

April 13, 2020

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Wisconsin Elections Commission

Re: **Treatment of Absentee Ballots in April 7 Election**

Dear Commissioners:

As counsel to the Democratic Party of Wisconsin (DPW) and the Democratic National Committee, we continue to receive reports of large numbers of absentee ballots being returned to local election officials by the U.S. Postal Service (USPS) with either no postmarks, postmarks without dates, or illegible postmarks. We are concerned that some municipal canvass boards might improperly reject such ballots even where it is clear that the voters mailed their ballots on or before election day and are in no way responsible for any potential postmark issues. Because the Wisconsin Election Commission (WEC) was unable to reach agreement on how election officials should address these issues, local officials across Wisconsin will have to make these decisions. It is essential for officials throughout Wisconsin to ensure consistent treatment of mailed absentee ballots through the application of uniform standards. We ask that you provide a copy of this letter to each of those officials to ensure a uniform standard throughout the state.

We strongly believe that local officials must follow the enclosed draft April 10, 2020 guidance document titled *Postmark Issues and Processing Absentee Ballots*, prepared by the WEC's professional staff, as they proceed to process the Spring Election absentee ballots returned by voters through the USPS. Although the WEC failed to adopt this recommended guidance on a 3-3 tie vote last Friday, the staff's draft document provides sound and even-handed guidance for implementing the U.S. Supreme Court's decision last week in *Republican National Committee v. Democratic National Committee*, 589 U.S. ____ (Apr. 6, 2020). In their application of this guidance, please be advised the USPS estimated two or three days were necessary for a ballot to arrive on time, and it advised voters to mail completed ballots one week before the election to ensure arrival by election day.

The key portion of this draft guidance appears on page 6 of the enclosed document:

[M]unicipal canvass boards [should] count a ballot, if otherwise valid, if the board determines, by a preponderance of the evidence, that the ballot was **in the possession of a USPS facility on or before April 7, 2020**, regardless of whether the ballot return envelope includes a postmark with a date on or before April 7th.

“Preponderance of the evidence” means enough evidence to make it **more likely than not that the ballot was in the possession of a USPS facility on or before April 7, 2020.**

In making its determination, the canvass board shall consider relevant factors such as whether the envelope includes a round stamp stating “April 2020” indicating it was processed on April 7, 2020; the established practices of the USPS in processing and delivering the municipality’s mail; the effect of the municipality or a third-party mail vendor applying return postage on the existence of a postmark stamp; and records or statements of USPS representatives regarding the location and transport of the ballot as of April 7, 2020.

In applying these standards, local election officials should proceed as follows:

- Absentee ballots postmarked on or before April 7 must be counted so long as they arrive by April 13. On the other hand, ballots that bear a postmark of April 8 or later must be excluded pursuant to the U.S. Supreme Court’s decision in *RNC v. DNC*.
- As for absentee ballots that either contain no postmark, no postmark with a date, or an illegible postmark:
 - Such ballots received on Wednesday, April 8, should be **conclusively presumed** to have been mailed on election day (the day before) or earlier, and thus counted. See the enclosed Declaration of Scott Van Derven, a 35-year veteran letter carrier and President of the Wisconsin State Association of Letter Carriers, ¶ 12 (“it is my opinion to a reasonable degree of certainty that any mail delivered to municipal clerks through the regular mail on Wednesday, April 8, MUST have entered the mailstream on April 7 or earlier”).
 - Such ballots received on Thursday, April 9, should be **rebuttably presumed** to have been mailed on election day, April 7, or earlier, and thus counted, subject to proof that a ballot was not cast and mailed until after April 7. See Van Derven Decl. ¶ 13 (“it is my opinion that the vast majority of mail delivered to municipal clerks on Thursday, April 9, is much more likely than not to have entered the mailstream on April 7 or earlier”).
 - Such ballots received between Friday, April 10 and Monday, April 13 should be counted if there is **reason to believe** that, because of USPS delays and other factors, the ballot may have been mailed on election day, April 7, or

earlier, subject to proof that the ballot was not cast and mailed until after April 7.

- In no event should an absentee ballot be rejected simply because it lacks a postmark, or lacks a dated postmark, or has an illegible postmark. As detailed in the enclosed WEC staff draft guidance and in the Van Derven Declaration, postmarks are not even required for many types of election mail, such as mail bearing a permit, meter, or precanceled stamp for postage. Moreover, there are many types of postmarks, some of which do not include full date information. And postmarks are often illegible.
- As the WEC staff guidance emphasizes, in cases where mailing dates are disputed, local election officials should investigate “the established practices of the USPS in processing and delivering the municipality’s mail,” together with “records or statements of USPS representatives regarding the location and transport of the ballot as of April 7, 2020.” Particularly because of USPS service reductions in many areas of the State and the unprecedented disruptions of the COVID-19 pandemic, consideration of the current on-the-ground realities of local postal service is essential.

The WEC staff’s draft guidance is fully consistent with the Supreme Court’s decision in *RNC v. DNC*. The Supreme Court majority was clear that ballots relinquished by the voter to the U.S Postal Service on or before Election Day should count, while those that voted after Election Day, would not.

This reading is consistent with the Supreme Court majority’s recognition that its decision might need “potential clarification and alterations by the State,” in the words of the WEC staff draft guidance (at 1); *see also RNC v. DNC*, slip op. at 4 (decision is “subject to any further alterations that the State may make to state law”). Wisconsin courts have long emphasized that “substantial compliance” with a statutory voting requirement is sufficient for the ballot to count unless the statute makes the requirement “mandatory,” thus voiding the ballot. *See Lanser v. Koconis*, 62 Wis. 2d 86, 214 N.W.2d 425, 426-32 (1974) (*re* validity of absentee ballots); *Roth v. LaFarge School Dist. Bd. of Canvassers*, 247 Wis. 2d 708, 634 N.W.2d 882, 889-92 (Ct. App. 2001) (*re* absence of required inspectors’ initials on ballot); *Johnson v. Hayden*, 105 Wis. 2d 468, 313 N.W.2d 869 (Ct. App. 1981) (*re* validity of absentee ballots). There is nothing in any Wisconsin statute suggesting that voters who mail their ballots on or before election day should have their ballots discarded simply because the envelopes containing those ballots had no postmarks, or postmarks with no dates, or illegible postmarks. Discarding such ballots where it is otherwise reasonably clear that the voter was timely in mailing her ballot on or before election day would violate this basic principle of Wisconsin election law.

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It is imperative that canvassing boards count absentee ballots where it “**more likely than not that the ballot was in the possession of a USPS facility on or before April 7, 2020.**”

Very truly yours,

A handwritten signature in blue ink, appearing to read "Marc E. Elias", with a stylized flourish at the end.

Marc E. Elias
Charles G. Curtis, Jr.

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Attachment 1

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Wisconsin Elections Commission

212 East Washington Avenue | Third Floor | P.O. Box 7984 | Madison, WI 53707-7984
(608) 266-8005 | elections@wi.gov | elections.wi.gov

DATE: For the April 10, 2020 Commission Meeting

TO: Members, Wisconsin Elections Commission

Prepared by: Michael Haas, Staff Counsel

FROM: Meagan Wolfe, Administrator
Wisconsin Elections Commission

SUBJECT: Absentee Ballot Mail Postmark Issues

Attached is proposed guidance to local election officials regarding the processing of Spring Election absentee ballots which were returned by voters through the U.S. Postal Service. The significance of the postmark date under court rulings and the unprecedented volume of absentee ballots requested in a compressed period of time leading up the election have highlighted categories of ballots which require the Commission's attention and analysis. Municipal clerks have reported a significant number of ballots which they believe should be counted as valid because the ballot was in the possession of the USPS on or before April 7, 2020, despite the fact that the ballot return envelope may not include a date on or before April 7th.

As the Commission has previously discussed, the U.S. Supreme Court has ruled that absentee ballots returned by mail are to be counted if they are postmarked by election day and received by April 13th. The Court did not delve into the precise meaning of "postmarked by election day" in the context of modern mail delivery procedures, and the Commission's previous discussion related to implementation of that directive also did not consider the number of ways that mail may be marked during the USPS processes. It has become apparent since the Commission's discussion of this item at its April 6th meeting that there are some gaps between the Court's general directive and the specific procedures used by the USPS in delivering and postmarking, or not postmarking mail.

Commission staff has consulted with the agency's litigation counsel regarding the interpretation of the Supreme Court's decision in *Republican National Committee et al. v. Democratic National Committee*. Outside counsel has advised that the Commission may determine its interpretation and application of the decision to specific facts, within existing state law, which the decision did not address. The Supreme Court's majority opinion envisioned potential clarification and alterations by the State.

The proposed guidance which is attached is consistent with the advice of litigation counsel that the Court's requirement of "postmarked by election day" is intended to be equivalent to the date that the voter mailed the ballot. In other words, the decision appears to assume that the USPS applies a postmark date to each ballot return envelope on the same day it is mailed by the voter. But the information submitted by municipal clerks demonstrates that such a step often is not the case by design.

Wisconsin Elections Commissioners

Dean Knudson, chair | Marge Bostelmann | Julie M. Glancey | Ann S. Jacobs | Robert Spindell | Mark L. Thomsen

Administrator
Meagan Wolfe

Notably, the Court's decision used the phrase "postmarked by election day" rather than "bearing a postmark with a date." This language appears to indicate the Court's emphasis on the ballot being available for the USPS to complete its process that sometimes but not always includes stamping a date, and not to disqualify a timely and otherwise valid ballot because the USPS did not use a postmark that included a date.

Recommended Motion

The Commission adopts the attached guidance and directives regarding the processing and counting of Spring Election absentee ballots which are received by April 13, 2020 and are returned in an envelope which does not bear a postmark that includes a date on or before April 7, 2020.

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Wisconsin Elections Commission

212 East Washington Avenue | Third Floor | P.O. Box 7984 | Madison, WI 53707-7984
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DATE: April 10, 2020

TO: All Wisconsin Local Election Officials

FROM: Meagan Wolfe
Administrator

SUBJECT: Postmark Issues and Processing Absentee Ballots

I. Background and Previous Guidance

This memorandum expands on two April 8, 2020 communications from the Wisconsin Elections Commission (WEC) regarding issues related to absentee ballot postmarks for the Spring Election and processing those ballots in WisVote. In short, the WEC directs that a mailed-in absentee ballot should be counted, if otherwise valid, if the municipal board of canvassers determines that the ballot was in the possession of a USPS facility on or before April 7, 2020 and it is delivered to the municipal clerk by 4:00 p.m. on April 13, 2020. This memorandum does not alter the WisVote treatment of these ballots but simply incorporates the earlier guidance for ease of reference.

In response to the WEC's April 8th communications, municipal clerks submitted hundreds of examples of absentee ballot envelopes which did not bear a postmark date on or before April 7, 2020 but which may have been in the possession of the U.S. Postal Service (USPS) by that date. WEC staff appreciates the prompt response of clerks who submitted those examples in order to assist the Commission in evaluating specific factual scenarios and developing further guidance for local election officials. A brief summary of the legal background is outlined in order to provide context and help to answer questions that may arise regarding this guidance.

As noted in the previous communication, on April 6, 2020 the U.S. Supreme Court ruled that all mailed-in absentee ballots must be "postmarked by election day, April 7, 2020, and received by April 13, 2020 at 4:00 p.m." However, the Court's decision identifies the postmark requirement as a reflection of the date that the voter mailed their ballot. The Court observed that the extension of the deadline for the receipt of absentee ballots to April 13th had the effect of extending the date for a voter to mail the ballot to April 7, indicating that the important fact was whether the voter had mailed the ballot by that date.¹ The Court did not review the actual procedures or timing of the USPS in applying postmarks in the mail system, the variety of practices among post office facilities, or the official handbook and rules of the USPS regarding the application of postmarks.

¹ *Republican National Committee, et al. v. Democratic National Committee*, 589 U.S. ____ (2020) at page 3.

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In our communications of April 8th, the WEC identified the following three categories of absentee ballots:

- 1) Ballots that contain a postmark of April 7, 2020 or earlier and are received by 4:00 p.m. on April 13, 2020 or that were delivered by any means to the polling place or central count location by 8:00 p.m. on Election Night. These ballots are to be counted if otherwise valid. They are recorded in WisVote as “Returned.”
- 2) Ballots that are received after 4:00 p.m. April 13, 2020 or that were hand-delivered after 8:00 p.m. on Election Night. These ballots are to be rejected and they are recorded in WisVote as “Returned After Deadline.”
- 3) Ballots returned after April 7, 2020 and before 4 p.m. on April 13, 2020 without a postmark, with an illegible postmark, with a postmark that does not contain a date, or with a postmark after April 7, 2020. The WEC directed clerks to hold those ballots until April 13, 2020 and indicated that additional guidance would be forthcoming. The WEC also advised that these ballots are to be recorded in WisVote as “Returned to be Rejected.” In WisVote, clerks must also identify one of three explanation types for these ballots:
 - a. Certification Insufficient;
 - b. Certificate Envelope Compromised.
 - c. Postmarked After Election Day (includes all postmark issues).

The WisVote designation of these ballots will be changed to “Returned” or “Deactivated” depending upon decisions made by the MBOC based on the guidance in section IV of this memorandum. If the clerk does not record any further action by the MBOC, these ballots will automatically reclassify in WisVote as “Deactivated” when the election closed checkpoint is checked.

II. Basis of Additional Guidance

The WEC bases its additional guidance upon its review of the Supreme Court’s decision in light of the sample envelopes submitted by municipal clerks and their explanations of local mailing procedures as well as the guidelines of the USPS. For example, the USPS Handbook PO-4008 Area Mail Processing Guidelines state:

A postmark is an official Postal Service™ imprint applied in black ink on the address side of a stamped mailpiece. A postmark indicates the location and date the Postal Service accepted custody of a mailpiece, and it cancels affixed postage. . . .Postmarks are not required for mailings bearing a permit, meter, or precanceled stamp for postage, nor to pieces with an indicia applied by various postage evidencing systems.

Under this provision, absentee ballots delivered by a voter to the USPS by April 7, 2020 may not necessarily contain a postmark, which would be not an error or oversight but a result of USPS policy.

The same guidelines further state:

The postmarking process uses the following three basic methods of imprinting:

1. **Automated:** Advanced facer canceller systems used by processing distribution centers cancel letters quickly. These machines are equipped with biohazard detection systems so letters postmarked by automation benefit from added safety measures.
2. **Mechanized:** A variety of older devices apply postmarks to flat-size mailpieces and to philatelic pieces.
3. **Manual:** Hand-stamp devices are used by Postal Service employees for local cancellation or philatelic requests.

A “local” postmark shows the full name of the Post Office, a two-letter state abbreviation, ZIP Code™, and date of mailing. Because the Postal Service is sensitive to the importance some customers place upon these postmarks, each Post Office is required to make a local postmark available. Lobby drops should be designated for this purpose with clear signage signifying its use.

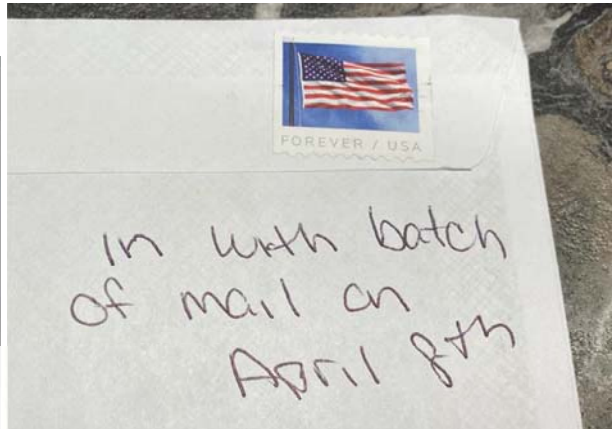
These guidelines illustrate that there are several methods of completing the “postmarking process.” As indicated by this excerpt and confirmed by numerous local election officials, a postmark date is not uniformly applied during these processes. Only the “local” postmark specifically includes the date of mailing. When return postage is applied by a municipality’s metering system or through a third-party vendor, for instance, it appears that a postmark date is not required to be applied, again as a matter of USPS policy and practice rather than error or oversight. As a result, a postmark may not include a postmark date even though it was in the possession of the USPS by that time.

Finally, the USPS has informed Commission staff that all election mail, whether it has a postage stamp or is metered, is stamped with a specific circular stamp on Election Day. The circular stamp may include “April 7, 2020” or “April 2020” but the distinctive circular stamp indicates that the envelope was processed by the USPS on April 7, 2020.

III. Postmark Examples.

Below are examples of the different postmark samples submitted by clerks. Examples are identified in eight different categories outlined below, the first two categories being the most common, with some municipalities reporting hundreds of examples. Several examples illustrate markings applied by third-party vendors.

1. Stamp - No Postmark



2. Stamp – Illegible Postmark



3. Pitney Bowes – No Date Or Postmark



4. Pitney Bowes – Illegible Postmark



5. Pitney Bowes – Two Postmarks



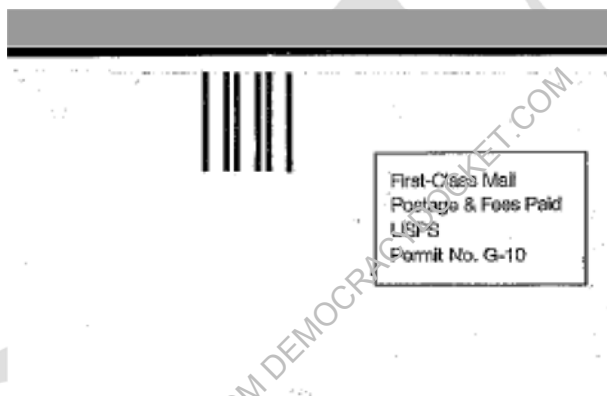
6. Neopost – No Date Or Postmark



7. Neopost – Stamp Includes Date but Postmark Contains Only Month and Year



8. Preprinted – No Postmark



IV. Processing Ballots in “Hold” Categories

Having considered the legal issues and USPS procedures described above, the Wisconsin Elections Commission directs municipal canvass boards to count a ballot, if otherwise valid, if the board determines, by a preponderance of the evidence, that the ballot was in the possession of a USPS facility on or before April 7, 2020, regardless of whether the ballot return envelope includes a postmark with a date on or before April 7th. “Preponderance of the evidence” means enough evidence to make it more likely than not that the ballot was in the possession of a USPS facility on or before April 7, 2020.

In making its determination, the canvass board shall consider relevant factors such as whether the envelope includes a round stamp stating “April 2020” indicating it was processed on April 7, 2020; the established practices of the USPS in processing and delivering the municipality’s mail; the effect of the municipality or a third-party mail vendor applying return postage on the existence of a postmark stamp; and records or statements of USPS representatives regarding the location and transport of the ballot as of April 7, 2020.

The Commission also directs that it is not sufficient that a voter deposited their ballot return envelope in a mailbox by April 7, 2020. Similar to other time-sensitive documents such as tax returns or government applications, in order to be timely, the ballot must have been in the possession of a USPS processing facility or post office on or before April 7, 2020.

The WEC believes this additional guidance properly implements the decision of the U.S. Supreme Court and ensures consistent treatment of mailed absentee ballots for the Spring Election.

Attachment 2

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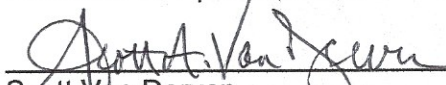
WISCONSIN STATE ASSOCIATION OF LETTER CARRIERS

SECRET 11-2

DECLARATION of SCOTT VAN DERVEN PRESIDENT, WISCONSIN STATE ASSOCIATION OF LETTER CARRIERS

1. Pursuant to 17 U.S.C. 1746, I declare as follows:
2. I am the president of the Wisconsin State Association of Letter Carriers, an association of more than 5,000 United States Postal Services employees in the State of Wisconsin. I was elected to this position by my peers.
3. I retired in 2018 after 35 years of service as a Letter Carrier.
4. Based upon my experience and knowledge, I am familiar with all relevant U.S. Postal Service procedures related to the collection and delivery of postal mail.
5. Despite retirement, I stay active in monitoring procedures. I observed a test in a Milwaukee Post Office as late as the third week of February, 2020.
6. In normal practice, any regular mail delivered through the normal Postal Service procedure, delivered on a particular day, MUST have been entered into the mailstream at least the day prior, and in most places in Wisconsin, two days prior.
7. In normal practice, not all mail would receive a postmark indicating the day and time of mailing.
8. In normal practice, business reply mail and metered mail would NOT receive any postmark at all.
9. In normal practice, I know of no instance in which mail enters into the mailstream, such as in a "blue" mailbox, a slot at a post office, or given to a letter carrier, in which that mail would then be delivered to the recipient the same day, even if mailed in the same Zip Code as the final recipient.
10. There can be exceptions to normal practice. For example, I was informed that in the city of Green Bay, the post office made a unique effort to deliver absentee ballots received on April 7, 2020 to the local municipal clerks that same day. Green Bay resumed the normal procedure April 8, 2020, meaning that any absentee ballot received on April 8, 2020 would not have been delivered until later.
11. I did not hear of and am unaware of any other exceptions to our normal procedures. If there were other examples I would have been notified.
12. Specific to this past week's election, as an expert on the postal system, it is my opinion to a reasonable degree of certainty that any mail delivered to municipal clerks through the regular mail on Wednesday, April 8, MUST have entered the mailstream on April 7 or earlier.
13. In addition, it is my opinion that the vast majority of mail delivered to municipal clerks on Thursday, April 9, is much more likely than not to have entered the mailstream on April 7 or earlier.
14. I declare under the penalty of perjury that the foregoing is true and correct.

Executed on April 12, 2020.


Scott Van Derven