

December 8, 2021

VIA EMAIL: kaardal@mklaw.com

Erick G. Kaardal, Esq.
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402

RE: In the Matter of *Werner, et al. v. Wolfe*
Case No. EL 21-31

Dear Mr. Kaardal:

As you know, the law firm of DeWitt LLP (“DeWitt”) is retained as special counsel for the Wisconsin Elections Commission (“Commission”) with respect to the above-referenced matter. This letter is in response to the Complaint, dated May 7, 2021, which you submitted to the Commission on behalf of your clients, Cynthia Werner, Rochar C. Jeffries, Mack Azinger, Dave Bolter, and Daniel Joseph Miller (collectively, the “Complainants”).

Procedural History

The Complaint, brought pursuant to Wis. Stat. § 5.06, is filed against Meagan Wolfe, Administrator of the Commission; Tom Barrett, Mayor of the City of Milwaukee; and Jim Owczarski, Clerk for the City of Milwaukee. Complainants accompanied the Complaint with an Appendix of over 700 pages.

By email to all parties dated May 15, 2021, DeWitt established a deadline of June 15, 2021 for Respondents to respond to the Complaint. On June 15, 2021, Respondents Barrett and Owczarski filed a joint Answer (“Answer”) and Respondent Wolfe filed both a Response (“Response”) and a Motion to Dismiss All Claims Against Her, along with a supporting brief.

By email dated June 23, 2021, DeWitt established a deadline of July 28, 2021 for Complainants to reply. On July 28, 2021, Complainants filed a single Memorandum of Law and Appendix in the above-referenced matter and four others (Case Nos. EL 21-24, 21-29, 21-30, and 21-33). Respondents Barrett and Owczarski objected to the combined Memorandum of Law and Appendix by letter dated August 12, 2021. By email dated later on August 12, 2021, DeWitt notified all parties that Complainants’ combined Memorandum of Law and Appendix were not accepted and were to be considered stricken from the record in this matter. DeWitt permitted Complainants to file a separate reply for this matter by August 19, 2021.

On August 19, 2021, Complainants filed a separate Reply in the above-referenced matter, along with a lengthy Appendix of 1077 pages. Respondents Barrett and Owczarski again objected to the Reply by letter dated August 26, 2021, arguing among other things that the Reply incorporated

In the Matter of *Werner, et al. v. Wolfe*
December 8, 2021
Page 2

new facts and issues not raised in the initial Complaint. By email dated August 30, 2021, DeWitt granted Respondents the opportunity to file a sur-reply brief no later than September 13, 2021, which deadline DeWitt later extended to September 27, 2021 by email dated September 9, 2021. Respondents Barrett and Owczarski filed a sur-reply brief on September 27, 2021. Also on September 27, 2021, Respondent Wolfe filed a reply brief in support of her motion to dismiss.

The Commission has reviewed the above-identified Complaint; Respondents' various answers, responses, and motions; Complainants' Reply; and Respondents' various sur-reply and reply briefs. The Commission provides the following analysis and decision pursuant to Wis. Stat. § 5.06 and the Delegation of Authority adopted by the Commission in 2018 and most recently amended on February 27, 2020.

In short, the Commission finds that Complainants did not show probable cause to believe that a violation of law or abuse of discretion occurred with regard to the claims asserted in the Complaint.

Complainants' Allegations

The Complaint states that Complainants are all Wisconsin electors residing in Milwaukee, Wisconsin. Complaint, ¶¶ 1-5. No respondent has provided any evidence to contest Complainants' residency.

Complainants allege that, beginning in May and June 2020, "the City of Milwaukee adopted private corporation conditions on the election process affecting state and federal elections." Complaint, p. 2. Specifically, Complainants object to the City of Milwaukee's acceptance of private grants provided by the Center for Tech and Civic Life ("CTCL"), a private non-profit organization headquartered in Chicago, Illinois. Complaint, ¶¶ 16, 19, 37. The Complaint alleges that the CTCL grant money was issued pursuant to a grant application referred to as the "Wisconsin Safe Voting Plan" ("WSVP"). Complaint, ¶¶ 29, 35. The Complaint alleges that CTCL money was accepted by the City of Milwaukee, the City of Kenosha, the City of Racine, the City of Green Bay, and the City of Madison. Complaint, ¶ 19. The Complaint refers to these five municipalities as the "WI-5" or "Wisconsin Five." Complaint, ¶ 38.

By accepting the CTCL grant money and working with CTCL representatives, Complainants allege that "Milwaukee failed to comply with state laws, including obtaining from the Commission a prior determination of the legality of the private corporate conditions in the election process, and failed to comply with the U.S. Constitution's Elections and Electors Clauses which guarantee the state Legislature the exclusive role in approving Wisconsin's legal conditions relating to federal elections." Complaint, pp. 2-3.

Complainants also argue that the acceptance of the CTCL grant money by the "Wisconsin Five" "affected [Complainants] as a demographic group." Complaint, ¶ 53 ("[W]ith the added private conditions on Milwaukee's election process, the Milwaukee Complainants were within a jurisdictional boundary that affected them as a demographic group."). *See also* Complaint ¶ 54 ("[B]y the Wisconsin Five cities contracting with CTCL and allied private corporations, the Wisconsin Five cities chose to favor the Wisconsin Five's demographic groups of urban voters

In the Matter of *Werner, et al. v. Wolfe*

December 8, 2021

Page 3

over all other voters in the State of Wisconsin.”). In their reply, Complainants went further with this assertion, arguing that “[t]he Wisconsin 5 cities’ WSVP provisions violate the Equal Protection Clause because it contains contract provisions picking and choosing among groups of similarly situated voters for improved in-person and absentee voting access.” Reply, p. 4.

With respect to Respondent Wolfe, the Complaint alleges that “WEC Administrator Meagan Wolfe ... has supported the Wisconsin Five cities’ claimed prerogative to adopt private corporate conditions on federal elections without approval by Congress, the state legislature and the Commission.” Complaint, ¶ 84. The Complaint generally cites testimony Respondent Wolfe gave on March 31, 2021 before the General Assembly’s Campaigns and Elections Committee (although Complainants do not provide any specific quotations from such testimony). In their Reply, Complainants take the position that Respondent Wolfe’s “testimony confirms an admission of issuing an unwarranted advisory opinion on a disputed claims when the Commission itself has that sole authority.” Reply, p. 86.

The Complaint seeks six essential forms of relief:

- Complainants first request that the Commission “investigate the circumstances and factual allegations asserted in this Complaint regarding the legality of Milwaukee’s acts and actions juxtaposed against state and federal election laws to ascertain whether those election laws were violated.” Complaint, pp. 5, 31.
- Complainants also ask that the Commission “issue an order requiring the Administrator, City of Milwaukee and its City Clerk to conform their conduct to Wisconsin Statutes and the Election and Electors Clauses, restrain themselves from taking any action inconsistent with Wisconsin Statutes and the Election and Electors Clauses and require them to correct their actions and decisions inconsistent with Wisconsin Statutes and the Election and Electors Clauses—including prohibiting the placement of private corporate conditions on state and federal elections and the involvement of private corporation and their employees in election administration.” Complaint, p. 32.
- Complainants request that the “Commission ... issue an order declaring that Milwaukee’s private conditions on federal elections and engagement of private corporations and their employees in election administration violated state law and federal law.” Complaint, p. 32.
- Complainants argue that the Commission should “reiterate that the Administrator may not render a decision without the approval of the Commission related to the legality of any agreement between private corporate entities and municipalities related to imposing private corporate conditions on its elections or related to private corporations and their employees being engaged in the administration of election laws.” Complaint, pp. 32-33. *See also* Complaint, p. 5.
- Complainants ask that the Commission consider “direct[ing] to the proper local or state authorities” “any further prosecutorial investigation.” Complaint, pp. 5, 33.

In the Matter of *Werner, et al. v. Wolfe*
December 8, 2021
Page 4

- “Finally, if the Commission determines that election laws were violated or that the law is unclear to provide the Commission itself with the ability to determine the legalities of private corporate conditions directly or indirectly affecting the election process and administration,” Complainants ask that “the Commission ... make recommendations to the State Legislature for changes to state election laws to ensure the future integrity of the election process.” Complaint, pp. 5, 33.

Respondents’ Asserted Defenses to Complaint

None of Respondents dispute the essential fact that the City of Milwaukee accepted and received the CTCL grant money.

Respondents Barrett and Owczarski assert several defenses to the Complaint, including the following:

- “Complainants fail to point to any law that prohibits the City’s acceptance of outside funds in order to provide a safer voting experience for its electorate, or even any law they claim was violated.” Answer, p. 2.
- “[T]he City [of Milwaukee] was one of 218 municipalities in Wisconsin to receive grant funds from CTCL (“WI-218”). Answer, p. 4. Complainants do not contest the fact more than 200 Wisconsin municipalities received CTCL grants, although, in their reply, they cite reports from two non-profit organizations contending that “large cities” received the majority of CTCL funds. See Reply, p. 8.
- “[T]he Complaint is [not] timely.” Answer, p. 4. See also Answer, pp. 7-12.
- The Complaint “does not set forth facts establishing probable cause to believe that a violation of law has occurred.” Answer p. 4. See also Answer, pp. 12-14.
- “Respondents [Barrett and Owczarski] are not ‘election officials’ as that term is used under Wis. Stat. § 5.06, the therefore the Complaint fails to state a claim.” Answer, p. 4. See also Answer, pp. 4-6. Additionally, Respondents Barrett and Owczarski argue: [A]ll of Complainants’ legal arguments center around the acceptance of the CTCL grant funds and approval of how those funds were to be used. Neither the Mayor nor the City Clerk, in any of their professional capacities, had authority to accept the CTCL grant. The Common Council took that action, yet it is not named as a party. The named Respondents are not synonymous with the entire City government; they have specific roles within it, and those roles do not include authority to accept the CTCL grant funds.” Answer, p. 13.
- “Complainants would have the Commission exceed its statutory authority by creating new election laws—essentially usurping legislative authority to do so.” Answer, p. 21.

In her Response to the Complaint, Respondent Wolfe admits that she gave legislative hearing testimony before the General Assembly’s Campaigns and Elections Committee on

In the Matter of *Werner, et al. v. Wolfe*
December 8, 2021
Page 5

March 31, 2021. Response, pp. 1-2. However, Respondent Wolfe asserts several defenses to the Complaint, including the following:

- Respondent Wolfe argues that the mere act of testifying before a legislative committee cannot be unlawful. Brief in Support of Motion to Dismiss, p. 9 (citing Wis. Stat. § 13.35(1)).
- Respondent Wolfe argues that her “legislative testimony on March 31, 2021 cannot possibly have contributed to any illegality in the conduct of the 2020 Presidential election, which had already taken place more than three months earlier.” Brief in Support of Motion to Dismiss, p. 10 n.3.
- Respondent Wolfe alleges that, in her legislative hearing testimony, she declined to comment on the lawfulness of the municipalities’ actions, stating: “I cannot offer my opinion or speculation on actions of individual municipalities. ... It would be outside of my statutory or delegated authority to determine if a municipality has acted lawfully.” Brief in Support of Motion to Dismiss, p. 10 n.3. Complainants did not contest the accuracy of this quotation.
- Respondent Wolfe alleges that she “did not make any determinations as to (1) the legality of actions or communications by municipal officials related to municipal acceptance or use of private grant funds; or (2) any relations between municipals officials and outside consultants.” Wolfe Response, p. 47.
- Respondent Wolfe denies “that she has engaged in, supported, or endorsed any activities contrary to federal law, state law, or directives of the Commission.” Wolfe Response, p. 48. She asserts that, despite Complainants’ allegations that she “publicly supported” the decision to accept grant funding (Complaint, p. 2 and ¶ 84), Complainants failed to back their assertions with actual facts: “[T]he Complaints do not identify any actual actions through which she purportedly provided such public support, other than legislative committee testimony that she gave almost five months after the 2020 election had taken place, and even longer after the municipalities had received and used the funds in question. Nor do they allege any facts concerning any non-public actions by the Administrator.” Reply Brief in Support of Motion to Dismiss, p. 3.

Commission Authority and Role in Resolving Complaints Under Wis. Stat. § 5.06

The Commission’s role in resolving complaints filed under Wis. Stat. § 5.06 is to determine whether an election official acted contrary to applicable election laws or abused their discretion in administering applicable election laws. *See* Wis. Stat. § 5.06(1) (“Whenever any elector of a jurisdiction or district served by an election official believes that a decision or action of the official or the failure of the official to act ... is contrary to law, or the official has abused the discretion vested in him or her by law ..., the elector may file a written sworn complaint with the commission....”).

In the Matter of *Werner, et al. v. Wolfe*
December 8, 2021
Page 6

The Commission has the inherent, general, and specific authority to consider the submissions of the parties to a complaint and summarily decide the issues raised. *See* Wis. Stat. § 5.06(6) (“The commission may, after such investigation as it deems appropriate, summarily decide the matter before it...”).

Here, the essential fact underlying all of Complainants’ allegations – the City of Milwaukee’s acceptance of CTCL grant funds – is undisputed. As described below, the Commission concludes that this essential fact fails to give rise to probable cause to find that Respondents committed a violation of law or abuse of discretion. Therefore, the Commission issues this letter, which serves as the Commission’s final decision regarding the issues raised in the Complaint.

Commission Findings

A. There Is No Probable Cause To Find That Respondents Committed A Violation Of Law Or An Abuse Of Discretion.

Under Wis. Stat. § 5.06(1), a “complaint shall set forth such facts as are within the knowledge of the complainant to show probable cause to believe that a violation of law or abuse of discretion has occurred or will occur.” Probable cause is defined in Wis. Admin. Code EL § 20.02(4) to mean “the facts and reasonable inferences that together are sufficient to justify a reasonable, prudent person, acting with caution, to believe that the matter asserted is probably true.” “Information which may establish probable cause includes allegations that set forth which persons are involved; what those persons are alleged to have done; where the activity is believed to have occurred; when the activity is alleged to have occurred and who are the witnesses to the events.” Wis. Admin. Code EL § 20.03(3).

Complainants, therefore, have the obligation to set forth sufficient facts to show probable cause to believe that Respondents Barrett and Owczarski committed a violation of law or abuse of discretion as a result of the City of Milwaukee’s acceptance of CTCL grant money, which allegedly resulted in the adoption of “private corporation conditions on the election process” and the “involvement of private corporations in ... election administration.”

Complainants also have the obligation to set forth sufficient facts to show probable cause to believe that Respondent Wolfe committed a violation of law or abuse of discretion as a result of allegedly supporting “the Wisconsin Five cities’ claimed prerogative to adopt private corporate conditions.”

The Commission concludes that Complainants have not set forth sufficient facts to show probable cause as required under Wis. Stat. § 5.06(1), for the reasons discussed below.

- i. The Acceptance of Private Grant Money, With Or Without Conditions And Consultant Involvement, Is Not Prohibited By Any Law The Commission Administers.*

This is not the first complaint the Commission has received related to the CTCL grant money. On August 28, 2020, another complaint was filed in Case No. 20-18 asserting that several respondents

In the Matter of *Werner, et al. v. Wolfe*
December 8, 2021
Page 7

(including Tom Barrett, who is one of the Respondents in this action) acted contrary to law and/or abused their discretion as a result of acceptance of the CTCL money. The Commission concluded, in part, that the complaint did not state probable cause because “the complaint does not allege any violations of election law that the Commission has authority over to enforce or investigate.”

The Commission has “the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing.” Wis. Stat. § 5.05(1). *See also* Wis. Stat. § 5.05(2w). A complaint under Wis. Stat. § 5.06(1) must therefore assert a violation of one of these chapters of the Wisconsin Statutes, or “other laws relating to elections and election campaigns.”

The Complaint in this matter cites Wis. Stat. § 7.15(1), the Elections Clause of the United States Constitution, and the Electors Clause of the United States Constitution as the basis for Complainants’ action. In their Reply, Complainants also referenced the Equal Protection Clause.

Respondents argue that none of these statutory or constitutional provisions explicitly prohibit the acceptance of private grant monies or the use of outside consultants. Respondents are correct.

Wis. Stat. § 7.15(1) states that municipal clerks have “charge and supervision of elections and registration in [each] municipality.” The municipal clerk “shall perform” certain duties specified in subsections (a) through (k) of the statute, as well as “any others which may be necessary to properly conduct elections or registration.” Wis. Stat. § 7.15(1). There is no language in section 7.15(1) that prohibits municipal clerks from using private grant money or working with outside consultants in the performance of their duties.

The Elections Clause of the U.S. Constitution states as follows:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const., art. I, § 4, cl. 1 (cited at Complaint, ¶ 12).

The Electors Clause of the U.S. Constitution provides:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.

U.S. Const., art. II, § 1, cl. 2 (cited at Complaint, ¶ 13).

Complainants argue that the Elections and Electors Clauses “provide no power to municipal governments to adopt private corporate conditions on federal elections or to introduce private corporations and their employees into federal election administration.” Complaint, ¶ 14. However, Complainants do not show that either the Elections Clause or the Electors Clause of the

In the Matter of *Werner, et al. v. Wolfe*
December 8, 2021
Page 8

U.S. Constitution *prohibit* the adoption of private corporate conditions or the introduction of private corporation employees into the election process.

Two bills introduced in March 2021 demonstrate the absence, in existing law, of any prohibition on the acceptance of private grant money or the use of outside consultants. 2021 Senate Bill 207 and 2021 Assembly Bill 173 would prohibit any official from “apply[ing] for or accept[ing] any donation or grant of private resources” (including “moneys, equipment, materials, or personnel provided by any individual or nongovernmental entity”) “for purposes of election administration.” The bill would also prohibit the appointment of any poll worker who is an employee of an “issue advocacy group.” This language is not currently in any Wisconsin statute; nor was it in the lead up to the November 2020 election.

Furthermore, a number of courts around the country have remarked upon whether the U.S. Constitution or federal election law prohibits the activities to which Complainants are objecting in this action. These courts have not found such prohibitions in the U.S. Constitution or federal laws.

For example, the United States District Court for the Eastern District of Wisconsin previously concluded that a group of plaintiffs (represented by the same attorney as is currently representing Complainants in this matter) failed to show a reasonable likelihood of success on the merits of a claim based upon similar allegations. In *Wisconsin Voters Alliance v. City of Racine*, No. 20-C-1487, 2020 WL 6129510 (E.D. Wis. Oct. 14, 2020), the plaintiffs alleged that various cities (including the City of Milwaukee) were prohibited from accepting and using private federal election grants by, among other things, the Elections Clause of the U.S. Constitution. The court declined to grant a temporary restraining order, stating:

Plaintiffs have presented at most a policy argument for prohibiting municipalities from accepting funds from private parties to help pay the increased costs of conducting safe and efficient elections. The risk of skewing an election by providing additional private funding for conducting the election in certain areas of the State may be real. The record before the Court, however, does not provide the support needed for the Court to make such a determination, especially in light of the fact that over 100 additional Wisconsin municipalities received grants as well. Plaintiffs argue that the receipt of private funds for public elections also gives an appearance of impropriety. This may be true, as well. These are all matters that may merit a legislative response but **the Court finds nothing in the statutes Plaintiffs cite, either directly or indirectly, that can be fairly construed as prohibiting the defendant Cities from accepting funds from CTCL.** Absent such a prohibition, the Court lacks the authority to enjoin them from accepting such assistance.

2020 WL 6129510, at *2, *appeal dismissed sub nom. Wisconsin Voters All. v. City of Racine*, No. 20-3002, 2020 WL 9254456 (7th Cir. Nov. 6, 2020) (emphasis added) (internal citations omitted).

Other courts have likewise concluded that no language in the U.S. Constitution or other election-related laws prohibits municipalities from accepting private grant money. *See Election Integrity Fund v. City of Lansing*, No. 1:20-CV-950, 2020 WL 6605985, at *1 (W.D. Mich. Oct. 2, 2020) (“Plaintiffs’ complaint and motion allege that the Cities’ receipt of grants from CTCL violates the

In the Matter of *Werner, et al. v. Wolfe*

December 8, 2021

Page 9

Constitution, the Help America Vote Act, 52 U.S.C. § 20901, *et seq.*, and the National Voters Registration Act, 52 U.S.C. § 20501, *et seq.* But Plaintiffs never identify language in any of those laws that explicitly prohibits cities from accepting private grants to administer elections. On the Court's review, no such explicit prohibition exists.”) (denying motion for temporary restraining order); *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559, at *3-4 (N.D. Iowa Oct. 20, 2020) (“Plaintiffs have not provided any authority, nor have I found any, suggesting that the Elections Clause imposes specific limits or restrictions as to how a federal election must be funded. ... There may be valid policy reasons to restrict or regulate the use of private grants to fund elections. However, it is for Congress and/or the Iowa Legislature, not the judicial branch, to make those policy judgments.”); *Georgia Voter All. v. Fulton Cty.*, 499 F. Supp. 3d 1250, 1255 (N.D. Ga. 2020) (“Fulton County's acceptance of private funds, standing alone, does not impede Georgia's duty to prescribe the time, place, and manner of elections, and Plaintiffs cite no authority to the contrary.”).

The Commission is persuaded by the case law cited above. Complainants have failed to identify any existing state or federal law prohibiting the acceptance of the CTCL grant money or work with outside consultants. Multiple federal courts have failed to find that existing law prohibits such activities, and the Commission likewise does not find such a prohibition to exist.

Unable to cite an explicit prohibition in existing law, Complainants attempt to save their claims with a different argument. Citing *Trump v. Wisconsin Elections Commission* (“*Trump v. WEC*”), 983 F.3d 919, 927 (7th Cir. 2020), Complainants argue that Respondents violated the Electors Clause by committing a “diversion of ... election law authority” when they accepted the CTCL grant money. See Complaint, ¶¶ 90-91. However, this citation works against Complainants, not for them.

The *Trump v. WEC* case concerned contested guidance issued by the Commission prior to the election. In its decision, the United States Court of Appeals for the Seventh Circuit examined the scope of the Electors Clause. “By its terms,” the court noted, “the Clause could be read as addressing only the manner of appointing electors and thus nothing about the law that governs the administration of an election (polling place operations, voting procedures, vote tallying, and the like).” 983 F.3d at 926. The court acknowledged, however, that the Electors Clause has been applied more broadly in some instances to “encompass[] acts necessarily antecedent and subsidiary to the method for appointing electors—in short, Wisconsin's conduct of its general election.” *Id.*

As examples of the Electors Clause being applied broadly, the court cited both *Bush v. Gore*, 531 U.S. 98 (2000) and *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). In those two cases, courts found violations of the Electors Clause where state actors invaded the province of the legislature *without being granted such authority by the legislature*.

In *Bush v. Gore*, for example, three Justices were critical of a departure from the legislative scheme put in place by the Florida legislature, finding that it violated “a respect for the constitutionally prescribed role of state legislatures.” 531 U.S. at 115 (Rehnquist, C.J., concurring) (emphasis original). In *Carson*, the Eighth Circuit concluded that the Minnesota Secretary of State likely violated the Electors Clause by adding a week to the deadline for receipt of absentee ballots. The

In the Matter of *Werner, et al. v. Wolfe*
December 8, 2021
Page 10

court remarked that “only the Minnesota Legislature, and not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota. ... Thus, the Secretary's attempt to re-write the laws governing the deadlines for mail-in ballots in the 2020 Minnesota presidential election is invalid.” 978 F.3d at 1060.

This line of authority does not support Complainants’ position because it is distinguishable from the circumstances now before the Commission. The Seventh Circuit explains the distinction in *Trump v. WEC*. The court remarked that – unlike in *Bush v. Gore* or *Carson* – the Commission had taken actions “under color of authority expressly granted to it by the Legislature.” 983 F.3d at 927. Accordingly, “even on a broad reading of the Electors clause,” the court could not find that the Commission acted unlawfully. *Id.* The “authority expressly granted to [The Commission] by the Legislature ... is not diminished by allegations that the Commission erred in its exercise.” *Id.*

Here, as in *Trump v. WEC*, the acceptance and use of CTCL funds was done “under color of authority expressly granted ... by the Legislature” for the charge and supervision of elections under Wis. Stat. § 7.15(1). Even if there were errors in the exercise of that authority, those errors do not diminish the authority and do not give rise to a violation of the Electors Clause.

Finally, Complainants attempt to assert a violation of the Equal Protection Clause. However, courts around the country considering similar claims have cast aspersions on the argument that acceptance of CTCL money results in a violation of equal protection law. A federal court in Minnesota, for example, rejected that argument as follows:

The City's actions in applying for and accepting the CTCL grant and using the grant money to improve all manners of voting in Minneapolis in the 2020 election affect all Minneapolis voters equally. All individual Plaintiffs are Minneapolis voters. Plaintiffs fail to explain how they will be uniquely affected by Minneapolis's actions. They assert that, because Minneapolis voters are statistically more likely to be progressive, Minneapolis's actions enhancing voting in general favor progressive voters and thereby suppress Plaintiffs’ votes. However, **as Minneapolis residents, Plaintiffs, themselves, are equal recipients of Minneapolis's actions to make voting safer during the pandemic.** The City's grant-funded expenditures will make it easier for the individual Plaintiffs to vote safely for the candidates of their choosing and to have those ballots processed promptly, no matter which method of casting a ballot they choose. Grant money will be used to assist with mail-in voting; voting by absentee ballots via a secure drop box; voting in person at early-voting sites; voting in-person on Election Day; and voter education to assist voters in choosing how to vote.

Minnesota Voters All. v. City of Minneapolis, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937, at *7 (D. Minn. Oct. 16, 2020) (emphasis added).

Once again, the Commission finds this case law persuasive. Although use of the CTCL grant money in Milwaukee may have resulted in benefit to Milwaukee voters over those outside of Milwaukee, and although voters within Milwaukee may have the tendency to favor a particular political party over another, that does not constitute an equal protection violation. *See Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 469 (E.D. Tex. 2020) (“Ultimately, Plaintiffs’ complain

In the Matter of *Werner, et al. v. Wolfe*
December 8, 2021
Page 11

that people with different political views will lawfully exercise their fundamental right to vote. That is not a harm. That is democracy.”). This is particularly true where other municipalities were free to seek the same grant money as did the City of Milwaukee. In fact, it is undisputed that over 200 municipalities in Wisconsin received such funding.

In an attempt to bolster their equal protection argument in their Reply, Complainants point to language in the WSVP to argue that the CTCL grant money was used to disproportionately benefit certain voters from within the City of Milwaukee, to the disadvantage of others. However, the WSVP was, as Complainants state, merely the grant application. Complainants provide no facts showing that the CTCL grant money was, in fact, used to disadvantage certain segments of the electorate over others. Absent such facts, Complainants fail to raise probable cause of a potential equal protection violation. As the Eastern District of Wisconsin stated when dismissing the *Wisconsin Voters Alliance* suit:

Plaintiffs have offered only a political argument for prohibiting municipalities from accepting money from private entities to assist in the funding of elections for public offices. They do not challenge any specific expenditure of the money; only its source. They make no argument that the municipalities that received the funds used them in an unlawful way to favor partisan manner. Their brief is bereft of any legal argument that would support the kind of relief they seek.

Wisconsin Voters All. v. City of Racine, No. 20-C-1487, 2021 WL 179166, at *3 (E.D. Wis. Jan. 19, 2021).

In the absence of existing state or federal law prohibiting the acceptance of private grant money or the use of outside consultants, the Commission cannot find a violation of law or abuse of discretion resulting from the CTCL grant money in the City of Milwaukee. To do so would be to essentially create new election law, which is the job of the legislature, not the Commission.

Complainants urge the Commission to act notwithstanding the absence of explicit legal authority, asserting that “the Commission is not impotent” and has been provided by the legislature “with an arsenal of weapons to exercise its powers and duties.” Reply, p. 48. Specifically, Complainants cite the Commission’s statutory authority to administer laws, investigate, take testimony, bring civil actions, and sue for injunctive relief. *Id.* This is all true, but Complainants do not and cannot argue that the Commission has the authority to *create* law. That is undeniably the province of the legislature.

For all of the above reasons, the Commission finds that there is no probable cause to believe that the acceptance of CTCL grant money was itself or resulted in any violation of law or abuse of discretion.

ii. *There Is No Probable Cause To Find A Violation Or Abuse Of Discretion By Respondent Wolfe.*

Complainants also fail to state facts sufficient to raise probable cause to believe that Respondent Wolfe committed a violation of law or abuse of discretion, for multiple reasons.

In the Matter of *Werner, et al. v. Wolfe*
December 8, 2021
Page 12

First, although Complainants assert that Respondent Wolfe supported the City of Milwaukee’s decision to accept the CTCL grant funding, Complainants fail to identify any specific action or statement on the part of Respondent Wolfe in which she allegedly provided such support. The Commission does not know with whom Respondent Wolfe allegedly communicated, what Respondent Wolfe allegedly did, what Respondent Wolfe allegedly stated, or any of the context for such details. Without such information, the Commission finds that “a reasonable, prudent person, acting with caution” could not find that Respondent Wolfe violated the law or abused her discretion. *See Wis. Admin. Code EL § 20.02(4)*.

Second, the Commission rejects Complainants’ argument (asserted for the first time in their Reply) that Respondent Wolfe issued an unauthorized advisory opinion. Again, Complainants fail to state any actual facts underlying that assertion. Advisory opinions are governed by clear statutory procedures set forth in Wis. Stat. § 5.05(6a)(a). Such opinions must be requested “in writing, electronically, or by telephone” – and there is no allegation that such a request was made. Such opinions must be “written or electronic” – and there is no allegation that Respondent Wolfe issued any physical or electronic writing. Advisory opinions, “[t]o have legal force and effect,” must “include a citation to each statute or other law and each case or common law authority upon which the opinion is based” – and there is no allegation that Respondent Wolfe ever provided such citations. Again, given Complainants’ allegations, the Commission finds that “a reasonable, prudent person, acting with caution” could not find that Respondent Wolfe issued any unauthorized advisory opinions.

iii. The Commission Need Not Determine The Remaining Issues Raised By Respondents.

In light of its conclusion that there is no probable cause to find that the acceptance of the CTCL grant money violated election law or constituted an abuse of discretion, the Commission need not address Respondents’ other defenses, including those concerning timeliness and whether Respondents Barrett and Owczarski are proper parties to this action.

Commission Decision

Based upon the above review and analysis, the Commission finds that the Complaint does not raise probable cause to believe that a violation of law or abuse of discretion has occurred. All claims are hereby dismissed. The Commission will not conduct its own investigation of the circumstances and factual allegations asserted in the Complaint and will not issue an order with the declarations Complainants have requested.

The Commission notes that Complainants also asked that the Commission direct “any further prosecutorial investigation ... to the proper local or state authorities” and “make recommendations to the State Legislature for changes to state election laws.” Complaint, p. 33. The Commission will not provide either of these forms of relief, both because Complainants failed to establish probable cause and because they are not available forms of relief under Wis. Stat. § 5.06.

A party filing a complainant under Wis. Stat. § 5.06 may only request – and the Commission may only order – that officials be required to conform their conduct to the law, be restrained from taking

In the Matter of *Werner, et al. v. Wolfe*
December 8, 2021
Page 13

action inconsistent with the law, or be required to correct any action or decision inconsistent with the law or any abuse of their discretion. *See* Wis. Stat. § 5.06(1) and (6). Referring matters for prosecution and making recommendation to the legislature are not options for relief under section 5.06.

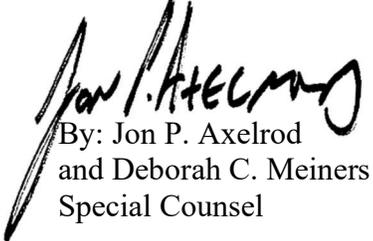
Right to Appeal – Circuit Court

This letter constitutes the Commission’s resolution of this complaint. Wis. Stat. § 5.06(2). Pursuant to Wis. Stat. § 5.06(8), any aggrieved party may appeal this decision to circuit court no later than 30 days after the issuance of this decision.

If any of the parties should have questions about this letter or the Commission’s decision, please feel free to contact me.

Sincerely,

COMMISSION



By: Jon P. Axelrod
and Deborah C. Meiners
Special Counsel

JPA:sd

cc: Commission Members
Kathryn Z. Block, Esq.
James M. Carroll, Esq.
Thomas C. Bellavia, Esq.
Steven C. Kilpatrick, Esq.