucial because the answer is likely to be different if the question is whether clerks may use a commercial printer to print ballots designed by the clerk with the content supplied by the clerk or whether a clerk may use a vendor to design and approve the content of the ballots.

The request may also fail the fourth criterion, depending on how one interprets the request from Corporation Counsel. As discussed in more detail in the second section of this letter, the interpretation of the relevant constitutional provision is not all that difficult. But if Corporation Counsel contends that it is and thinks that litigation will be the result, then under the fourth criterion the Attorney General should be

reluctant to issue an opinion that may affect such litigation, in particular, because the Department of Justice might very well be counsel in such litigation.

Section 2 of the published criteria provides further requirements for requests from corporation counsel (and other agencies with a legal staff) as follows:

2. Any request from a corporation counsel, district attorney or a state officer or state agency that has staff legal counsel should satisfy all of the following criteria:

A. The request should set forth a tentative conclusion upon any question presented and the reasoning upon which that conclusion is based.

B. The request should set forth and analyze all relevant statutory provisions, case law and other authorities, whether or not they support the tentative conclusion concerning the question presented.

C. A question should not be submitted simply because someone wishes it submitted. A question should not be submitted unless, after having given the problem careful consideration, a satisfactory legal answer cannot be reached.

Under Subpart A, the request should set forth “a tentative conclusion upon any question presented.” The April 24, 2024, request does not even set forth a clear question presented much less a conclusion.

Under Subpart B, the request should set forth and analyze all relevant statutory provisions, case law and other authorities, whether or not they support the tentative conclusion. The April 24, 2024, request does not do so.

Under Subpart C, a question should not be submitted simply because someone wishes it submitted. Again, the April 24, 2024, request fails to meet this criterion. Here, Corporation Counsel says essentially that the amendment is vague and he wishes that you would clarify it for the benefit of the 1,850 municipal clerks, but that is not a sufficient basis for a request.

With all due respect to Dane County Corporation Counsel, he seems to have ignored your Office’s published criteria and asked you to give legal advice to third parties (municipal clerks) in non-specific situations and without a sufficient factual or legal background for you to render a meaningful and lawful opinion. He is basically asking you to anticipate potential issues and questions and write a law review article on the

meaning of Article III, § 7(2). That is not a proper request for a formal opinion from the Office of the Attorney General.

2. *The meanings of “election official” and “task in the conduct of any primary, election, or referendum” are not complicated.*

With respect to who is an “election official,” the answer is not complicated. Wisconsin Statutes § 5.02(4e) defines an "election official" as "an individual who is charged with any duties relating to the conduct of an election." There is no reason that the term should have a different meaning in the Wisconsin Constitution with one important point of emphasis supplied by the language in the constitutional amendment.

The Constitution says that “No individual other than an election official *designated by law* may perform any task in the conduct of any primary, election, or referendum.” (Emphasis added.) So the difference between the statutory definition and the Constitution is that the “charged with any duties” language in the statute is superseded by the constitutional language “designated by law.”

To be an election official *designated by law* the person must derive their duties with respect to elections directly from the statutes. For example, that would include all of the various clerks who are charged by the statutes with elections-related duties (town clerks under Wis. Stat. § 60.33(4)(a), village clerks under Wis. Stat. § 61.25(1), all municipal and city clerks under Wis. Stat. § 7.15(1) and county clerks under Wis. Stat. § 59.23(2)(i)). It would also include Municipal and County Board of Canvassers under Wis. Stat. § 59.23(2)(i) and the additional election officials appointed under Wis. Stat. § 7.30(2).

This list may not be exhaustive because there may be other statutes that charge other individuals with duties relating to the conduct of an election, but the important limitation here, however, is that each of the individuals charged by the above statutes or by other statutes not listed may not perform duties other than those they are specifically charged with by statute. They cannot delegate those duties to other individuals not so charged with the duties absent statutory authority for such delegation.

With respect to delegation of tasks by a “municipal clerk” it must be noted that Wis. Stat. § 5.02(10) provides that “municipal clerk means the city clerk, town clerk, village clerk, and the executive director of the city election commission and their authorized representatives.” That means that the clerk, herself, does not need to

perform every task in Chapters 5–12 personally but can delegate those tasks to employees of her office or other authorized representatives.¹

However, all such authorized representatives must also be “election officials.” The Constitution and the related election statutes must be read in conjunction and consistently with each other. “Election officials,” appointed under the provisions of Wis. Stat. § 7.30(2)(a), are the only individuals (other than the electors themselves) who are authorized under law to directly participate in the voting process. Wisconsin’s voter fraud statute requires that the “election official in charge” receive an elector’s ballot; the elector violates the terms of the statute if he or she hands the ballot off to a third party. *See* Wis. Stat. § 12.13(3)(n). And as noted previously, under the statutes “election officials” are the only people who are authorized to conduct an election. Wis. Stat. § 7.30(2)(a).

In light of these, and other, statutory requirements, any “authorized representatives” of the municipal clerk for purposes of Wis. Stat. § 5.02(10) must also be either a deputy clerk or election officials appointed under Wis. Stat. § 7.30—the Constitution and the statutes do not make sense read any other way.

What this means is that private consultants and advisors can clearly no longer participate in conducting elections and government cannot delegate election tasks which the clerk is charged by law to perform. A specific instance of this was cited by State Senator Eric Wimberger, one of the primary authors of the amendment in his testimony in favor of the Joint Resolution approving the amendment.²

With respect to what constitutes a “task” in the conduct of an election the question is only slightly more complicated. There are probably hundreds of tasks set forth in Chapters 5–12 of the Wisconsin Statutes relating to the conduct of elections and enumerating them would be difficult and time-consuming. However, the statutes assign each task to a relevant election official. Those tasks are the ones that must be performed by election officials and frequently by a specifically designated election official (for example, Wis. Stat. § 7.10 contains tasks that must be performed by the

¹ Various other statutes either authorize the clerk to delegate tasks to deputy clerks or assign the task directly to the “clerk or deputy clerk.” *See, e.g.,* Wis. Stat. §§ 6.33(1), 6.55(2)(c)1., 6.86(3)(a)1., 6.87(1) and (2).

² In his testimony, Senator Wimberger referred to a contract between a private funder and the City of Green Bay which required the city to use a particular outside advisor and where over the course of several months the City Clerk found herself excluded from elections meetings and where that advisor “orchestrated the fall election and acted as a city clerk would act, though paid by CTCL, including managing staff and having access to ballots.”

county clerk, while Wis. Stat. § 7.15 contains tasks that must be performed by municipal clerks).

The April 24, 2024, request contends that “[t]here are many ‘tasks’ that are collaterally related to elections” and that these collateral tasks such as the printing of ballots are the ones that require clarification. But that gets back to your Office’s published criteria for requests for opinions.

Here, for example, Corporation Counsel could have said that the County Clerk has certain duties relating to ballots under Wis. Stat. § 7.10 and the question is whether the Clerk may have the ballots needed for an election printed by a commercial printer. The request would have to specify what tasks the clerk intended to perform and what tasks the clerk wanted to contract out. The question could then be presented as to whether the actual printing of the tens of thousands of ballots needed for an election must be done by the clerk or whether it could be done by a commercial printer.

Corporation Counsel would then have to present all of the relevant facts as well as setting forth and analyzing all relevant statutory provisions, case law and other authorities, and then present a tentative conclusion. Only after that process is complete is there a proper request to your Office for a formal opinion.

With respect to whether a clerk may contract with a commercial printer to print ballots that are designed by the clerk to comply with all of the statutory requirements for ballots and contain all of the required content for ballots, we will not parse the statutory language here, but it is relatively easy to conclude that based upon the statutory language that the ballots may be sent to a commercial printer for printing. This is consistent with the fact that government frequently purchases services and supplies from vendors. The amendment requires public officials to actively control the use of these supplies and services. Election officials may not allow private funders to dictate how elections are to be run and may not relinquish effective control of elections to private parties through contracts or otherwise.

The key point, however, is that each task which Corporation Counsel believes is a so-called collateral task would have to be similarly presented, reviewed, and decided under the relevant statutes. Absent Corporation Counsel presenting sufficient facts and analysis relating to that question, it becomes impossible for you as Attorney General to provide a useful and lawful formal opinion.

CONCLUSION

Because there is not a proper request for a formal opinion presented in Corporation Counsel’s April 24, 2024, letter, we urge your Office to take no further action except

to return it to the requester with instructions to resubmit the request in an appropriate form (the result indicated in your Office's published criteria).

However, if your Office decides to take further action then we urge that any opinion that you issue be consistent with the substantive comments in this letter.

Very truly yours,

/s/ Lucas T. Vebber

Lucas T. Vebber
Deputy Counsel