

Timothy Zignego
3824 Wood Court
Hubertus, WI 53033

David W. Opitz
5132 Country Club Beach Rd.
Port Washington, WI 53074

Frederick G. Luehrs, III
N64W21545 Mill Rd.
Menomonee Falls, WI 53051

Case Code: 30701
Case Type: Declaratory Judgment

Case No:

Plaintiffs

v.

Wisconsin Election Commission
212 E Washington Ave 3rd Floor
Madison, WI 53703

Marge Bostelmann, Julie Glancey, Ann Jacobs,
Dean Knudsen and Mark Thomsen

Each of the above defendants is sued in their official capacities
as members of the Wisconsin Election Commission at their
office address of 212 E Washington Ave 3rd Floor
Madison, WI 53703

Defendants.

COMPLAINT

The Plaintiffs, by their undersigned counsel, hereby allege as follows:

1. This is an action against the Wisconsin Election Commission (“WEC”) and five commissioners of the Wisconsin Election Commission (the “WEC Commissioners”) (collectively “the Defendants”) based upon the Defendants’ failure and refusal to comply with state law.

2. Wisconsin Statute § 6.50(3) requires that upon receipt of reliable information that a registered voter has moved, WEC shall notify the voter by mail of that information. The voter

then has the ability to inform WEC that the voter has not moved and affirm that the voter remains at the address on their voter registration or, if the voter has moved, to register at their new address.

3. Wisconsin Statute § 6.50(3) is very clear as to WEC's duty if the voter does not respond to the notice. **If the elector . . . fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or board of election commissioners shall change the elector's registration from eligible to ineligible status.** (Emphasis added.)

4. Despite the mandatory language in the statute, the Defendants have decided that if voters do not respond to the notice that WEC would not change the voter's registration from eligible to ineligible status until somewhere between 12 months and 24 months after the notice was mailed and not responded to, rather than in 30 days as required by the statute.

THE PARTIES

5. Plaintiff, Timothy Zignego, is a registered Wisconsin voter and a taxpayer residing at 3824 Wood Court, Hubertus in Washington County, Wisconsin.

6. Plaintiff, David Opitz is a registered Wisconsin voter and a taxpayer residing at 5132 Country Club Beach Rd, Port Washington in Ozaukee County, Wisconsin.

7. Plaintiff, Frederick Luehrs, III is a registered Wisconsin voter and a taxpayer residing at N64W21545 Mill Rd, Menomonee Falls in Waukesha County, Wisconsin.

8. Each of the Plaintiffs is harmed and aggrieved by the conduct of the Defendants as described further herein. The Plaintiffs have standing as voters under Wis. Stat. § 5.06, as taxpayers because the Defendants are spending taxpayer money on illegal activities which causes pecuniary harm to the Plaintiffs, and as aggrieved parties under Wis. Stat. § 227.40 because the Defendants' invalid rule interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiffs.

9. The Defendant, Wisconsin Election Commission, is a governmental agency created under Wis. Stat. § 5.05 and charged with the responsibility for the administration of Chapters 5 and 6 of the Wisconsin Statutes and other laws relating to elections and election campaigns, other than laws relating to campaign financing. The Wisconsin Election Commission has its offices and principal place of business at 212 E. Wisconsin, 3rd Floor, Madison, WI 53703.

10. The Defendants, Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudsen and Mark Thomsen are commissioners of the Wisconsin Election Commission and were 5 of the 6 commissioners at all times relevant hereto. A sixth commissioner, Jodi Jensen, was involved in the matters that form the basis for this case but Ms. Jensen has since resigned and, thus, is not named as a defendant herein. Each of the WEC Commissioners is an “election official” within the meaning of Chapters 5 and 6 of the Wisconsin Statutes. Each of the WEC Commissioners is sued solely in their official capacities.

JURISDICTION AND VENUE

11. This court has jurisdiction pursuant to Wis. Stat. §§ 5.06, 806.04(1) and (2), and 227.40(1).

12. Venue is proper pursuant to Wis. Stat. §§ 227.40 and 801.50 (2) and (3)(a) and (b).

NATURE OF ACTION

13. By statute, Wisconsin now participates in what is called the Electronic Registration Information Center (“ERIC”). ERIC is a multi-state cooperative that shares information regarding voter registration.

14. As part of ERIC, Wisconsin receives a report regarding what are sometimes referred to as “Movers.” This refers to Wisconsin residents who, in an official government transaction, have reported an address different from their voter registration address.

15. After receiving the report on Movers from ERIC, WEC undertakes an independent review of the “Movers” information to ensure its accuracy and reliability.

16. Once WEC reviews the information from ERIC, then as required by Wisconsin law, WEC sends a notice to those voters, at the address on their voter registration, and asks them to affirm whether they still live at that address. If the voter affirms that he or she has not moved, then nothing happens and the voter remains in the active status on the voter rolls at that address.

17. The issue raised in this complaint is what happens if a voter who receives such a notice does not respond to the notice.

18. Wisconsin law is clear on that question. Wis. Stat. § 6.50(3) states that:

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 by 1st class mail to the elector's registration address stating the source of the information. All municipal departments and agencies receiving information that a registered elector has changed his or her residence shall notify the clerk or board of election commissioners. **If the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or board of election commissioners shall change the elector's registration from eligible to ineligible status.** Upon receipt of reliable information that a registered elector has changed his or her residence within the municipality, the municipal clerk or board of election commissioners shall change the elector's registration and mail the elector a notice of the change. This subsection does not restrict the right of an elector to challenge any registration under s. 6.325, 6.48, 6.925, 6.93, or 7.52 (5). (Emphasis added)

19. Despite the mandatory language in the statute, the Defendants have decided that WEC would not change the voter’s registration from eligible to ineligible status until somewhere between 12 months and 24 months after the notice was mailed and not responded to, rather than in 30 days as required by the statute.

20. WEC sent notices to approximately 234,000 Movers in October, 2019 (the “October, 2019 notices”). The Defendants have stated that they will not comply with Wis. Stat. § 6.50(3) with respect to the October, 2019 notices.

21. As set forth by WEC staff, “instead of deactivating their voter registrations within approximately 30 days under Wis. Stat. § 6.50(3), deactivation would take place between 12 months and 24 months, giving the Movers a chance to vote in both the General and following Spring Election.”

22. The Defendants do not have the power to set aside the policy decision of the Wisconsin Legislature in this regard.

23. The decision by the Defendants was contrary to law on two different bases.

24. First, the decision by the Defendants violated their clear duty under Wis. Stat. § 6.50(3).

25. Second, the Defendants violated their duties under Chapter 227 of the Wisconsin Statutes.

26. WEC has been granted rule-making power by the Legislature under Wis. Stat. § 5.05(1)(f) to “promulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns, other than laws regulating campaign financing, or ensuring their proper administration.”

27. However, when exercising that rule-making power, the Defendants must comply with Chapter 227 of the Wisconsin Statutes.

28. Here, the Defendants have contravened the will of the Legislature and created new election law policy for the State by simply voting on such a new policy in a motion at a WEC

meeting (which is certainly not the procedure required for rule-making under Chapter 227), all of which conduct is contrary to law and an abuse of discretion.

29. On October 16, 2019, the Plaintiffs filed a formal complaint involving the same unlawful conduct alleged in this Complaint with WEC (the “WEC Complaint”). The WEC Complaint was filed pursuant to Wis. Stats § 5.06(1), which provides that any voter may file a written sworn complaint with WEC requesting that any election official “be required to conform his or her conduct to the law.”

30. The WEC Complaint named as respondents the individual commissioners named as Defendants herein, each of whom meets the definition of an election official under Wisconsin law.

31. WEC acknowledged receipt of the WEC Complaint on October 23, 2019.

32. By letter dated October 25, 2019 WEC dismissed the WEC Complaint. WEC stated that the ground for dismissal of the WEC Complaint was that it was “not timely” in light of the statutory rule that such complaints “shall be filed promptly *so as not to prejudice the rights of any other party.*” Wis. Stat. § 5.06(3). (Emphasis added.) This was despite the fact that the WEC Complaint was filed the week after WEC sent the October 2019 notices. A true and correct copy of the October 25, 2019 letter from WEC dismissing the WEC Complaint is attached hereto as Exhibit A.

33. WEC’s October 25th decision also stated that given the facts described in the WEC Complaint, there are no circumstances in which the Plaintiffs could assert any additional facts which would “cure the defect” which led WEC to dismiss their complaint. Thus, the Plaintiffs have no practical ability to refile their complaint with WEC at any future time or on any known basis.

34. WEC's decision dismissing the complaint was without basis in fact or law. The WEC Complaint was filed promptly after WEC's final decision to implement the unlawful conduct described in this Complaint by sending the October 2019 Notices to voters between October 7 and October 11, 2019. In fact, the dispute presumably would not have been ripe until WEC sent the October 2019 notices and informed municipal clerks that WEC did not intend to enforce Wis. Stat. § 6.50(3) with respect to the October 2019 notices, which it did in training materials published in September 2019 and a memo dated October 4, 2019.

35. Moreover, no voter would be prejudiced by the date on which the WEC Complaint was filed. The Plaintiffs do not challenge the form of the notice sent to voters. Rather, the Plaintiffs challenge the decision by WEC not to follow up on the notices that were actually sent as required by Wis. Stat. § 6.50(3).

36. Thus, voters received proper notices and the only issue in this case is whether WEC must comply with § 6.50(3) with respect to voters who do not respond to the notices.

37. And it cannot be the case that WEC's claim of an adverse effect on WEC staff, who have spent time and effort implementing an unlawful plan, can possibly constitute "prejudice to the rights of a party" for purposes of the § 5.06(3).

38. Although WEC stated that its dismissal of the WEC Complaint was without prejudice, its decision represents the final disposition of the WEC Complaint, and no further action before WEC is possible. WEC has thus "disposed of" the WEC Complaint and Plaintiffs are authorized by Wis. Stat. § 5.06(2) to commence an action in this court to "test the validity" of the Defendants' "decision, action or failure to act."

39. Thus, the Plaintiffs seek a declaration from this Court that the conduct of the Defendants violated Wis. Stat. §6.50(3) and a temporary and permanent injunction or, in the

alternative, a writ of mandamus, requiring the Defendants to comply with Wis. Stat. § 6.50(3) with respect to the October 2019 Notices.

FIRST CAUSE OF ACTION – VIOLATION OF WISCONSIN STATUTE § 6.50(3)

40. The Plaintiffs reallege and incorporate all of the preceding allegations of the complaint as if fully set forth herein.

THE ERIC MOVERS REPORT IS RELIABLE.

41. As cited above, Wis. Stat. § 6.50(3) states that “[u]pon 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 by first class mail to the elector's registration address stating the source of the information.” (Emphasis added.)

42. Whether the ERIC Movers report is reliable is a question of law but the following facts show that the report is reliable.

43. The statute, itself, provides that any voter who receives a notice can continue their registration at their existing address by responding to the notice and informing WEC that the voter has not moved. Thus, the statute, on its face, assumes that some voters who have not moved will nevertheless receive a notice under the statute. The Legislature did not require certainty that the voter has moved prior to sending notice to the voter, only the existence of reliable information.

44. “Reliable” means something that is “consistently good in quality or performance or able to be trusted.” <https://www.lexico.com/en/definition/reliable>

45. It is the Wisconsin Legislature, itself, that made the decision to join ERIC. *See* Wisconsin Statute § 6.36(1)(ae).

46. The very reason that the Legislature determined that Wisconsin would join ERIC (and pay the required dues) is because ERIC is widely considered as a reliable source of information to be used by its member states (there are currently 29 states that are members) to update and improve the accuracy of their voter rolls.

47. The Legislature made that decision on behalf of the State of Wisconsin because the information to be received from ERIC was consistently good in quality such that it could be trusted.

48. Moreover, as confirmed by ERIC's own website, the reports that ERIC provides to its member states include "*reports that show voters who have moved within their state, voters who have moved out of state, voters who have died, duplicate registrations in the same state and individuals who are potentially eligible to vote but are not yet registered.*" (Emphasis added.)

49. That is, one of the known benefits of joining and paying dues to ERIC is to receive a Movers Report from ERIC.

50. Further, the information contained in ERIC's Movers Report is information reported by the voter (and not a third party) in an official government transaction. The source of the information makes the information reliable.

51. Moreover, Wisconsin's history with ERIC shows that the ERIC Movers Report is accurate.

52. WEC received a Movers report from ERIC in October 2017.

53. WEC staff reviewed and vetted that report before taking any action on the report. See, Exhibit B, WEC Staff Report for March 11, 2019 meeting ("March 11th Staff Report") ("Before any action was taken regarding these voters [identified in the ERIC Movers report], Commission staff vetted the list for changes that were not relevant to the voter's registration, such

as changes to mailing addresses or temporary changes.”) A true and correct copy of the March 11th Staff Report is attached hereto as Exhibit B.

54. Based on the reliability of the ERIC Movers report, WEC sent notices under Wis. Stat. § 6.50(3) to 341,855 voters in November, 2017.

55. The notice was in the form of a postcard directing the voter to sign and return the postcard if the voter desired to continue voting at the address on the postcard or to visit *myvote.wi.gov* to update their voter registration.

56. Of these 341,855 voters, only 6,153 responded to the notice by continuing their registration at their existing address. (March 11th Staff Report, Ex. B.)

57. The remainder (335,702) were deactivated from the voter registration list as required by law. *See* Wis. Stat. § 6.50(3).

58. Ultimately, 18,117 of the 335,702 voters whose registration status was deactivated were reactivated based upon one of the following: (1) the voter contacted their municipal clerk or WEC and stated that they still resided at the address on their voter registration, (b) WEC staff found an error of some sort, or (c) the voter voted in an election in 2018 from the address on their voter registration. (March 11th Staff Report, Ex. B.)

59. The total of the voters who returned the post cards (6,153) and the voters who were later reactivated (18,117) is 24,270. That number represents 7% of the voters who were sent notices in 2017.

60. This number does not represent “unreliability” in the ERIC data. The ERIC report covers voters who submitted an address different than their voter registration address in an official government transaction. The fact that a voter reported a different address to a government agency

is a “reliable” indicator that the voter may have moved, even if it turns out that the voter did not actually move.

61. Because these voters had reported two different addresses for themselves, the State of Wisconsin had a legitimate reason to ask these voters to confirm the address on their voter registration which is what the November 2017 notice asked the voters to do.

62. All that can be said about these 24,270 voters is that they reported an address different from their voter registration address in an official government transaction but had not actually moved to that second address.

63. The remaining 93% of the voters who received the November 2017 notice: (a) took no steps to maintain their registration at their original address and, either (b) registered to vote at their new address, or (c) have taken no steps to reregister or vote since their registration was deactivated.

64. This would mean that even assuming the 7% was a measure of unreliability (which it is not), the ERIC data from 2017 was still 93% reliable.¹

65. As part of a subsequent staff report prepared for the June 11, 2019 WEC meeting (the “June 11th Staff report”), WEC staff also reviewed a subset of the 2017 notices that had been classified as “undeliverable.” A true and correct copy of the June 11th Staff Report is attached hereto as Exhibit C.

66. WEC staff found that 6% of those voters subsequently voted from their original address (see, June 11th Staff report). So, even if “reliability” is measured by the percentage of

¹ It is possible that some part of the voters who have taken no action actually still live at their original address but there is no evidence that supports that possibility. In a later report the staff slightly revised the totals and reported that an additional small number (20) of voters were reactivated as the result of participating in the 2019 Spring Primaries. *See*, June 11th Staff Report, Ex. C. But this extremely minor change actually supports the reliability of the original ERIC data.

voters on the ERIC report who actually moved—rather than whether the ERIC data accurately shows which voters have reported a different address in a government transaction—the ERIC Movers report was still highly reliable (94%) for the subset of notices that were “undeliverable.”

67. After reviewing the data described in Paragraphs 56 through 64 above, the March 11th Staff Report concluded that “the in-state movers data is a largely accurate indicator of someone who has moved or who provided information to the post office or DMV which makes it appear that they moved.” (See, Exhibit B at page 10.)

68. WEC received a new ERIC Movers report in 2019.

69. WEC staff again reviewed and vetted the information prior to taking any action on the ERIC report. See, WEC Training Materials for 2019 Movers Mailing WisVote Webinar (the “Training Materials”). A true and correct copy of the Training Materials is attached hereto as Exhibit D.

70. Among other things, WEC staff identified and reviewed the potential matches between the ERIC Movers report and Wisconsin’s voter registration list, made sure no military voters were on the list, made sure that no voters were on the list who had received a notice during the 4 year maintenance process, checked for data quality issues, and reviewed the address information for accuracy. (Training Materials, Ex. D)

71. After taking those steps to confirm the accuracy of the ERIC report, WEC staff, as a matter of fact, again relied on the report to send notices to approximately 234,039 Wisconsin voters between October 7 and October 11, 2019. See WEC Memo to Clerks dated October 4, 2019. A true and correct copy of the WEC October 4, 2019 memo is attached hereto as Exhibit E.

72. On October 7, 2019 WEC also sent a memo to all members of the Wisconsin Legislature explaining what WEC had done with respect to the Movers notice. A true and correct copy of the WEC memo to Legislators is attached hereto as Exhibit F.

73. In its October 7, 2019 memo to Legislators WEC acknowledged that WEC had sent its first notice to Movers relying on the ERIC Movers Report in 2017 and that the October, 2019 notices were the second such mailing. WEC complied with Wis. Stat. § 6.50(3) with respect to the first Movers notice sent in 2017 but never explains to the Legislators why WEC refused to comply with Wis. Stat. § 6.50(3) for the 2019 mailing.

74. Other states that have so-called “top down” systems, meaning that the state’s voter registration system is maintained by the state and used by municipalities (as opposed to being maintained by the local municipalities), rely upon the ERIC Movers report to change the registration status of voters if the voter does not respond to a notice sent to the voter following the state’s receipt of the ERIC Movers Report. (See, Exhibit B, March 11th Staff Report at pages 6-7 for Virginia and 7-8 for Minnesota.)

75. Under Wis. Stat. § 6.50(3), voters who received one of the October, 2019 notices had three options: (a) if they moved, reregister at their new address in advance of the next election or on election day, (b) if they have not moved, return the form provided by WEC within 30 days affirming that they still live at their voter registration address or do so online at MyVote (in which case no action is taken to change their registration status) or (c) take no action to continue their active registration status at their voter registration address and have their voter registration status changed from eligible to ineligible 30 day after receipt of the notice. However if the voter’s registration status is changed and the voter has not actually moved the voter can simply reregister at their existing address in advance of the next election or at the polls the next time the voter votes.

76. Reregistering presents no hardship on the voter because the voter can do so at the polls on election day. Each voter needs to bring their Voter ID to the polls to vote in any event and given that the voter has not moved from their previous residence their Voter ID will likely match their voter registration address but, if not, the voter can use a variety of other forms of proof of residence.

77. The Defendants, however, have decided not to enforce the 30 day requirement contained in Wis. Stat. § 6.50(3) with respect to the October 2019 Notices.

78. The Defendants' conduct clearly conflicts with state law. WEC's duty under Wis. Stat. § 6.50(3) to change an elector's registration from eligible to ineligible when the statutory conditions are met is mandatory, not discretionary, and there is no provision in the law permitting the WEC Commissioners to cause WEC to wait up to two years before executing this task.

SECOND CAUSE OF ACTION – VIOLATIONS OF WIS. STAT. § 227.10

79. The Plaintiffs reallege and incorporate all of the preceding allegations of the complaint as if fully set forth herein.

80. While WEC has the statutory power to promulgate rules under chapter 227, *see* Wis. Stat. § 5.05(1)(f), in exercising that power WEC must comply with the requirements of Chapter 227. The Defendants did not do so.

81. Wis. Stat. § 227.10(1) requires that “[e]ach 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.”

82. The Defendants were interpreting several Wisconsin Statutes when they made the decision not to enforce Wis. Stat. § 6.50(3), including but not limited to Wisconsin Statutes §§ 5.05(15), 6.361(1)(ae) and 6.50(3). (See, March 11th Staff Report, Ex. B, pages 10-11.)

83. Moreover, the Defendants then adopted a statement of general policy applicable to the entire State of Wisconsin, which policy was to not enforce Wis. Stat. §6.50(3).

84. As part of their statutory duties, therefore, the Defendants were obligated to promulgate their interpretation of parts of Chapters 5 or 6 and the new statement of policy as a rule, but they violated that statutory duty.

85. The Defendants were aware that the new statement of policy required a statutory change or a new rule because that subject was raised by WEC staff in the March 11th Staff Report. (See Exhibit B, page 11 (“[S]taff believes any such long-term process should be reflected in either the agency’s administrative rules or the Statutes.”) But the Defendants acted without promulgating a rule.

86. Further, the Defendants may not promulgate a rule which conflicts with state law. See Wis. Stat. § 227.10(2) (“No agency may promulgate a rule which conflicts with state law.”)

87. Thus, while WEC has the power to interpret Wis. Stat. § 6.50(3) (and other statutes), the Defendants violated the law and abused their discretion when they interpreted the statutes in a way directly inconsistent with § 6.50(3). *Seider v. O’Connell*, 2000 WI 76, ¶ 28, 236 Wis. 2d 211, 612 N.W.2d 659 (“An administrative rule that conflicts with an unambiguous statute exceeds the authority of the agency that promulgated it.”)

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs request the following relief:

A. A declaration that the decision made by the Defendants not to enforce Wis. Stat. § 6.50(3) was unlawful.

B. A declaration that the decision made not to enforce Wis. Stat. § 6.50(3) and to adopt a new election law policy constitutes a rule; that the Defendants did not promulgate that rule as required by state law; and, that as a result the rule is invalid and may not be enforced by WEC;

C. A declaration that the decision not to enforce Wis. Stat. 6.50(3) constitutes a rule and that the rule is inconsistent with Wis. Stat. § 6.50(3) and as a result void.

D. A temporary and permanent injunction requiring that the Defendants cease and desist from ignoring and failing to enforce Wis. Stat. § 6.50(3).

E. In the alternative, a writ of mandamus that WEC shall change the registration status from eligible to ineligible for each voter who was sent the October 2019 notice and who did not respond to the notice within 30 days.

F. Such equitable or other relief as is just and appropriate.

Respectfully submitted this ____ day of November, 2019.

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