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SUPREME COURT

Nos. 2019AP2397 and 2020AP112

In the Wisconsin Supreme Court

STATE OF WISCONSIN EX REL. TIMOTHY ZIGNEGO, DAVID W. OPITZ AND FREDERICK G. LUEHRS, III

PLAINTIFFS-RESPONDENTS-PETITIONERS,

v.

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

DEFENDANTS-APPELLANTS.

Appeal from the Circuit Court of Ozaukee County
Honorable Paul V. Malloy, Presiding
Case No. 19-CV-449

REPLY BRIEF OF PLAINTIFFS-RESPONDENTS-PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page Number**

Statutes

Other

ARGUMENT

I. WEC is a board of election commissioners.

The Defendants argue that WEC is not a "board of election commissioners." But under the common, ordinary and accepted meaning of those words, that is precisely what it is. Defendants say that the phrase should be given a defined and narrow technical meaning. But nothing in the statutes calls for that and nothing in the structure or purpose of the law compels such a conclusion. In the Defendants "just-so" story, this Court is asked, at every step of the interpretive process, to ignore plain meaning and presume a hypertechnical structure that the legislature did not choose and which cannot be presumed. It is asked to assume that the legislature turned a statute that imposes a duty to remove persons who have moved on the the officials that maintain them into one in which those officials (now the Defendants) are absolved of that responsibility.

A. The common, ordinary and accepted meaning of the words "board of election commissioners" includes WEC and that term is neither technical nor specially-defined.

The starting point in interpreting §6.50(3) is *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis.2d 633, 681 N.W.2d 110, in which this Court said that "[s]tatutory language is given its common, ordinary, and accepted

meaning, except that technically or specially-defined words or phrases are given their technical or special definitional meaning." A commonly understood term *may* have a more narrow technical meaning but the presumption is otherwise. *See Masri v. State Labor & Indus. Review Comm'n,* 2014 WI 81, ¶ 32, 356 Wis. 2d 405, 850 N.W.2d 298 ("Wisconsin Stat. §146.997…begins with several definitions but, important for this case, [it] does not define 'employee.' Thus, as we interpret the statute, we must attempt to give the word 'employee' its 'common, ordinary, and accepted meaning.'") (citing *Kalal*)

The words of § 6.50(3) "have common ordinary meanings which by common knowledge occur to the mind of any one of ordinary intelligence upon their being used" and, thus, are not technical words. *Sharpe v. Hasey*, 134 Wis. 618, 114 N.W. 1118, 1119 (1908). Nor do the statutes derogate from that meaning by specifying a narrow and technical meaning. Chapters 5-12 of the Wisconsin Statutes (which deal with election law) begin with definitions (46 of them) but none define "board of election commissioners."

Defendants have repeatedly argued that that there is a "definition" found in §7.20 (which creates municipal boards of election commissioners), but that's just not so. In fact, the Court of Appeals conceded (Ct. App. Dec. at ¶74) that the phrase is not

defined in the statute. For that reason, it must be given its common, ordinary and accepted meaning. *See Masri,* supra.

Wis, Stat. § 5.025 says that the term "commission" refers to the Wisconsin Election Commission but it does not say that WEC is *only* referred to in that way. And, in fact, WEC is *not* only referred to as the "commission."[1] Even if it were possible for a differing use of a statutory term in one place to alter its "common, ordinary and accepted" meaning in another, that usage would have to be completely uniform. In any event, the legislature knows how to adopt limiting – and exclusive – defintions in contructing statutes. It did not do so here.

For the Court to presume a technical meaning that is not expressly set forth or a necessary – or even likely – inference from the statutory language would be to substitute speculation about legislative intent for the language of the law. *Kalal,* 2004 WI at ¶ 52 ("It is the *law* that governs, not the intent of the lawgiver.... Men may intend what they will; but it is only the laws that they enact which bind us.")

Discerning the plain meaning of the words "board of elections commissioners" is not difficult. The dictionary definition

[1] For example, the Legislature also refers to WEC as the "elections commission." *See* §§5.01(4)(a), 5.05(2w), 5.40(7), 5.58(2m), 5.60(1)(b) and 6.275(1)(f). Nor does it always refer to municipal board of election commissioners as "board of elections commissioners." For example, it uses "board of election commissioners of any municipality" in Wis. Stats. §6.36(1)(c) and "municipal board of election commissioners" in §5.40(7).

of a "board" is "a group of persons having managerial, supervisory, investigatory, or advisory powers." Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/board. WEC is a group of 6 persons who have the responsibility for the administration of Wisconsin's election laws. *See*, §5.05(1). Moreover, the predecessor to WEC was the Government Accountability Board. It is certainly no stretch to think of WEC as a "board." WEC certainly deals with "elections." It supervises the laws relating to "elections and election campaigns." Wis. Stat. §5.05(1). Finally, WEC is called a commission and its members are "commissioners."

The Defendants argue that this Court may depart from this plain meaning based upon other statutes in which the Legislature sometimes – but not always – refers to WEC as the "commission" and yet other statutes in which the Legislature sometimes – but not always – refers to municipal boards of elections commissioners as boards of election commissioners. WEC is a sometimes the "commission," but that does not mean that it may not also be "a board of election commissioners." A municipal board of election commissioners is sometimes a "board of election commissioners" does not mean that WEC may not also be one.

There must be some independent reason to think that, even in the absence of a statutory definition, a narrow and technical definition can be indirectly implied from a differing and uneven

use of a term whose ordinary meaning would include WEC. It is well accepted that an undefined term may mean different things in different contexts. In the absence of a legislative direction that a term must have a narrow and technical defintion, a term should be given its common sense of meaning. *See Masri*, supra. Any other approach – any attempt to infer a special meaning from an elaborate exegesis of multiple statutes passed at different times for different reasons – risks substitution of the court's judgment for the enacted law.

This is particularly so given the context of §6.50(3). As noted in our initial brief, the relevant language was written prior to the establishment of WEC (and its predecessors) as the entity in charge of maintaining a statewide voter roll. Because "board of election commissioners" was broad enough to include these new entities, it not surprising that the legislature did not change the language. It is quite clear that the statute places an obligation to update the rolls on those who maintain them. There is nothing in the language of the statute, it's history or its structure to permit a court to infer an unexpressed legislative decision to reserve certain functions for local officials who no longer are responsible for maintenance of the rolls.

B. Excluding WEC from the duties under §6.50(3) leads to an unreasonable result.

The Defendants' interpretation of §6.50(3) would mean that there is no governmental agency left to perform the obligations set forth in §6.50(3). Imposing that duty on 1,850 municipal clerks would lead to inevitable violations of the federal Help America Vote Act ("HAVA").

HAVA mandates that states have statewide voter registration lists maintained and administered by the chief election official in the state in a uniform and nondiscriminatory manner. *See*, 52 U.S.C §21083. Specifically, 52 U.S.C. §21083 states as follows:

> each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level.

This federal requirement has 3 components that are critical here: (1) the voter rolls must be "statewide" and not municipality by municipality, (2) the voter rolls must be maintained and administered by the chief election official in the State (in Wisconsin that is the Administrator of WEC) and not by municipal clerks, and (3) the voter rolls must be maintained in a uniform and nondiscriminatory manner.

Each of these three critical components would be violated if it is municipal clerks rather than WEC that exercises the duties

under §6.50(3). First, if they were obligated to address movers, the 1,850 municipal clerks would be administering and maintaining the voter rolls which would mean that they were not being administered and maintained "statewide." Second, the chief election official of the State would not be administering and maintaining the voter rolls. Third, the rolls could not possibly be maintained in a uniform and nondiscriminatory manner by 1,850 different people.

The Defendants' first attempt to avoid this conclusion is to argue that the Petitioners have not developed this argument before and that it should not be considered now, citing *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177. (Def. Br. at 23.) They confuse legal issues (which must be asserted below or can be waived) with legal arguments (which are not subject to waiver). *State v. Weber*, 164 Wis. 2d 788, 789, 476 N.W.2d 867, 868 (1991).

Here, the legal *issue* is - does §6.50(3) apply to the WEC? That issue has not been waived and legal arguments regarding the issue can always be modified.

Further, as this Court noted in *Weber*, once the case is before this Court, the issues are the ones presented in the petition for review, 164 Wis. 2d at 789, and "once an issue is raised in a petition for review, any argument addressing the issue may be asserted in the brief of either party or utilized by this court." *Id.* at

791. The HAVA argument was raised extensively in the Petition for Review at 12-13 and 17-18.[2]

Once the Defendants finally get to the point, they say that there is no conflict with HAVA here. They argue that local election officials are permitted to make changes to the voter registration list under 28 U.S.C. §21083(a)(1)(A)(v)–(vii)[3] and under §§6.36(1)(b)1.b and(1)(c) so there is allegedly no tension between state and federal law. But that statement is a non sequitur.

It does not explain how 1,850 municipal clerks acting independently of one another could: (1) perform the duties required under §6.50(3) in a *uniform and nondiscriminatory* manner, (2) satisfy the requirements of a statewide list, or (3) result in a list administered and maintained by the chief election officer of the state.

Given the federal constraints imposed on the State by HAVA and that Wisconsin has moved to a "top down" and centralized maintenance of voter rolls, the more reasonable way to understand §§6.36(1)(b)1.b and(1)(c) (and 52 U.S.C. §21083(a)(1)(A)(v)–(vii)) which allow local election officials to add or change entries on the registrations list is that they may do so at the direction and

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[2] In any event, Petitioners did raise the HAVA argument. See Ct.App. Resp. Br. at 27-28 (the purpose of having a state agency maintain the voting list was to ensure Wisconsin was complying with HAVA).

[3] HAVA has been renumbered and the provision is now 52 U.S.C. §21083(a)(1)(A)(v)–(vii).

instruction and under the supervison of WEC but not independently of WEC.

Indeed, §5.05(15) contemplates exactly such a state of affairs when it provides that WEC "shall require all municipalities to use the list in every election and may require any municipality to adhere to procedures established by the commission for proper maintenance of the list."

That also explains why, as the WEC Administrator acknowledged in an affidavit, when Milwaukee, Green Bay and Hobart wanted to reactivate the registrations of voters who had received a movers notice, they had to *ask* WEC to reactivate them (R. 23:9.). Municipal clerks and municipal boards of election commissioners do **not** have the unilateral power to remove voters from the voter rolls. The rolls are maintained by WEC (and not the local municipalities) as required by HAVA.

II. The Writ of Mandamus was properly issued

The Defendants continue to assert that the information in the ERIC Movers Report is not reliable and, therefore, triggers no obligation under §6.50(3). But the Defendants' argument has two major flaws.

First, the Defendants ignore that the statute contains not one obligation but instead contains two different obligations relevant here – a notice obligation and a deactivation obligation.

Under §6.50(3), it is the notice obligation that references reliability. There is no reliability test in the deactivation obligation. Thus, reliability must be determined prior to sending the notices. And, in fact, WEC sent the notices. Once the notices were sent, the deactivation obligation exists if the voter does not reply.

The statute uses the word "shall" and the word "shall" is presumed to be mandatory. Once WEC sent the notices, it had a plain and positive legal duty under statute.

Second, the obligation to act on reliable information is also mandatory. Wis. Stat. § 6.50(3) ("Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or board of election commissioners *shall* notify the elector by mailing a notice ….") (emphasis supplied) There is no dispute here that the particular data at issue in this case is objectively reliable. Once WEC had received this information from ERIC, it could not be ignored.

WEC staff did a follow up study on the Movers List and presented the results to the Commissioners at the May 20, 2020 Commission meeting. The result is that the list was 98% accurate. (Pet. App. at 207.) The Defendants speculate that there could be more "non-movers" among those who have not registered to vote at another location. There is no reason to think so. But even if that's

true, the movers list would be – as Defendants acknowledge – 96% accurate. (Def. Br. at 29.) Defendants argument reduces to, as they themselves say, that the Movers list is not "foolproof."

It is clear that the Legislature did not mean that "reliable" information must be "foolproof," "perfect" or in no need of verification. §6.50(3) clearly contemplates that "reliable" information need not be perfect since it directs WEC to verify it and permits voters who have not actually moved to easily maintain their registration at their actual address. "Reliable" in the context of the statute means sufficiently accurate to trigger the notice requirements of §6.50(3).

Third, the Defendants are wrong when they say that Petitioners are calling for some type of a "group" or "collective" determination of reliability. The Movers List is not an "estimate" or algorithmic prediction of who may have moved. Each person who is on the Movers list is there because of *individual* information that *he or she* has provided. The decision to send a notice and to deactivate those who do not respond is an individual decision based on individualized information. That the information was gathered by a computer does not make it otherwise. The only "collective" decision that is being made is WEC's.

III. The Contempt Order was proper

The law is clear that the Defendants were legally obligated to comply with Writ of Mandamus (whether or not they thought it

was likely to ultimately be reversed). *Wisconsin Employment Relations Bd. v. Milk & Ice Cream Drivers & Dairy Emp. Union, Local No. 225*, 238 Wis. 379, 299 N.W. 31, 41 (1941) (citing *State ex. rel. Attorney General v. Fasekas*, 223 Wis. 356, 358, 269 N.W. 700, 701 (1936) ("Whether the order was right or wrong, it was the duty of the defendants to obey it until relieved therefrom in some one of the ways prescribed by law.")) Here the Contemnors refused to comply with the Mandamus Order for 32 days.

IV. The Petitioners have standing.

The Petitioners have standing both as voters and as taxpayers.[4] As voters, the Petitioners are harmed if others are enabled by WEC to vote when, or at a location where, they are not legally eligible to vote. It diminishes the value of the Petitioners' lawful votes. The Petitioners are also harmed if the Defendants fail to administer elections as required by law. 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). Statutory provisions regarding the challenges of electors are inapposite. The Petitioners are not challenging an elector; they are demanding that WEC follow the law.

[4]Additionally, as Petitioners have previously explained, they brought this action under §5.06. Defendants now misconstrue Petitioners' claims as being appeals of administrative actions that should have been brought under Ch. 227. That is incorrect, and for the reasons Petitioners have put forth in their opening brief and explained herein, Petitioners clearly have standing.

Second, the Petitioners are harmed as taxpayers. In *S.D. Realty Co. v. Sewerage Commission of Milwaukee*, 15 Wis. 2d 15, 112 N.W.2d 177 (1961), this Court held that taxpayers have standing to challenge any unlawful action by a government entity that results in the expenditure of public funds. In *Hart v. Ament*, 176 Wis. 2d 694, 699, 500 N.W.2d 312, 314 (1993) this Court pointed out 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." Here, WEC spent substantial staff time and resources to develop the unlawful policy that was adopted by the WEC Commissioners to subvert the requirements of §6.50(3). It will expend resources using and maintaining voter rolls that are not kept in accordance with the law.

Finally, the Petitioners are within the zone of interest protected by the statute. The Legislature, in enacting §5.06(2), specifically granted them standing to require election officials to follow election law. The process for the Petitioners to challenge the Defendants' unlawful conduct is laid out in §5.06(2) and the Petitioners followed that process here.

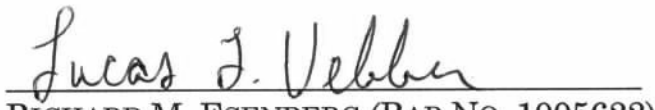
CONCLUSION

For the reasons stated herein, the Petitioners request that this Court reverse the decision of the Court of Appeals and affirm the Circuit Court's Mandamus Order and Contempt Order.

Dated this 13th day of July, 2020.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this reply brief is 2,996 words, calculated using the Word Count function of Microsoft Word.

Dated this 13th day of July, 2020.

LUCAS T. VEBBER

CERTIFICATE OF COMPLIANCE WITH 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 s. 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 13th day of July, 2020.

Lucas T. Vebber

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