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2022CV001603

WISCONSIN CIRCUIT COURT
WAUKESHA COUNTY

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
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Plaintiffs' Response Memorandum to Defendant's and Intervenor-Defendants' Motion to Dismiss

The Plaintiffs, Concerned Veterans of Waukesha County, Ken Marek, Tom Gudex, and Janel Brandtjen properly filed their complaint against the Wisconsin Elections Commission (“WEC”) in this Court. While this Court has suggested an administrative action against municipal clerks, another plaintiff, Dennis Barthenheier did file an administrative complaint with WEC against the Menomonee Falls Village Clerk, Waukesha County, Wisconsin. The WEC, in turn, notified the parties that it would hold the matter “in abeyance pending resolution of the *Concerned Veterans* case.” Kaardal Decl. Ex. 1 (WEC ltr. to Kaardal, Jan. 12, 2023). Both actions were filed under Wisconsin Statutes § 5.06.

By the WEC abeyance letter, WEC has conceded primary jurisdiction to this Court—and rightfully so. This Court should retain jurisdiction. This case is not a matter where factual or

technical issues predominate for an agency adjudication. This proceeding is about statutory interpretation and significant legal issues for this Court to decide.

Specifically, Concerned Veterans seeks this Court to adjudicate the interplay between §§ 6.22(4)(a) and (6) to reveal that the WEC's guidance documents relating to military electors lists fail to comply with the law. Contrary to the Union Veterans Council's arguments that the military elector lists play no role, the military elector list plays a critical role to the validity of a requested military elector absentee ballot for local elections held within the municipality.

Importantly, it is the military elector list which ensures that "the elector's request [for] an absentee ballot" corresponds to "where the elector resides in the same calendar year in which the request is received." Wis. Stat. § 6.22(4)(a). Military electors are essentially, "a member of a uniformed service on active duty who, by reason of that duty, is absent from the residence where the member is otherwise qualified to vote..." Wis. Stat. § 6.34(a). Thus, this "residency" requirement is special because military electors can be serving anywhere in the state, nation or world and still vote where they intend to "reside" in Wisconsin. In fact, military electors don't actually have to live where they vote, they only have to intend to reside there. *Id.* Thus, the military elector list is an additional legally-required aid to clerks in administering the special "residency" requirement for military electors. Also, because the military elector list is a public record maintained by the municipal clerk, it should be available to the public from the municipal clerk to audit. Wis. Stat. §§ 19.31–19.39.

Under §§ 6.22(4)(a) and (6), the military elector list is legally required of each municipal clerk for several specific functions. First, it will identify whether the requesting person is a registered military elector in a particular municipality or portion thereof. Second, it will identify where to send the requested absentee ballot. If the clerk is not otherwise directed by the requesting military elector to send the absentee ballot to a specific address, then the clerk sends the absentee ballot to the

default address on the list. Third, it will indicate, in conjunction with other election information, which absentee ballot to send, including the specific local elections for the applicable municipality or portion thereof. Fourth, it will indicate, in conjunction with other election information, where the absentee ballot is to be sent by the military elector to ensure it is counted in the applicable municipality or portion thereof. Fifth, if the military elector is not on the military elector list, then § 6.22(3) is applicable. Sixth, the military elector list, once created, is a public record available to the public under Wisconsin's Public Records Law. Wis. Stat. §§ 19.31–19.39.

Procedurally, Concerned Veterans has standing under § 227.40, under § 5.06 and under § 6.84, because voters are entitled to have elections they participate in administered properly under the law. Moreover, the exhaustion of administrative remedies is not required here under § 5.06. In an administrative proceeding, it does not follow that the WEC, as a defendant, could or should investigate and prosecute itself. As one Wisconsin Supreme Court justice wrote, it “makes little sense.” *Teigen v. Wisconsin Elections Comm.*, 976 N.W.2d 519, 567 (Wis. 2022), *reconsideration denied*, 2022 WI 104, ¶ 169 (J. Hagedorn, concurring). The exhaustion of administrative remedies is unnecessary, as the WEC's abeyance letter confirms. Regardless, seeking declaratory relief under § 227.40(1) opens the courthouse door to prompt and efficient challenges of the validity of an agency's guidance documents. *Id.* at ¶ 170.

The legal issues presented before this Court are ripe for adjudication. Therefore, the WEC's motion to dismiss should be denied.

Argument

I. There is no dispute regarding the legal standard for a motion to dismiss; a court must accept the complaint's allegations as true.

“A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint.” *Data Key Partners v. Permira Advisers LLC*, 849 N.W.2d 693, 698–701 (Wis. 2014), *quoting John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, ¶ 12, 303 Wis.2d 34, 734 N.W.2d 827 (*quoting BBB Doe v.*

Archdiocese of Milwaukee, 211 Wis.2d 312, 331, 565 N.W.2d 94 (1997)). The court will accept as true all facts well-pleaded in the complaint and the reasonable inferences. *Id.* at ¶ 19 (citation omitted). Legal conclusions are not accepted as true. *Id.* (citations omitted). Wisconsin Statutes § 802.02(1) (a) sets the requirements for a complaint to withstand a motion to dismiss for failure to state a claim: “A short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.” *Id.* at ¶ 20. The Wisconsin Supreme Court has accepted the legal principles found in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007): “the sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled. Plaintiffs must allege facts that plausibly suggest they are entitled to relief.” *Id.* at ¶ 31. Concerned Veterans of Waukesha County¹ has met this burden.

II. Plaintiffs have standing under § 227.40(1), under § 5.06, and under § 6.84(1).

A. The exhaustion of administrative remedies is not required.

This Court had previously implied that it might not have primary jurisdiction over the Concerned Veterans complaint, suggesting that municipal clerks should be parties to the underlying action:

One of the primary issues or problems with the Court being able to grant the relief requested is that 6.22(6) is a requirement of the municipal clerks, and the municipal clerks are not currently before this court for me to grant any kind of orders or relief.

Mot. Hring. Transcr. 80: 8–12 (Nov. 7, 2022), Kaardal Decl. Ex. 2. To that end, Dennis Barthenheier, under § 5.06, filed a verified administrative complaint in WEC against Amy Dishinger, the Village Clerk for Menomonee Falls, Waukesha County, similar to the underlying

¹ References to “Concerned Veterans of Waukesha County” is inclusive of all plaintiffs unless otherwise specifically identified.

complaint here. In response, the WEC held the Barthenheier matter in abeyance pending the adjudication of the Concerned Veterans complaint in this Court:

Barthenheier v. Dishinger will be held in abeyance pending resolution of the *Concerned Veterans* case.

WEC Ltr to Kaardal (Jan. 12, 2023), Kaardal Decl. Ex. 1.

The WEC letter concedes to this Court's primary jurisdiction. And, this Court should retain jurisdiction. *Wisconsin Prop. Tax Consultants, Inc. v. Wisconsin Dept. of Revenue*, 976 N.W.2d 482, 485 (Wis. 2022) (describing primary jurisdiction doctrine). "[W]hen the issue involves factual or specialized questions that fit 'squarely within the very area for which the agency was created,' it is appropriate to allow the agency to address the matter first." *Id.* But, "when statutory interpretation or issues of law are significant, the circuit court will have less reason to let the agency decide the question first." *Id.*

This case is not a matter where factual or technical issues predominate for an agency adjudication. The allegations of the complaint must be accepted as true. This proceeding is about statutory interpretation and significant issues of law for this Court. Moreover, Concerned Veterans has standing under § 277.40, § 5.06 and § 6.84. Specifically, Concerned Veterans seeks this Court to adjudicate the interplay between §§ 6.22(4)(a) and (6) to reveal that the WEC's guidance documents fail to comply with the law. Voters are entitled to have elections they participate in administered properly under the law.

B. Wisconsin Statutes § 277.40(1) grants standing to pursue the validity of WEC's guidance documents.²

Wisconsin Statutes § 277.40(1) grants standing to any person seeking judicial review of the validity of a rule or guidance document:

² Concerned Veterans will not argue that it has taxpayer standing. *See* Plts. Compl. ¶¶ 47–48.

Except as provided in sub. (2), the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the rule or guidance document brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides or has its principal place of business or, if that party is a nonresident or does not have its principal place of business in this state, in the circuit court for the county where the dispute arose.

“Validity” means “the quality of being logically or factually sound; soundness or cogency.”

New Oxford American Dictionary 1912 (Angus Stevenson, Christian A. Lindberg eds., 3rd ed., Oxford University Press 2010).

The purpose of statutory interpretation and application is to apply the meaning of the words the legislature chose. *Jefferson v. Dane County*, 951 N.W.2d 556, 562 (Wis. 2020) citing, *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. “Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id. quoting, Kalal*, 271 Wis. 2d 633, ¶45, 681 N.W.2d 110. If the language chosen is clear and unambiguous, the court will stop the inquiry and apply the plain meaning of those words. *Id.*, ¶¶ 45, 46. “Important to the meaning of a statute is the context in which it occurs, and we interpret statutes to reasonably give effect to every word.” *Id.* at 562-3, ¶ 46.

Here, Concerned Veterans has identified fundamental flaws of logic and factually unsound WEC guidance to municipal clerks by omissions precluding military elector lists. *E.g.*, Plts. Compl. ¶¶ 23–27. The plain common and ordinary meaning of “validity” is not confined to a court to declare that an agency has failed to comply with its statutory obligations to municipal clerks. The “invalidity” of a guidance document is reflected in its being “not true because [it is] based on erroneous information or unsound reasoning.” *New Oxford American Dictionary* 913. The lack of guidance reflects unsound reasoning as a WEC policy. The WEC is responsible for the interpretation of election laws in Wisconsin in the election process. WEC Memo. to Dismiss at 4–5

(Dec. 19, 2022); Union Veterans Council Memo to Dismiss at 4 (Jan. 17, 2023). And, processing military elector absentee ballots is a critical aspect of the election process for municipal clerks.

As one Wisconsin Supreme Court justice has opined as part of a majority opinion, § 227.40(1) expressly opens the doors to the courthouse to challenge WEC guidance documents without the need to exhaust administrative remedies:

Wis. Stat. § 227.40(1) expressly opens the courthouse doors to those challenging administrative rules or guidance documents: “A declaratory judgment may be rendered whether or not the plaintiff has first requested the agency to pass upon the validity of the rule or guidance document in question.” This seems to carve out a particular kind of legal claim—a challenge to rules and guidance documents—and relieves the petitioner of pleading one's case with the agency first. Applying this as written, and in the absence of other contrary arguments, I conclude Teigen was not required to take his case to WEC before seeking judicial relief under § 227.40(1). Thus, Teigen has not failed to exhaust his administrative remedies before bringing this claim.... I therefore proceed to the merits.

Teigen v. Wisconsin Elections Commn., 976 N.W.2d 519, 567–68 (Wis. 2022), *reconsideration denied*, 2022 WI 104, ¶ 170 (Hagedorn, J., concurring).

The WEC did not challenge Concerned Veterans standing, but conceded primary jurisdiction to this Court as previously described. Regardless, while the *Teigen* majority opinion granted him standing under his constitutional right to vote under § 6.84(1), Justice Hagedorn's logic also has merit. Section 227.40(1) provides statutory standing to Concerned Veterans challenging WEC guidance documents.

C. Plaintiffs have standing under § 6.84(1).

Union Veterans argues that Concerned Veterans have no standing because the WEC guidance documents did cause them an injury in fact. Union Veterans Memo. to Dismiss at 6. Union Veterans also suggested that military elector lists “play no role in the processing of requests for military absentee ballots.” *Id.*

First, the Wisconsin Supreme Court would disagree with the Union Veterans standing argument. Here, Concerned Veterans argue that as voters, they are entitled to have elections they participate administered properly under the law. *See Teigen*, 976 N.W.2d at 529, ¶ 21 (plurality). As § 6.84(1) demonstrates, “[t]he legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged.” The Supreme Court has emphasized that “[i]f the right to vote is to have any meaning at all, elections must be conducted according to law”:

The right to vote presupposes the rule of law governs elections. If elections are conducted outside of the law, the people have not conferred their consent on the government. Such elections are unlawful and their results are illegitimate. “If an election ... can be procured by a party through artifice or corruption, the Government may be the choice of a party for its own ends, not of the nation for the national good.”

Id. at 529–30, quoting John Adams, *Inaugural Address in the City of Philadelphia* (Mar. 4, 1797), reprinted in *Inaugural Addresses of the Presidents of the United States* at 10 (1989). The underlying complaint reveals a vulnerability in the election process and provides examples of that vulnerability. Plts. Compl. ¶¶ 27–44. Here, like in *Teigen*, “[t]he Wisconsin voters’ injury in fact is substantially more concrete than the ‘remote’ injuries we have recognized as sufficient in the past.” *Id.* at 530.

And, as Concerned Veterans contend, the missteps of the WEC affect the integrity of an election, more eloquently described by the *Teigen* Supreme Court as unlawful procedures degrading the foundation of a free government:

Electoral outcomes obtained by unlawful procedures corrupt the institution of voting, degrading the very foundation of free government...When the level of pollution is high enough, the fog creates obscurity, and the institution of voting loses its credibility as a method of ensuring the people's continued consent to be governed.

Id., see e.g., Plts. Compl. ¶ 36.

The Union Veterans contention that the military elector lists play no role in the processing of military absentee ballots is misleading. Union Veterans Memo. to Dismiss at 6. Under § 6.22(4)(a),

the municipal clerk has specific directions relating to providing an absentee ballot to a registered military elector upon request:

[U]pon the elector's request an absentee ballot for all elections that occur in the municipality or portion thereof where the elector resides in the same calendar year in which the request is received, unless the individual otherwise requests.

In order to determine the residence of the registered elector within the municipality for that calendar year, the municipal clerk must refer to the military elector list. Because the military elector list is created from WisVote, the data in WisVote is derived from *registered voters*. See e.g., WEC Memo. to Dismiss at 12 n.7. Wisconsin Statutes 6.22(3)³ plays no role here, because that statutory provision relates to *unregistered* military voters who because they are *unregistered*, would not appear on a military elector list.

In short, if a military elector has a residential address in, for example, Madison, but is deployed out-of-state and requests an absentee ballot, he or she will be sent one at that municipal address of residency or any other address he or she desires. In this context, the military elector list serves many functions.

- It ensures that “the elector's request [for] an absentee ballot” corresponds to “where the elector resides in the same calendar year in which the request is received.” Wis. Stat. § 6.22(4)(a).
- It will identify whether the requesting person is a registered military elector in particular municipality or portion thereof.
- It will identify where to send the requested absentee ballot.
- It will indicate, in conjunction with other election information, which absentee ballot to send, including the specific local elections for the applicable municipality or portion thereof.

³ “REGISTRATION EXEMPT. Military electors are not required to register as a prerequisite to voting in any election.” Wis. Stat. § 6.22(3).

- It will indicate, in conjunction with other election information, where the absentee ballot is to be sent by the military elector to ensure it is counted in the applicable municipality or portion thereof.
- If the military elector is not on the military elector list, then § 6.22(3) is applicable.
- The military elector list is a public record available to the public under Wisconsin's Public Records Law. Wis. Stat. §§ 19.31–19.39.

The Concerned Veterans dispute with the WEC is the agency's unsound policy of failing to ensure the integrity of election outcomes by not providing municipal clerks direction as to the military elector lists. As the complaint details, WEC's failure is the root cause of an existing statewide election process problem. The WEC appears steadfast in a position that it's not the agency's problem, but the municipal clerks' fault. WEC Memo. to Dismiss at 16–17. If true, then WEC's legally position begs the question of the WEC's role in the election process.

Regardless, under the *Teigen* Supreme Court analysis of § 6.84(1), as applicable to disputes with the WEC under similar factual circumstances, Concerned Veterans has standing to pursue its claims in this Court.

D. No exhaustion of administrative remedies is necessary; thus, Plaintiffs have standing under § 5.06.

Again, Justice Hagedorn's logic in *Teigen* with regard to § 5.06, would substantiate why Concerned Veterans has standing in this Court. As explained, the interplay between what is an "election official" and the separately defined "elections commission," does not lend itself to have an agency investigate and prosecute itself:

Wisconsin Statutes § 5.06 gives WEC an adjudicatory role when an "election official" violates the law. An "election official" in the elections statutes is "an individual who is charged with any duties relating to the conduct of an election." Wis. Stat. § 5.02(4e). However, WEC is separately defined immediately following this as "the elections commission." Wis. Stat. § 5.025. WEC's powers and duties are outlined in § 5.05 and include a direction to "investigate violations of laws administered by the commission" and "prosecute alleged civil violations of those laws." § 5.05(2m)(a). Similarly, §

5.06(4) authorizes WEC to “investigate and determine whether any election official ... has failed to comply with the law.”

Teigen, 976 N.W.2d at 567, ¶ 169 (Hagedorn, J. concurring). As Justice Hagedorn concluded, “with the statutory distinction between an ‘election official’ and the ‘commission’ lead me to conclude the better reading is that the § 5.06 complaint process does not apply to complaints against acts of WEC as a body.” *Id.* Indeed, it “makes no sense,” the WEC would or should (1) investigate itself, and in turn, (2) prosecute itself. *Id.* Indeed, the WEC’s abeyance gives credence to Justice Hagedorn’s logic. Kaardal Decl., Ex. 1. The WEC has conceded primary jurisdiction to this Court and does not argue for dismissal for failing to exhaust administrative remedies. WEC Memo. to Dismiss.

However, Union Veterans has made the exhaustion of administrative remedies argument for the WEC. Union Veterans Memo. to Dismiss at 10–11. Despite the Union Veterans contention that the Concerned Veterans complaint is against municipal clerks, it is not. *See id.* at 11. Their acts were caused by WEC’s unsound guidance. The key relief is for this Court to declare the legal violations of the WEC. Plts. Compl. at 10, Relief. And, there is nothing to suggest this Court cannot modify the relief requested within the confines of the circumstances as Concerned Veterans requested: “The Court should also grant any other relief it deems proper, necessary, or just, consistent with the law and under the circumstances of this case.” *Id.*

III. Military elector lists play a critical role in the municipal election process; the WEC’s unsound guidance is to ignore military elector lists.

No one seeks to discourage military electors from voting. However, “[i]f the right to vote is to have any meaning at all, elections must be conducted according to law.” *Teigen*, 976 N.W.2d at 529–530. Military electors are essentially, “a member of a uniformed service on active duty who, by reason of that duty, is absent from the residence where the member is otherwise qualified to vote...” Wis. Stat. § 6.34(a). And, Concerned Veterans has identified fundamental flaws of logic and factually unsound WEC guidance to municipal clerks by omissions regarding the use of legally-

required military elector lists. *E.g.*, Plts. Compl. ¶¶ 23–27. The lack of guidance reflects WEC’s unsound reasoning as an agency policy. WEC is responsible for the interpretation of election laws in Wisconsin in the election process. WEC Memo. to Dismiss at 4–5. WEC’s guidance does an unreasonably poor job of interpreting and applying §§ 6.22(4)(a) and (6).

Indeed, WEC has admitted it is responsible for issuing guidance in the administration and enforcement of election laws. WEC Memo. to Dismiss at 5. WEC also admits it has the inherent authority to create and issue guidance documents. *Id.* In the absence of guidance in the election processes, the WEC creates an unsound policy of ignoring its own admitted legal obligations in the administration and enforcement of election laws as delegated to it by the state legislature. The WEC therefore relinquishes obligations to avoid “[e]lectoral outcomes obtained by unlawful procedures [that] corrupt the institution of voting, degrading the very foundation of free government....” *Teigen*, 976 N.W.2d. at 530.

Union Veterans contend that military elector lists “play no role in the processing of military absentee ballot requests.” Union Veterans Memo. to Dismiss at 6. Yet, neither Union Veterans nor WEC, suggest the purpose of military elector lists in the first instance. However, an examination of § 6.22(4)(a), in conjunction with § 6.22(6), shows otherwise. What the Union Veterans and WEC do not make clear is that the military elector lists apply only to *registered* military electors. The lists are created from WisVote. This is significant because if a military elector is *not registered*, § 6.22(3) makes certain he or she is not deprived of an opportunity to vote:

REGISTRATION EXEMPT. Military electors are not required to register as a prerequisite to voting in any election.

Under § 6.22(4)(a), the municipal clerk has specific directions relating to providing an absentee ballot to a *registered military elector*⁴ upon request:

[U]pon the elector's request an absentee ballot for all elections that occur in the municipality or portion thereof where the elector resides in the same calendar year in which the request is received, unless the individual otherwise requests.

The critical aspect of this provision is that where the military elector declares residency—the specific municipality or portion thereof—determines the absentee ballot’s “local elections” to be voted upon and where the absentee vote will be counted. This “residency” requirement for military electors does not limit the right to vote because the military elector may be serving anywhere in the state, nationally or globally. Yet, there is still a requirement for intending to reside there: the military elector is to have intended to reside in that municipality “in the same calendar year in which the request is received.” In other words, the military elector, regardless of where they live statewide, nationally or globally must have an intent to “reside” there, not actually live there, “in the same calendar year in which the request is received.” This is a very special privilege only given to military electors.

Hence, the military elector lists do play a role in the election process to protect military electors because military electors are in a different position than non-military electors. As explained above, military electors have a special “residency” requirement only requiring an intention to reside, not actually residency, in the municipality where the military elector votes. The military elector list will identify whether the requesting person is a registered military elector in a particular municipality

⁴ The statutory provision states an “eligible military elector.” The ability to vote, that is, “eligibility” is defined under § 6.02–6.03. For example, a person must be a U.S. citizen and 18 years of age or older. Wis. Stat. § 6.02(1). And, a person is not eligible to vote if the “person is incapable of understanding the objective of the elective process...or any person convicted of treason, felony or bribery, unless the person's right to vote is restored through a pardon or under § 304.078 (3).” Wis. Stat. § 6.03(1)(a), (b).

or portion thereof. The military elector list will identify where to send the requested absentee ballot. If the clerk is not otherwise directed by the requesting military elector to send the absentee ballot to a specific address, then the clerk sends the absentee ballot to the default address on the list. The military elector list will indicate, in conjunction with other election information, which absentee ballot to send, including the specific local elections for the applicable municipality or portion thereof. The military elector list will indicate, in conjunction with other election information, where the absentee ballot is to be sent by the military elector to ensure it is counted in the applicable municipality or portion thereof. If the military elector is not on the military elector list, then § 6.22(3) is applicable. The military elector list is a public record available to the public under Wisconsin's Public Records Law. Wis. Stat. §§ 19.31–19.39. The public can use the military elector list to audit the government officials' performance under the laws regulating military elector absentee balloting.

In each case, the statutory scheme reveals an intent of the military elector to cast a ballot in the municipality of his or her choice where the ballot will be counted. For example, if a military elector resides in Madison, but is deployed in Germany, by requesting an absentee ballot *without* directing it to his German address, the absentee ballot will be sent to the default address on the military elector list—Madison. For all the municipal clerk would know, that military elector might arrive home in time and will have an absentee ballot waiting for him to cast a ballot. Nothing requires the military elector to vote in person.

If the same military elector has not intended to reside in the municipality within the same calendar year in which the request is received, the municipal clerk cannot send an absentee ballot. Instead, the clerk would direct him or her to re-register to declare where his or her vote would be counted or to invoke § 6.22(3) which still has the same effects.) The clerks need to know where the vote is to be counted as it will affect local elections and the elector's right to vote in local elections.

Even so, if the military elector requests his or her absentee ballot be sent to another address (being stationed in the states or overseas) the municipal clerk will send the ballot to that location. The request of the military elector does not change the intent to “reside” and vote in the municipality, in this example, Madison.

Finally, if not on the military elector list, the municipal clerk is on notice that the military elector’s intent is to cast a ballot in that municipality and the clerk is to provide the elector that opportunity. This ensures compliance with §§ 6.22(3) and 6.84(1): “The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged.”

But, Concerned Veterans have alleged that the WEC does not instruct through any guidance criteria to the municipal clerks to use the military elector lists while WEC knows or should know that clerks are not using the military elector lists. *E.g.*, Plts. Compl. ¶¶ 21, 22; Exs. A, B. The omission is a policy as it occurs for each election cycle in which military elector lists are created. *See e.g., Calhoun v. Ramsey*, 408 F.3d 375, 380 (7th Cir. 2005) (By presenting a series of incidents where “the same problem has arisen many times and the [government entity] has acquiesced in the outcome,” a plaintiff has produced sufficient evidence that the lack of policy is in fact a *de facto* policy choice, not a discrete omission.). And, the WEC’s policy is unsound. It has no validity and allows for the undermining of the integrity of the election process. Indeed, the WEC admits: “those guidance documents simply do not enumerate specific responsibilities of clerks...” WEC Memo. to Dismiss at 19.

The WEC cites to *Serv. Employees Intl. Union, Loc. 1 v. Vos*, 946 N.W.2d 35, 71 ¶ 111 (Wis. 2020) for the proposition that the Concerned Veteran’s claims are not actionable under § 227.40. WEC Memo. to Dismiss at 14. As previously discussed, § 227.40, is the correct vehicle to adjudicate the allegations as presented to this Court. The paragraph the WEC relies upon in *SEIU*, only affirms

how the court would adjudicate issues related to guidance documents under § 277.40, which is in line with the Concerned Veterans' position:

Each of these sections does little more than add the term “guidance document” to various subsections of Wis. Stat. § 227.40, which formerly applied only to rules. The parties do not make any particularized argument against judicial review of guidance documents, and we see no reason why the legislature's provision for such review differs so profoundly from judicial review of administrative rules that the former would necessarily be unconstitutional under any circumstances, while the latter is not.

SEIU, 946 N.W.2d at 71, ¶ 111.

Instead, the WEC seeks to shift its legal responsibilities elsewhere in order to blame the municipal clerks. WEC Memo. to Dismiss at 16, citing *SEIU*, 946 N.W.2d at 64, ¶ 96. The WEC asserts that local election officials must interpret the election laws for themselves. However, the WEC missed the point found in the *SEIU* decision. The WEC's issuance of guidance documents are not per se administrative rules; they do provide “guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.” *Id.* at ¶ 100. They are communications about election laws, reflecting the mandate of the WEC regarding interpretation and enforcement of those laws. *See e.g.*, Wisc. Stat. §§ 5.05, 5.06.

The WEC's omitted guidance-policy is subject to review by this Court. This Court can adjudicate the issue at least under § 277.40. The Concerned Veterans complaint has identified a vulnerability of the election process as it pertains to the clerks' non-use of military elector lists as WEC's guidance-policy dictates. The WEC should be corrected accordingly.

Conclusion

The Plaintiffs Concerned Veterans of Waukesha County, Ken Marek, Tom Gudex, and Janel Brandtjen have standing to sue. Moreover, their allegations state a claim for which relief can be granted. Therefore, the motion to dismiss should be denied.

Dated: March 8, 2023

Electronically signed by Erick G. Kaardal
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