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STATE OF WISCONSIN

COURT OF APEALS

DISTRICT IV

Case No. 2019AP2397, 2020AP112

STATE OF WISCONSIN ex rel.
TIMOTHY ZIGNEGO, DAVID W. OPITZ,
and FREDERICK G. LUEHRS, III,

Plaintiffs-Respondents,

v.

WISCONSIN ELECTIONS COMMISSION,
MARGE BOSTELMANN, JULIE GLANCEY,
ANN JACOBS, DEAN KNUDSEN and MARK
THOMSEN,

Defendants-Appellants.

APPEAL FROM A FINAL ORDER
OF THE OZAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE PAUL V. MALLOY, PRESIDING

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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ARGUMENT

Wisconsin Stat. § 6.50(3) simply does not apply to the circumstances presented here: a claim brought by three voters seeking mass, state-wide deactivation of other voters' registrations based on one set of data that is not always an accurate indicator of whether a person has changed his voting residence. Section 6.50(3) instead applies only when there is "reliable information" that a *particular* voter has moved outside a municipality. In other words, it requires a judgment-based determination of reliability applied on a voter-by-voter basis at the local level. And, tellingly, section 6.50(3) does not, by its plain terms, apply to the Wisconsin Elections Commission, at all. It applies to only municipal clerks and boards of elections commissioners, neither of which is the Wisconsin Elections Commission.

Nothing Plaintiffs have argued in response changes these fundamental statutory problems. Instead, they resort to other statutes or assertions that have no bearing on that plain language. First, Plaintiffs cite the Commission's duty to maintain the statewide registration list pursuant to Wis. Stat. § 5.05(15). But that says nothing about any obligation to revise the list, which is specifically addressed in another statute—section 6.50. Under *that* statute, revision of the list is sometimes a duty of the Commission and sometimes of local election officials, depending on the particular statutory subsection involved. Deactivation of voter registrations under subsection (3) is exclusively the province of municipal clerks and boards of elections commissioners.

Second, Plaintiffs contend that the Commission's past conduct matters, but it does not. It is irrelevant to what section 6.50(3) actually says. Whatever the Commission did with past data, the fact remains that section 6.50(3) does not apply to the Commission and does not empower—much less require—it to do anything. And contrary to Plaintiffs'

assertion, the Commission made no previous determination that the Movers data is "reliable information." In fact, it found just the opposite: the Movers data is *not* always a reliable indicator of a change in voting residence.

Finally, the statistical reliability of the Movers data is also irrelevant to Plaintiffs' argument. Section 6.50(3) applies to individual electors and is not designed to address reliable information and deactivation on a mass-scale. The statute simply does not apply here and, therefore, cannot impose a plain duty on the Commission, as required for a writ of mandamus.

I. Plaintiffs are not entitled to a writ of mandamus.

A. Mandamus was improper based on section 6.50(3)'s "reliable information" standard and because the statute does not apply to the Commission.

As fully explained in the first brief, there are multiple reasons that Plaintiffs' argument is unworkable on a basic statutory level.

For example, section 6.50(3)'s deactivation process is triggered *only* when there is "reliable information that a registered elector has changed his or her residence to a location outside of the municipality." Wis. Stat. § 6.50(3). Instead of engaging in a reliability analysis on a voter-by-voter basis, the circuit court assumed the ERIC Movers data was "reliable information" for hundreds of thousands of people. However, it is undisputed that the ERIC Movers data is not always an accurate reflection of an individual's voting residence. Left unaddressed was whether information about any *particular* voter was reliable—in other words, the statutory trigger was not meaningfully applied, nor could it be on this mass scale.

Further, the Commission has no positive and plain duty under section 6.50(3) because that statute does not apply to the Commission. The Wisconsin Elections Commission is not a "board of election commissioners" under section 6.50(3). The "commission" and "board of elections commissioners" are entirely separate entities. *See* Wis. Stat. §§ 7.08, 7.20, 15.61; *compare* Wis. Stat. § 6.50(1)–(2), *with* (3). The Wisconsin Elections Commission is referred to as the "commission" throughout the election laws. Wis. Stat. § 5.025. It is not a "board." Wis. Stat. § 15.61.

In addition, Plaintiffs' response brief is silent as to their legal right, or standing, to bring their challenge. They provide nothing to rebut the argument that they lack a cognizable injury and are not within the "zone of interests" protected by section 6.50(3). Nor do they address the fact that different statutes specifically provide for an individual elector to challenge another elector's registration and require a more robust "beyond a reasonable doubt" burden of proof. *See* Wis. Stat. §§ 6.325, 6.48. Plaintiffs' failure to respond to this argument means it is implicitly conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

These basic statutory reasons show that Plaintiffs' claim is fundamentally misguided.

B. Nothing in Plaintiffs' response changes the analysis.

Plaintiffs make three main arguments in response. First, they argue that the Commission's duty to maintain the registration list pursuant to section 5.05(15) somehow implicitly requires the Commission to perform the obligations expressly placed on local officials in section 6.50(3). (Resp't Br. 29). Second, they argue that the Commission's past conduct matters. And, finally, they argue that the ERIC Movers data is "reliable information."

None of these arguments meaningfully advance Plaintiffs' claim. On the one hand, they assert that section 6.50(3) obligates the Commission to deactivate voter registrations, but on the other hand, they avoid grappling with the plain language of that subsection. There is no legal or factual support for Plaintiffs' arguments.

1. The Commission's duty to maintain the registration list under section 5.05(15) does not change the revision process under section 6.50(3).

Plaintiffs argue that the Commission's duty to maintain the registration list pursuant to section 5.05(15) somehow amends, *sub silentio*, the express coverage of section 6.50(3) and its revision mechanism. (Resp't Br. 27–30.) That contention is meritless.

Section 5.05(15) provides, in relevant part, that "[t]he commission is responsible for the design and *maintenance* of the official registration list." "Maintain" does not mean change. Just the opposite. The dictionary defines "maintain" as "to keep in an existing state." Merriam-Webster, http://www.merriam-webster.com/dictionary/maintain (last visited February 19, 2020).

That the Commission is generally required to "maintain" or "keep" the registration list does not address when a revision is triggered. Rather, section 6.50 specifically addresses "revision" of the list. In other words, these two statutes do not address the same topic. And, even if they did, a general statute would yield to the more specific statute. *See Gottsacker Real Estate Co. v. DOT*, 121 Wis. 2d 264, 269, 359 N.W.2d 164 (Ct. App. 1984) (the specific statute controls over the general statute).

Indeed, the Commission's revision duties are specifically addressed in section 6.50 through the four-year audit process in subsections (1) and (2). The other subsections

require *local entities* to make revisions—like subsections (3) through (6). Contrary to Plaintiffs' assertion, municipal clerks and boards of elections commissioners are expressly authorized to make changes to the registration list. *See* Wis. Stat. §§ 6.36(1)(b)1.b., (1)(c), 7.20(1). Thus, Plaintiffs' contention that the Legislature, through the enactment of section 5.05(15), *implicitly* assigned to the Commission powers and duties previously reserved to local entities yet kept intact *express* language maintaining the differences among them, is simply untenable.

Plaintiffs' argument assumes that the Commission is literally a "board of election commissioners." For example, they assert that "board of election commissioners" has no "definition," (Resp't Br. 13, 26), but that entity is comprehensively described in Wis. Stat. § 7.20. (*See* App. Br. 20.) Further, they have no response to the fact that "commission" does have a definition, *see* Wis. Stat. § 5.025, and that definition does *not* include "board of election commissioners."

Plaintiffs also claim that nothing in section 6.50(3) limits "board of election commissioners" to a municipal board by comparing it to Wis. Stat. § 6.36(1)(b), which uses the phrasing "board of election commissioners *of any municipality*." However, there is nothing anomalous about that. There are municipal *and* county boards of election commissioners, so that use of "municipal" is the Legislature specifying, for purposes of that subsection, which is implicated. *See* Wis. Stat. § 7.20. And, in any event, it remains the case that the statutes specifically define the Elections Commission as "the commission," not as anything else.

In a related point, Plaintiffs quote an earlier version of section 5.05(15) that reads: "The *board* is responsible for the design and maintenance of the official registration list." (Resp't Br. 28.) Section 5.05(15) no longer reads that way. It now uses the term "the commission" three times and does not

reference "the board" even once. This law *used to* reference "the board" because, at that time it was created, the "elections board" was the state entity responsible for elections administration in Wisconsin. *See* 2003 Wis. Act 265, § 6; Wis. Stat. § 5.02(1s) (2001–02). The elections board was later replaced by the government accountability board, which, in turn, was replaced by the Commission in 2016. *See* 2015 Wis. Act 118, § 2. At no time was section 6.50(3) amended to include "the commission," even though the Legislature added "the commission" to other subsections in that statute and throughout chapter 6. *See e.g.,* 2015 Wis. Act. 118, §§ 69, 77. The Legislature's action shows that it knows the difference between "the commission" and a "board of election commissioners," as explained above.

Plaintiffs cannot rewrite the plain language of section 6.50(3). Their arguments fail.

2. The Commission's past conduct is irrelevant to whether section 6.50(3) requires it to act now.

Plaintiffs also argue that the Commission's past conduct demonstrates that it determined that the ERIC Movers data is "reliable" and that it is required to deactivate voter registrations under section 6.50(3). (Resp't Br. 18–21, 30–35.) There is no factual or legal support for this argument.

Plaintiffs first point to the Commission's deactivation action in 2017. After receiving the first report on ERIC Movers data in 2017, the Commission mailed postcards to the identified electors directing them to reregister if they had moved or to sign and return the card to the municipal clerk or board of elections commissioners to keep their registration current, and the Commission gave those affected 30 days to do so before deactivating. (R. 23:5–6.) This process proved to be extremely problematic. For example, the Commission learned that the Movers data was *not* a reliable indicator of a

change in voting residence because that data is collected for purposes other than voter registration. And the Commission ended up reactivating the registrations of many electors.[1] (R. 4:8–12; 23:5–10.)

That flawed attempt of course says nothing about what section 6.50(3) says, which is the question posed to the Court. Its mandate applies only to municipal clerks and boards of elections commissioners. Past acts, however they are interpreted, are irrelevant to the scope of section 6.50(3). *See Andersen v. DNR*, 2011 WI 19, ¶ 25, 332 Wis. 2d 41, 796 N.W.2d 1 ("The extent of the agency's statutory authority is a question of law which we review independently and without deference to the agency's determination."); *Koschkee v. Taylor*, 2019 WI 76, ¶ 20, 387 Wis. 2d 552, 929 N.W.2d 600 (an agencies' powers, duties, and scope of authority are fixed and circumscribed by the legislature). Revisions are mandated by section 6.50, and they do not include deactivation of voter registrations in this context.

Plaintiffs also point to the Commission's actions in 2019. They argue that the letter the Commission mailed to ERIC Movers in October 2019 was a notice under section 6.50(3) and that, counterfactually, the Commission actually made a reliability determination. That is not so. (Resp't Br. 18, 20, 31–32, 35–36.) To the contrary, the Commission observed that the data is not always correct on a voter-by-voter basis, and it certainly made no finding that it was reliable. The October 2019 mailing was not triggered by a section 6.50(3) reliability determination but rather was just

[1] These actions were not challenged in court.

the informational mailing contemplated by the ERIC Agreement.[2] (R. 23:5; 24:5.)

Relatedly, Plaintiffs argue that "[i]f § 6.50(3) does not apply to [the Commission], then [the Commission] has no other power under which they may send mailings to registered voters in the first place." (Resp't Br. 35.) However, Wis. Stat. § 6.36(1)(ae) specifically directs the Commission to follow the terms of the ERIC agreement, which includes notifying those flagged by ERIC as possible Movers.[3] Indeed, this goes to Plaintiffs' unfounded assumption that the purpose of ERIC data is to deactivate voters, and that it has no other purpose. (*See* Resp't Br. 35.) What they miss is that a primary purpose is to *inform* voters themselves of their possible need to reregister, empowering them to do so. (R. 23:5, 10; 24:4–5.) The Commission's mailing here serves that important purpose.[4]

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[2] The Commission sent the mailing to *all* Movers on the list, not just to those who moved "to a location outside of the municipality," as set forth in section 6.50(3).

[3] Plaintiffs assert that, if the Commission is relying on the ERIC Agreement as authority to send out an informational mailing, it is acting pursuant to an unconstitutional statute. (Resp't Br. 18–19 n.4, 20–21.) Plaintiffs did not plead such a claim and, thus, that issue is not before this Court.

[4] Plaintiffs incorrectly state that the Commission has decided that voters will be deactivated within one to two years. (Resp't Br. 37.) However, the Commission has not adopted a definitive plan or timeline for deactivation of voter registrations. (R. 23:11; 52:1–2.) Rather, the Commission has indicated a need for future statutory guidance on this topic. (R. 52:1–2; 53.)

3. The statistical reliability of the ERIC Movers data is irrelevant because section 6.50(3) applies to individual voters.

Plaintiffs argue that the ERIC Movers data has "an accuracy rate of approximately 95% [and] is, objectively, 'reliable.'" (Resp't Br. 23.) Statistical reliability is irrelevant to the standard here—voting is not a science experiment. Whether a person resides somewhere does not turn on probabilities but rather specific facts. Section 6.50(3) requires "reliable information that *a* registered elector" has moved. It is undisputed that there are thousands of voters for whom the data is inaccurate. (Resp't Br. (conceding a 5–6% rate of "nonmovers").) Thus, ERIC data cannot be applied indiscriminately.[5]

The Legislature has already decided that the mere fact that a person may have reported a residence different than his voter registration address does not necessarily mean that person has changed his permanent voter registration address. Wis. Stat. § 6.10. And "additional verification"—like checking "duplicate addresses or minor deviations in addresses" and sending notice with a 30-day deadline for response—has proven ineffective in rooting out electors who have not actually changed their voting residence. (Resp't Br. 22–23.)

Plaintiffs seem to say that the Court should not be concerned with improperly removing voters because of

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[5] There are numerous examples of voters with inaccurate 2019 ERIC Movers data. Steve Chamraz, *Voters flagged for deletion still live where list says they don't*, TMJ4 (last updated Feb. 17, 2020, 3:00 PM), https://www.tmj4.com/news/local-news/voters-flagged-for-deletion-still-live-where-list-says-they-dont.

election day registration. However, that point is irrelevant to the statute's coverage in the first instance. Further, same-day registration is not the failsafe that Plaintiffs claim it is. Voters may come to the polls not knowing that they have been removed from the poll list and need proof for residence—like a recent utility bill or paystub—to reregister. Even if they have a valid photo identification for purposes of voting, that identification would not necessarily provide proof of residence for registration purposes. *See* Wis. Stat. §§ 5.02(6m) (definition of "identification"), 6.79(2) (voting procedure), 6.34(3) (documents used to establish proof of residence).

The statistical reliability of the Movers data means nothing to individual voters for whom the data is incorrect. Because section 6.50(3) sensibly applies to individual electors, the statutory standard simply does not apply here.

II. The writ of mandamus cannot form the basis for a contempt finding.

This Court should reverse the writ of mandamus, rendering the contempt issue irrelevant. Only if the contempt order were interpreted to have imposed one day of sanctions is there anything left to discuss. In that instance, the one day of contempt should be reversed, for the reasons stated in the first brief.[6] The Commission did not intentionally disobey the writ because it made repeated efforts to obtain a stay of the writ, and it reasonably interpreted the writ as allowing for time to seek a stay prior to deactivation.

Plaintiffs contend that the Commission claims that it "had no obligation to do anything" after the circuit court issued that writ. (Resp't Br. 14.) But that is not what

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[6] The Court imposed a remedial sanction for the purpose of terminating a continuing contempt of court. That sanction was imposed for, at most, only one day before this Court stayed the ruling. (R. 93; 124; 125.)

happened. On the contrary, staff provided the Commission with several options for deactivation of voter registrations. (R. 93:3–4, 9–14.) Under the circumstances—which included pending stay motions, the general acknowledgment that it made sense to seek an appellate ruling, and the potential for voter confusion—the Commission waited until the appellate courts decided the pending stay motions, while also beginning contingency planning.

The Commission's actions are further supported by the fact that the writ itself was not an unequivocal directive. Not only did the writ not clearly direct the Commission when to deactivate voter registrations, it also did not clearly direct whose registrations it must deactivate and whether notice of deactivation was required. Plaintiffs provide no response to this argument and do not even attempt to explain how the writ unequivocally directed the Commission to deactivate particular voter registrations in a certain timeframe. There is nothing to support the circuit court's finding of contempt under these circumstances.

CONCLUSION

This Court should reverse the writ of mandamus and vacate the contempt order of the circuit court.

Dated this 19th day of February 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2959 words.

Dated this 19th day of February 2020.

KARLA Z. KECKHAVER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (Rule) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of February 2020.

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