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Clerk of Circuit Court
Waukesha County
2022CV001603

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 8

CONCERNED VETERANS OF
WAUKESHA COUNTY, et al.,

Plaintiffs,

v.

WISCONSIN ELECTIONS
COMMISSION,

Defendant,

UNION VETERANS COUNCIL, et al.,

Intervenor-
Defendants.

Case No. 2022CV1603
Case Code: 30701
Declaratory Judgment

Judge Michael P. Maxwell

**MEMORANDUM IN SUPPORT OF
INTERVENOR-DEFENDANTS UNION VETERANS COUNCIL AND
CAPTAIN TIMOTHY McDONALD’S MOTION TO DISMISS**

INTRODUCTION

Plaintiffs brought this eleventh-hour lawsuit just days before the November general election, seeking emergency relief to delay the counting of lawful military absentee ballots. The Court rightly refused to grant the proposed temporary injunction, and the Court should now dismiss the Complaint for failure to state a claim. The Wisconsin Elections Commission filed a Motion to Dismiss and supporting brief on December 19, which Intervenor-Defendants join in full. Intervenor-Defendants file this separate Motion and Memorandum in Support to raise three additional arguments for dismissal.

First, Plaintiffs lack standing. Their theory of voter standing under *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, ¶¶19–36, 403 Wis. 2d 607, 976 N.W.2d 519 (plurality op.), fails because the statutory provision they invoke is an ancillary recordkeeping provision that plays no role in determining who may vote or what votes are counted. And they fail to allege the unlawful expenditures of taxpayer funds that would be required to support their alternative assertion of taxpayer standing. *See Fabick v. Evers*, 2021 WI 28, ¶11, 396 Wis. 2d 231, 956 N.W.2d 856.

Second, Plaintiffs have no cause of action. The Commission’s brief explains why Plaintiffs may not sue under Wis. Stat. § 227.40: their claim that the Commission *failed to issue* guidance may not be brought under that provision, which allows only claims to *invalidate existing guidance*. Commission’s Br. at 12–14. Plaintiffs also invoke Wis. Stat. § 5.06, but that provision authorizes only complaints against local election officials, not against the Commission itself—the only defendant here. Wis. Stat. § 5.06(1); *see also Teigen*, 2022 WI 64, ¶¶47–50 (plurality op.).

Finally, Plaintiffs’ claims are barred by their failure to exhaust administrative remedies before filing suit. Plaintiffs’ claim is ultimately that local election officials do not properly maintain lists of military electors. But Wis. Stat. § 5.06(2) precludes *any* “action or proceeding to test the validity of any decision, action or failure to act on the part of any election official with respect to” “election administration or conduct of elections,” *unless* the complaining elector first files a complaint with the Commission under § 5.06(1). *See* Wis. Stat. § 5.06(1), (2). Plaintiffs filed no such complaint, so this suit is barred.

For these reasons, and the reasons given in the Commission’s Brief in Support of its Motion to Dismiss, the Court should dismiss Plaintiffs’ claims.

BACKGROUND

I. Statutory Background

Wisconsin's election laws create a set of special procedures for absentee voting by "military electors." Wis. Stat. § 6.22(1). "Military electors" are those serving in the uniformed services—the army, navy, air force, marine corps, coast guard, health services commissioned corps, and the national oceanic and atmospheric administration commissioned corps—as well as merchant marine members, "[c]ivilian employees of the United States and civilians officially attached to a uniformed service who are serving outside the United States," peace corps volunteers, and "[s]pouses and dependents of those listed in the above categories residing with or accompanying them." Wis. Stat. § 6.22(1)(b)–(c). Unlike other Wisconsin voters, military electors are not required to register to vote before requesting an absentee ballot. Wis. Stat. §§ 6.22(3), 6.27. Nor are they required to maintain a current Wisconsin residence, because they may vote based on their "residence prior to becoming a military elector." Wis. Stat. § 6.22(2)(a).

This case concerns Wis. Stat. § 6.22(6), an ancillary recordkeeping provision requiring that each municipal clerk "keep an up-to-date list of all eligible military electors who reside in the municipality in the format prescribed by the commission." The statute instructs clerks to keep the list "current through all possible means" and to "exercise reasonable care to avoid duplication of names or listing anyone who is not eligible to vote." *Id.* And it provides that each clerk "shall distribute one copy of the list to . . . each polling place in the municipality for use on election day." *Id.*

"Unlike many places around the country, Wisconsin has a highly decentralized system for election administration." *State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, ¶13, 396 Wis. 2d 391, 957 N.W.2d 208. "Rather than a top-down arrangement with a central state entity or official controlling local actors, Wisconsin gives some power to its state election agency (the

Commission) and places significant responsibility on a small army of local election officials.” *Id.* As relates to Wis. Stat. § 6.22(6), the Commission has “the duty and power to issue guidance and formal advisory opinions,” *id.* ¶18, but municipal clerks are the officials charged with actually applying the statute, Wis. Stat. § 6.22(6); *see Zignego*, 2021 WI 32, ¶15 (“Our election laws give municipal clerks a vast array of duties and responsibilities consistent with their primary role in running Wisconsin elections.”).

II. Litigation Background

Plaintiffs filed this lawsuit on November 4, 2022, alleging that the Commission has violated Section 6.22(6) by issuing two guidance documents for municipal clerks: the Military and Overseas Voter Manual (the “Military Manual”),¹ which the Commission issued on February 4, 2022, and a “Military & Overseas Cheat Sheet for Clerks” (the “Military Cheat Sheet”),² which the Commission issued on August 15, 2022. Plaintiffs complain that neither guidance document discusses Section 6.22(6)’s list requirement. And they blame that omission for three invalid military ballots that municipal clerks issued in response to a since-fired election worker’s fraudulent requests, none of which were voted.

In papers filed with the Complaint, Plaintiffs asked the Court to enter a temporary injunction requiring that *all* military ballots be “sequestered” until after Election Day and further verified before being counted. The Court held a hearing on Monday, November 7—the day before the election—and rejected Plaintiffs’ motion in full. The Court also granted Union Veterans Council and Captain McDonald’s motion to intervene for purposes of the hearing by oral ruling

¹ Dkt. 2 at 13; also available at <https://elections.wi.gov/resources/manuals/military-and-overseas-voter-manual>.

² Dkt. 2 at 41; also available at <https://elections.wi.gov/resources/quick-reference-topics/military-overseas-cheat-sheet-clerks>.

during the hearing, and then granted the motion in full by written order the next day. Dkt. 36. Wisconsin military absentee votes were counted along with other absentee ballots on election day. No credible allegations or reports of military voter fraud in that election have since emerged.

LEGAL STANDARD

To survive a motion to dismiss, a complaint “must plead facts, which if true, would entitle the plaintiff to relief.” *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶21, 356 Wis. 2d 665, 849 N.W.2d 693; *see* Wis. Stat. § 802.02(1). In ruling on a motion to dismiss, a court “accept[s] as true all facts well-pleaded in the complaint and the reasonable inferences therefrom.” *Data Key Partners*, 2014 WI 86, ¶19. That said, “legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss.” *Id.* And “courts are not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* ¶25 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S 544, 555 (2007)).

ARGUMENT

The Court should grant the motion and dismiss this lawsuit for failure to state a claim. In addition to the reasons given in the Commission’s Motion to Dismiss, which Intervenor-Defendants adopt in full, Plaintiffs lack standing, they lack any valid cause of action, and they failed to exhaust an available, mandatory administrative remedy.

I. Plaintiffs lack standing.

Plaintiffs do not have standing to pursue their claims in this case. Plaintiffs primarily invoke Chapter 227’s administrative review provisions.³ *See* Compl. ¶6. The Wisconsin Supreme Court has established a two-part test for standing to sue an agency under that Chapter. First, a plaintiff must have suffered an “injury in fact,” meaning one that is “a direct result of the agency

³ Plaintiffs also invoke Wis. Stat. § 5.06, but as explained below, *infra* Part II, that statute does not provide them with a cause of action.

action.” *Teigen*, 2022 WI 64, ¶20 (plurality op.) (explaining standing principles for purposes of Wis. Stat. § 227.40 actions specifically); see *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶¶12–31, 402 Wis. 2d 587, 977 N.W.2d 342 (clarifying standing principles for purposes of Chapter 227 in general). Second, a plaintiff must show that “the injury is to an interest which the law recognizes or seeks to regulate or protect.” *Teigen*, 2022 WI 64, ¶20 (plurality op.); see *Black River Forest*, 2022 WI 52, ¶25 (abolishing the old “zone of interests” inquiry in favor of the foregoing). Plaintiffs satisfy neither condition.

A. The challenged Commission guidance has not caused Plaintiffs an injury in fact.

The Commission’s guidance or lack of guidance about military elector lists has not caused Plaintiffs an injury because those lists play no role in the processing of requests for military absentee ballots. Plaintiffs assume otherwise and further assume that maintenance and distribution of the lists could somehow neutralize the risk of fraudulent ballot requests which—they allege—injure their rights as voters. See Compl. ¶¶25–46. Every step in that chain of assumptions is wrong.

Military elector lists play no role in the processing of military absentee ballot requests. Section 6.22(6) requires each municipal clerk to “keep an up-to-date list of all eligible military electors who reside in the municipality,” only for one specific purpose: so that the clerk can “distribute one copy of the list to each polling place in the municipality for use on election day.” Wis. Stat. § 6.22(6). Nothing in the statute requires municipal clerks (or the Commission) to consult the military elector lists when *processing* requests for military absentee ballots, a step which by law must typically happen well before election day. See Wis. Stat. § 6.22(4)(b) (“The municipal clerk shall send or transmit a ballot, *as soon as available*, to each military elector who files a timely request for a ballot.”). Indeed, three other subsections of Section 6.22—subsections

(2), (4) and (5)—establish how municipal clerks must handle requests for military ballots. None says anything about consulting a military elector list. *See* Wis. Stat. § 6.22(2), (4), (5).⁴

This makes sense; using military elector lists to screen ballot applications would run afoul of the core principle underpinning the whole statutory scheme. Wisconsin law explicitly provides that “[m]ilitary electors are not required to register as a prerequisite to voting in any election.” Wis. Stat. § 6.22(3). That provision—and the policy it furthers, making it easy for servicemembers to vote—is impossible to square with a requirement that military voters to be listed on the “military elector list” before a ballot issues. In practical effect, such a requirement would be a registration requirement.

Because the military elector lists do not play any role in local officials’ decisions about how to process military absentee ballot requests, those lists do not affect Plaintiffs’ voting rights. Accordingly, no guidance the Commission has or has not issued related to the lists affects their voting rights either. This is not a case like *Teigen* where voters can plausibly allege that thousands of unlawful votes have “pollute[d] the integrity of the results.” 2022 WI 64, ¶25 (plurality op.). To the contrary, Plaintiffs have not alleged that any unlawful ballots are being cast. *See* Compl. ¶¶26–46 (alleging that only three such ballots were requested, and none voted). But *even if they had*, military elector lists would be neither the cause of nor a coherent solution to that injury. Thus, the Commission’s guidance or lack of guidance about those lists is not the “direct” cause of any alleged “injury in fact.”

⁴ Wis. Stat. § 6.22(2)(c) provides that military electors may apply for absentee ballots using the “federal postcard registration and absentee ballot request form,” so long as the municipal clerk is able to determine from the form “[t]hat the applicant is qualified to vote in the ward or election district where he or she seeks to vote” and “[t]hat the applicant qualifies to receive an absentee ballot under this section.” That federally coordinated system does not in any way rely on the Section 6.22(6) lists.

B. The list provision does not protect Plaintiffs' right to vote.

Turning to the second standing requirement, Plaintiffs also cannot show that the provision in dispute protects their right to vote. Rather, Section 6.22(6) is, as just discussed, an administrative provision that details the format in which municipal clerks should keep lists of eligible military electors for distribution to polling places. Because Section 6.22(6) does not restrict who may vote or affect what votes may be counted, it is quite different from the statutes at issue in *Teigen*, which the Court held restricted how votes could be cast and what votes could be counted, and therefore potentially affected election results. *Teigen*, 2022 WI 64, ¶¶21–29 (plurality op.); *see also id.* ¶¶55–63 (majority op.). The alleged failure of local officials to maintain a list that has no effect on who may vote or how does not implicate voting rights in the same way. Although Wisconsin law undoubtedly protects voting rights, here unlike in *Teigen*, Plaintiffs have not alleged any injury to those rights from the challenged agency action. And Chapter 227 standing exists only when the statute a plaintiff invokes is intended to protect that plaintiff's allegedly injured, legally protected rights. *Teigen*, 2022 WI 64, ¶20 (plurality op.); *Black River Forest*, 2022 WI 52, ¶25.

C. Plaintiffs do not have taxpayer standing.

Plaintiffs also assert taxpayer standing, Compl. ¶¶8, 48, but they do not allege that its basic requirements are met. To invoke taxpayer standing “it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss,” *Fabick*, 2021 WI 28, ¶11 (quoting *S.D. Realty Co. v. Sewerage Comm'n of the City of Milwaukee*, 15 Wis. 2d 15, 21, 112 N.W.2d 177, 181 (1961)). Here, Plaintiffs have not even alleged—much less demonstrated—that the challenged conduct has caused any additional expenditure of taxpayer funds or caused them any pecuniary loss. Plaintiffs therefore lack taxpayer standing as well.

Plaintiffs neither satisfy the two conditions for Chapter 227 voter standing nor allege the prerequisites for taxpayer standing. Accordingly, “sound judicial policy,” *see Black River Forest*, 2022 WI 52, ¶17, dictates that their case should be dismissed.

II. Neither of Plaintiffs’ asserted causes of action is available to them.

In addition to lacking standing, Plaintiffs lack a statutory cause of action. Wisconsin law does not create a freestanding right of private plaintiffs to sue under any and all statutes. A plaintiff must instead establish that a specific statute creates an applicable “private cause of action.” *See DSG Evergreen Family, L.P., v. Town of Perry*, 2020 WI 23, ¶48–49, 390 Wis. 2d 533, 939 N.W.2d 564; *Farr v. Alternative Living Servs. Inc.*, 2002 WI App 88, ¶14, 253 Wis. 2d 790, 643 N.W.2d 841.

Plaintiffs’ complaint asserts two “private cause[s] of action”: one arising under Wis. Stat. § 227.40, which governs declaratory judgment proceedings related to administrative rules and guidance, and one arising under Wis. Stat. § 5.06, which governs administrative complaints against local election officials. Compl. ¶6. But neither is available to these Plaintiffs.

As the Commission explains in its Motion to Dismiss, Section 227.40 does not permit court-ordered guidance creation, which is what Plaintiffs seek here. Commission’s Br. at 12–14. Because Wis. Stat. § 227.40 does not authorize the only remedy that would redress Plaintiffs’ alleged injuries—court-ordered guidance creation—it cannot furnish them with an appropriate cause of action.

Plaintiffs’ Complaint also identifies a second purported cause of action, arising under Wis. Stat. § 5.06. Compl. ¶6. The Complaint does not explain how that statute could be read to authorize lawsuits against the Commission. It cannot. Section 5.06 creates an administrative grievance process applicable to local officials to be *administered* by the Commission, not a cause of action *against* the Commission. *See* Wis. Stat. § 5.06(1); *Teigen*, 2022 WI 64, ¶33 (plurality op.) (“[I]t

would be nonsensical to have WEC adjudicate a claim against itself under Wis. Stat. § 5.06(1).”). Specifically, Section 5.06 permits an elector to “file a written sworn complaint *with the commission* requesting that the official be required to conform his or her conduct to the law, be restrained from taking any action inconsistent with the law or be required to correct any action or decision inconsistent with the law or any abuse of the discretion vested in him or her by law.” Wis. Stat. § 5.06(1). For that reason, six of seven Justices in *Teigen* concluded that Wis. Stat. § 5.06 does not confer generalized standing on voters. *See* 2022 WI 64, ¶¶32–34 (plurality op.); *id.* ¶¶210–215 (Walsh Bradley, J., dissenting). That consensus forecloses Plaintiffs’ reliance on Section 5.06 for their cause of action here: if Section 5.06 does not even create statutory standing for such suits, it certainly does not create a cause of action. Moreover, Wis. Stat. § 5.06 expressly allows just one form of judicial review—an “*appeal*” of a decision from the Commission on an administrative complaint against a local official. Wis. Stat. § 5.06(8) (emphasis added). Plaintiffs never filed such a complaint, so their suit cannot possibly be authorized by this appeal provision.

Bolstering this point, a Section 227.40 action of the sort discussed above is “the *exclusive* means of judicial review of the validity of a rule or guidance document” except “as provided in [Wis. Stat. § 227.40(2)].” Wis. Stat. § 227.40(1) (emphasis added). And actions against the Commission under Wis. Stat. § 5.06 are not listed in subsection 2’s list of exceptions. *See* Wis. Stat. § 227.40(2). Accordingly, to credit Plaintiffs’ novel reliance on Section 5.06 for their cause of action, the Court would need to disregard not only that Section’s plain text but also Section 227.40’s.

III. Plaintiffs’ failure to exhaust administrative remedies against local officials bars this lawsuit.

Finally, this lawsuit is also barred by Plaintiffs’ failure to exhaust their administrative remedies. Wis. Stat. § 5.06(2) provides that electors may not “commence an action or proceeding

to test the validity of any decision, action, or failure to act on the part of any election official” regarding, among other things, “election administration,” “without first filing a complaint” with the Commission under Wis. Stat. § 5.06(1). Wis. Stat. § 5.06(1), (2). Plaintiffs’ lawsuit—although filed against the Commission—directly challenges “the validity” of local officials’ alleged failures to maintain military elector lists, so it falls within the plain text of this requirement. Yet Plaintiffs do not allege that they filed a complaint with the Commission under Section 5.06(1). Their claim is therefore barred by Wis. Stat. § 5.06(2).

The fact that Plaintiffs’ lawsuit is only against the Commission, not local election officials, and therefore not a suit authorized by Wis. Stat. § 5.06(8), does not change this analysis. The relief that Plaintiffs seek—action by the Commission to force local election officials to follow the Election Code—is precisely the sort of relief that is available through Section 5.06(1)’s administrative process. That fact distinguishes this case from *Teigen*, where three Justices concluded that the voters’ failure to file a Section 5.06(1) complaint before suing the Commission did not foreclose their claims. 2022 WI 64, ¶¶44–51 (plurality op.). The voters in *Teigen* sought to invalidate existing Commission guidance authorizing ballot drop boxes—relief that was unavailable to them under Section 5.06(1). Here, in contrast, Plaintiffs seek to force the Commission to require local officials to comply with the law (as Plaintiffs understand it). *See* Compl. ¶33 (“the Clerk of South Milwaukee”); *id.* ¶37 (“the Clerk of Menomonee Falls”); *id.* ¶41 (“Village Clerk of Shorewood”). Allowing this lawsuit to proceed, when Plaintiffs do not allege that they have ever grieved against any one of those clerks, would in effect permit an end-run around the procedures the Legislature put in place for exactly this sort of election-administration dispute. *Teigen* does not authorize such gamesmanship.

CONCLUSION

For the reasons stated above, the Court should grant the Motion to Dismiss.

DATED this 17th day of January, 2023.

Respectfully submitted,

Electronically signed by Diane M. Welsh

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