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June 22, 2020

Meagan Wolfe
Administrator
Wisconsin Election Commission
212 East Washington Ave.
Third Floor
P.O. Box 7984
Madison, WI 53707-7984

Via electronic mail only to:
elections@wisconsin.gov
Meagan.Wolfe@wi.gov

Re: Absentee Ballot Return Options Memo date March 31, 2020 and Open Records Request

Dear Ms. Wolfe:

I am writing to you regarding the Absentee Ballot Return Options Memo you sent to municipal clerks dated March 31, 2020 (the "Memo"). In the Memo, in paragraph 2 you say:

Ballots can be returned to the clerk's office, an in-person absentee (or early voting) site or the voter's polling on election day. A family member or another person may also return the ballot on behalf of the voter.

In particular, I am writing about the highlighted sentence above. This statement is in conflict with the law. In particular, Wis. Stat. § 6.87(4)(b)1 provides that electors must place their ballot in an envelope and follow certain procedures, and that "...The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots."

The statute obviously means that the *elector* shall mail it, or the *elector* shall deliver it "in person." There is no statutory basis to permit a third person to mail it or to take possession of the ballot to deliver it in person. This is especially true given Wis. Stat. § 12.13 which provides that no person may "receive a ballot from or give a ballot to a person other than the election official in charge" and that no person may "receive a completed ballot from a voter unless qualified to do so." Given those statutes, can you please provide the legal basis for that statement in the Memo that a family member or another person may return the ballot on behalf of the voter?

Also, the Memo appears to be related to the COVID-19 crisis. Can you please let me know whether the Memo was intended to be limited to the April election or whether you still consider it valid for the August primary and the November general election? If it was intended to be limited to the

April election can you provide me with a copy of any communication that you have sent to the municipal clerks setting forth that limitation?

Also, can you please provide me with any documents that show that this statement in the Memo (and the statutory interpretation which it contains) was approved by the Commission or one of the predecessor bodies to the Commission as opposed to being promulgated by WEC staff?

At the WEC meeting on June 17, 2020, Chair Ann Jacobs stated that she believed that the state statute relating to third parties returning ballots was worded ambiguously and that the statute had been interpreted in a way allowing such a practice for years. Can you also please provide me with any written statements by WEC (or any of its predecessors) which set forth that interpretation?

It appears to us that in addition to the Memo being inconsistent with state statutes, the Memo is also unlawful because it is an unpromulgated rule under Wisconsin law. We asked WEC to promulgate a rule on this subject but WEC refused to do so. Based on the Memo, however, and the statements made by the WEC chair at the June 17, 2020 meeting, WEC has already interpreted the statute to mean that “A family member or another person may also return the ballot on behalf of the voter,” it simply neglected to follow the statutory rule-making process for doing so.

As you know, WEC is an “agency” as that term is defined Wis. Stats. Ch. 227. State law clearly provides: “Each 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.” Wis. Stat. § 227.10(1).

In this context, WEC’s interpretation of this statute meets the definition of a “rule” as that term is defined by Wis. Stat. § 227.01(13). It is an interpretation of a statute which WEC has adopted to govern its administration of Chapter 6. Alternatively, it is a statement of policy and/or a general order of general application. It has the force of law and has been issued by WEC to interpret legislation enforced by the agency (namely, Wis. Stat. § 6.87(4)(b)1.).

As a rule, this policy should have been promulgated under the provisions for rule-making under Chapter 227, which, among other things would have provided the public an opportunity to weigh in. But the rule-making process was not followed. Since WEC’s interpretation/policy is a rule, and that rule was not promulgated in accordance with the requirements of Wis. Stat. Ch. 227, it is invalid. Wis. Stat. § 227.40(4)(a).

Even if WEC were to argue that the Memo (and the other previous interpretations) are just guidance and not a rule (we would disagree with that argument), WEC did not comply with the requirements for guidance documents contained in Wis. Stat. § 227.112.

Again, I am providing you with this background so you can let me know why you disagree.

Finally, this letter is also a request for public records, made under Wisconsin’s Open Records Law, Wis. Stats. §§19.31-19.39. Specifically, I am requesting the documents set forth below. I would be happy to speak with you or with anyone else from WEC if you think that any of my requests are not clear.

1. Copies of all documents sent by you or any other staff of the Wisconsin Election Commission (“WEC Staff”) to any of the WEC Commissioners regarding or relating to the Memo.
2. Copies of any communication that you or WEC Staff have sent to municipal clerks regarding or relating to the Memo.
3. At the WEC meeting on June 17, 2020, Chair Ann Jacobs stated that she believed that the state statute relating to third parties returning ballots was worded ambiguously and that the statute had been interpreted in a way allowing such a practice for years. I am requesting any written statements by WEC (or any of its predecessors) which set forth that interpretation, i.e., allowing a third party to deliver a ballot for a voter.
4. Copies of any documents that show that the highlighted statement in the Memo (and the statutory interpretation which it contains) was approved by the Commission or one of the predecessor bodies to the Commission as opposed to being promulgated by staff.
5. Copies of all documents exchanged between WEC Staff or between WEC Staff and any of the WEC Commissioners regarding the subject of ballot harvesting between March 1, 2020 and the date of this request. In this context, “ballot harvesting” means a third party requesting an absentee ballot for an elector, and/or returning an absentee ballot on behalf of the elector after it has been completed.

Please be aware that the Open Records Law defines “record” to include information that is maintained on paper as well as electronically, such as data files and unprinted emails. Wis. Stat. §19.32(2).

If these records are stored electronically, the law requires you to provide them in that electronic format. See *Lueders v. Krug*, App. No. 2018AP431 (Wis. Ct. App. 2019). Electronic records can be sent by email to brian@will-law.org. Otherwise, they may be mailed to the address above.

Please also be aware that the Open Records Law “shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of access generally is contrary to the public interest, and only in an exceptional case may access be denied.” Wis. Stat. § 19.32(1). If you deny my request, the law requires you to do so in writing and state what part of the law you believe entitles you to deny my request. Wis. Stat. § 19.35(4)(a).

The Open Records Law states that you may charge for "the actual, necessary and direct cost" of locating records, if this exceeds \$50, for photocopies, and for postage. Wis. Stat. § 19.35(3). Please advise me before processing this request if there will be a cost incurred.

As you know, the law requires you to respond to this request “as soon as practicable and without delay.” Wis. Stat. § 19.35(4)(a).

If you are not the records custodian for this information, please forward this request to the appropriate person.

Again, please contact me if I can help clarify or refine this request.

Sincerely,

/s/Lucas Vebber
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